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COMMENCEMENT OF AN ACT OF PARLIAMENT (or its provision)

Beedi and Cigar Workers (Conditions of Employment) Act, 1966 (32 of 1966) — S. 1 (3) — Appointed date under — 1-1-1969 appointed as the date on which all the provisions of said Act shall come into force in State of Bihar. — Bih. Gaz., 20-12-1968, Ext. P. 2.

Madras State (Alteration of Name) Act, 1968 (53 of 1968) — S. 1 (2) — Appointed date under — 14-1-1969 appointed as date on which said Act shall come into force. Gaz. of India, 30-12-1968, Pt. II, S. 3(ii), Ext. P. 1511.

Pondicherry (Extension of Laws) Act, 1968 (26 of 1968) — S. 3 (2) — Appointed date under — Lt. Governor appointed 9-1-1969 as the date on which the Acts mentioned below shall come into force in Union Territory of Pondicherry —

- (1) Transfer of Property Act, 1882 (4 of 1882);
- (2) Indian Stamp Act, 1899 (2 of 1899) (as in force in State of Madras on 1-8-1966);
- (3) Indian Registration Act, 1908 (16 of 1908). — Pondicherry Gaz., 8-1-1969, Ext.

NOTABLE CASE LAW

CONSTITUTIONAL LAW

1. Where the Government black-lists a person and debars him from submitting tenders for a Government Contract (which tenders the Government is not bound by law to invite) is there infringement of any of the person's civil rights? (No) AIR 1969 Ker 81 (FB)

COURT-FEES

2. Whether, when case is remanded in appeal under O. 41, R. 23, (as amended in U. P., Mad., Andh. Pra., Kerala and Mysore) of Civil Procedure Code, on the ground that it was in the interest of justice to do so, the appellant is entitled to refund of court-fee? (Yes)
AIR 1969 All 142 (FB)

3. Whether in an appeal to a Division Bench of Delhi High Court from the judgment of a Single Bench, when the judgment fulfills all criteria of a decree, the court-fee should be paid ad valorem under Sch. I Art. 1? (Yes)
AIR 1969 Delhi 85 (FB)

EDUCATION

4. Are Rules 67, 75 and 77 (as amended in 1965) of the Kerala Education Rules

EDUCATION (contd.)

(1959), constituting original authority in officers (other than Manager of Schools) void being repugnant to Sections 11 and 12 (2) of the Kerala Education Act (6 of 1959)? (Yes)

AIR 1969 Kerala 91 (FB)

HINDU ADOPTIONS AND MAINTENANCE

5. Should an adopted boy who was adopted by a Hindu widow after the Hindu Adoptions and Maintenance Act, 1956, came into force be deemed to be an adopted son of the deceased husband conferring upon the boy, so adopted, rights of inheritance to the estate of the deceased husband? (No)
AIR 1969 Mad 72 (E)

INCOME-TAX

6. Whether the losses sustained by the assessee in speculative dealings can be set off against his profits from any other business activity under S. 10 in spite of first proviso to S. 24 (1) of Income-tax Act (1922)? (No)
AIR 1969 SC 209

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— Art. 246 — Imposition of additional wealth tax on capital assets — Validity — See Constitution of India, Art. 14 Ker 69 (C N 15)

— Art. 254 — Competency of Legislature to provide for surcharge — See Electricity Act (1910), S. 3 (f) SC 227 C (C N 42)

— Art. 254 (2) — Dispute between co-operative and its employees — Registrar alone can adjudicate — Reference to Labour Court under I. D. Act is illegal — See Co-operative Societies — M. P. Co-operative Societies Act (17 of 1961), S. 55 (2) Madh Pra 46 (C N 15)

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— Art. 284 — Moneys deposited in Court — Investment of — Power of Court — See Constitution of India, Art. 283 Guj 74 (C N 15)

— Art. 299 (1) — Plea of denial of contract — Raised in reply argument in appeal — Not admissible — See Civil P. C. (1908), O. 6, R. 8 Tripura 26 A (C N 7)

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— Art. 309 — Temporary appointment for a fixed period to officiate in a post — Reversion before expiry of period is illegal — See Constitution of India, Art. 311 (2)

Orissa 81 (C N 26)

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— Art. 311 — Government servant — Resignation — Acceptance by Government — Withdrawal of resignation not permissible even before communication or order of acceptance — See Constitution of India, Article 309

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— Art. 311 — Disciplinary proceedings under — Requirements of principles of natural justice — Second inquiry after show cause notice or giving of copy of report — Not necessary in every case — (Natural Justice — Principles) — SC 198 C (C N 37)

— Art. 311 — Termination of service by compulsory retirement — Tests to be applied for ascertaining whether termination amounts to removal or dismissal

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— Art. 311 — Order of compulsory retirement in public interest — Article if attracted — See Civil Services — All India Services Act (1951), S. 3 (1) — Orissa 37 E (C N 18)

— Art. 311 (2) — Resolutions dated 21-5-1963 and 15-9-1965 of Government of Orissa, Political and Services Department — Raising of retirement age to 58 years, unequivocally — Government servant attaining 55 years, consequently continuing in service for 2 more years — His compulsory retirement thereafter without giving reason is illegal

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— Art. 366 (22) — Consent to sue a former Ruler is no consent to sue his successor — Successor recognised under Art. 366 (22) has in his own independent right, the personal immunity from civil action — See Civil P. C. (1908), S. 86 — Andhra Pra 106 B (C N 32)

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— Sch. 7, List III, Entry 38 — Competency of Legislature to provide for surcharge — No conflict in Cl. 12 of Schedule in former Act and Ss. 3 and 4 of latter Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act — See Electricity Act (1910), S. 3 (f) — SC 227 C (C N 42)

— Sch. 7, Entry 86 — Imposition of additional wealth tax on capital assets — Validity — See Constitution of India, Art. 14

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CONTEMPT OF COURTS ACT (32 of 1952)

— S. 1 — Disobedience of stay order which is ineffective — Cri. Misc. Case No. 28 of 1964, D/- 16-8-1964 (Cal), Reversed

SC 189 B (C N 35)

— S. 1 — Nature of contempt proceedings — Duty of Court — Delay in transmission of orders of superior Court to subordinate Court — Contempt proceedings are not "proper" — See Contempt of Courts Act (1952), S. 3

SC 189 D (C N 35)

— S. 1 — Appointment of Commissions of Inquiry under Commission of Inquiry Act, during pendency of civil litigation, when amounts to contempt of Court — Enquiry cannot be said to be judicial — Commission cannot commit contempt, being Statutory Commission — Commissions of Inquiry Act (1952), Section 3 — SC 215 C (C N 41)

S. 1 — Disobedience of orders of High

Court by State — Even State is guilty of contempt — Fact that wrong legal advise resulted in disobedience does not affect the liability — See Constitution of India, Art. 215

Pat 72 (C N 18)

— Ss. 3, 1 — Nature of contempt proceedings — Duty of Court — Delay in transmission of orders of superior Court to subordinate Court — Contempt proceedings are not proper — SC 189 D (C N 35)

— S. 4 — Contemner must offer an apology and that too clearly and at earliest opportunity — Person offering belated apology runs the

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 risk that it may not be accepted, for such an apology hardly shows contrition which is the essence of purging of contempt — However, a man may have the courage of his convictions and may stake his all on proving that he is not in contempt and may take the risk — (Here the persons ran gauntlet of such risk and fairly succeeded) SC 189 C (C N 35)
 — S. 4 — Conviction for contempt of Court — Award of costs — High Court has inherent power to award costs

Pat 70 A (C N 17)

CONTRACT ACT (9 of 1872)

— S. 2 — Coal consigned to Company by Colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945, which was then in force — Sanction and order at instance of Company — Wagons supplied by Railway on order by Coal Commissioner — Refusal of Company to take delivery — Railway selling coal and suing company for demurrage — Normally consignee is liable — On facts also that Colliery acted as agent of company — Duty of Railway pointed out — Extent of liability of consignee — See Railways Act (1890), S. 56 SC 193 (C N 36)

— Ss. 2 (h), 10 — Lease deed stipulating sale of land if lessor was ever required to sell and if lessee agreed to purchase at reasonable price — Stipulation no completed contract — No question of specific performance or violation of contract arises — (Specific Relief Act (1963), S. 18) Assam 43 (C N 10)

— S. 10 — Forward contract — Ready delivery contract — Contract held not ready delivery contract and was hit by Sec. 15 read with S. 2 (c) — See Forward Contracts (Regulation) Act (1952), S. 15

Andh Pra 88 (C N 29)

— S. 10 — Lease deed stipulating sale of land if lessor was even required to sell and if lessee agree to purchase it at reasonable price — Stipulation no completed contract — See Contract Act (1872), S. 2 (h)

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— S. 10 — Construction of contract — Arbitration clause providing innumerable persons as arbitrators — Identity of arbitrator must be interpreted as vague and uncertain — AIR 1964 Tri 27, Diss. from

Tripura 19 A (C N 6)

— S. 62 — Partition between brothers effected by registered deed but not by metes and bounds — Mistake in deed corrected by unregistered document resulting in increase of share of one — Other brother selling his share, received under original deed — Purchaser is not affected by the subsequent correction under unregistered deed

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— Ss. 65, 70 — Suit based on void contract — Benefit derived from transaction — Party bound to compensate

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— S. 70 — Benefit derived from void contract — Party bound to compensate — See Contract Act (1872), S. 65

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CONTRACT ACT (contd.)

— S. 72 — Forward contract — Ready delivery contract — What is — See Forward Contracts (Regulation) Act (1952), S. 15
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— S. 74 — Suit to recover loan with interest — Decree passed on basis of compromise between parties — Compromise providing that creditor would accept a sum forgoing even a part of principal amount in full discharge if paid before a certain date — Default clause in compromise that, if debtor failed, creditor would be entitled to decree for full amount of claim with future interest and costs — Default clause contains no element of penalty as it gave no advantage to the creditor who would have got a decree in the same terms even if debtor had chosen to contest the claim — The terms of the compromise considered as a whole were advantageous only to the debtor — Civil P. C. (1908), O. 28, R. 3 Pat 85 A (C N 21)

— S. 148 — Evidence Act (1872), Ss. 101-104 — Storing agent — Liability to return goods — Burden of proof

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— S. 149 — See Railways Act (1890), S. 56

SC 193 (C N 36)

— S. 186 — See Railways Act (1890), S. 56

SC 193 (C N 36)

CO-OPERATIVE SOCIETIES

BOMBAY CO-OPERATIVE SOCIETIES ACT (7 of 1925)

— S. 54 — Admission — What is — Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar — Registrar entitled to call for information under Ss. 54 and 60 (b) of the Bombay Co-operative Societies Act — Statement in reply is an admission under Section 17 and not hit by S. 24 — See Evidence Act (1872), S. 17 Tripura 31 B (C N 8)

— S. 60 — Applicability — Secretary to Co-operative Society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payment held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held, no bar to trial for offences under Penal Code — See Penal Code (1860), S. 408

Tripura 31 A (C N 8)

— Ss. 60 (b) and (c) — Admission — What is — Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar — Registrar entitled to call for information under Ss. 54 and 60 (b) of the Bombay Co-operative Societies Act — Statement in reply is an admission under S. 17 and not hit by S. 24 — See Evidence Act (1872), S. 17

Tripura 31 B (C N 8)

— S. 61 — Applicability — Secretary to Co-operative Society entrusted with its funds and

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 responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held, no bar to trial for offences under Penal Code — See Penal Code (1860), S. 408

Tripura 31 A (C N 8)

— S. 63 — Applicability — Secretary to Co-operative Society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held, no bar to trial for offences under Penal Code — See Penal Code (1860), S. 408

Tripura 31 A (C N 8)

M. P. CO-OPERATIVE SOCIETIES ACT (17 of 1961)

— Ss. 55 (2), 93 — Dispute between Co-operative Society and its employees — Registrar, under S. 55 (2) alone can adjudicate — Reference to Labour Court under S. 10 (1) of Industrial Disputes Act (1947), is illegal — (Constitution of India, Art. 254 (2)) — Industrial Disputes Act (1947), S. 10 (1)

Madh Pra 46 (C N 15)

— S. 93 — Dispute between Co-operative Society and its employees — Registrar alone can adjudicate — Reference under S. 10 (1) of I. D. Act is illegal — See Co-operative Societies — M. P. Co-operative Societies Act (17 of 1961), S. 55 (2)

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COURT-FEES ACT (7 of 1870)

See under Court-fees and Suits Valuations.

COURT FEES AND SUITS VALUATIONS**COURT-FEES ACT (7 of 1870)**

— S. 13 — Refund of Court-fees — Remand in appeal under O. 41, R. 23, Civil P. C. (as amended in U. P.) on ground that it was in the interest of justice to do so — Appellant entitled to refund on court-fees

All 142 A (C N 27)

— Sch. I, Art. 1 — Judgment — Meaning of, explained — See Delhi High Court Act (1966), S. 10 Delhi 85 C (C N 15) (FB)

— Sch. II, Art. II — Judgment — Meaning of, explained — See Delhi High Court Act (1966), S. 10 Delhi 85 C (C N 15) (FB)

CRIMINAL PROCEDURE CODE (5 of 1898)

— S. 4 (1) (w) — Violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Prosecution and defence

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 witnesses examined on the same day — Trial illegal — See Essential Commodities Act (1955), S. 7 Pat 105 (C N 27)
 — S. 10 — Sessions Judge directing District Magistrate to deliver proceeds of sale of subject matter of offence to accused on his furnishing security bond to the satisfaction of the District Magistrate — Additional District Magistrate can accept the bond — Direction of sessions Judge not mentioning in whose favour bond has to be executed — Bond in favour of State Government is not bad — See Criminal P. C. (1898), S. 517 SC 189 A (C N 35)

— S. 32 — Second Schedule — Trade mark and Property mark — Distinction — Complaint only of infringement of property mark — Sub-Magistrate held could try that offence — See Penal Code (1860) S. 482 Mad 94 (C N 22)

— S. 103 — Taking of sample of adulterated milk by Food Inspector — Witnesses — Requirement as to — See Prevention of Food Adulteration Act (1954), S. 10 (7) All 109 C (C N 19)

— S. 103 — Information gathered as a result of illegal search and seizure — Admissibility in evidence — See Constitution of India, Art. 19 Delhi 91 O (C N 16)

— Ss. 127 and 128 — Power to disperse assembly — Who can exercise — Refusal or failure to disperse — Effect — Action can be taken under S. 128 — Unlawful character of assembly has to be determined under S. 141 I. P. C. — Disobedience of command under S. 127 is not a relevant consideration — (Penal Code (1860), S. 141)

All 130 B (C N 25)

— S. 128 — Unlawful assembly — Power to disperse assembly — Who can exercise — Refusal or failure to disperse — Effect — See Criminal P. C. (1898), S. 127 All 130 B (C N 25)

— S. 145 — In passing order under S. 145 Magistrate is not bound by report of Police — He has to make his own judicial enquiry Manipur 27 (C N 10)

— S. 145 (4) — Seize — Property attached under Section 145 (4) — Later, temporary injunction issued by civil court in respect of same property — Subsequently, Magistrate appointing Tehsildar as Receiver — Appointment is valid — (Civil P. C. (1908), Order 31 Rule 1, Order 21, Rule 54) Raj 82 A (C N 17)

— S. 145 (4) — Attachment of property under — Appointment of Receiver — Not challenged within time prescribed — Cannot be challenged in revision against appointment — See Criminal P. C. (1898), S. 439 Raj 82 B (C N 17)

— S. 146 (1) — Attachment of land unde and directing parties to Civil Court to resolve dispute as to possession — Suit for declaration — Dismissed for non-appearance — Subsequent suit for same relief — Whether barred — See Limitation Act (1908), S. 23 J and K 48 (C N 11)

— S. 156 (2) — Irregularity in investigation — Objection as to — Must be raised at all

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early stage of trial — See Drugs and Cosmetics Act (1940), S. 22 Andh Pra 99 D (C N 31)
 — S. 156 (2) — Complaint under S. 32 (1), Drugs Act, by Inspector on basis of investigation conducted by unauthorised Inspector — Effect on cognisance — See Drugs and Cosmetics Act (1940), S. 21

Andh Pra 99 B (C N 31)
 — S. 165 (5) — Investigation under S. 132 Income-tax Act, 1961 — Not in the nature of investigation into any offence — See Income-tax Act (1961), S. 132

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 — S. 165 (1) — Search and seizure of documents — Authorised officer is not required to record reasons for — See Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965)

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— S. 173 — Report by police officer in a non-cognisable case — Must be treated as a police report within Ss. 251, 251-A and 252 — See Criminal P. C. (1898), S. 251-A

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— S. 190 — Report by police officer in a non-cognisable case is a police report — Proceedings before Magistrate on basis thereof cannot be under S. 251-A — Cognisance so taken is only in nature of error in proceeding antecedent to trial — See Criminal P. C. (1898), S. 251-A

All 123 B (C N 23)

— S. 190 — Violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Cognisance taken on basis of report of Magistrate deputed to search premises of accused — Trial — Validity — See Essential Commodities Act (1955), S. 7

Pat 105 (C N 27)

— S. 190 (1) — Complaint under S. 32 (1), Drugs Act — Investigation conducted by unauthorised Inspector — Power of Court to take cognisance — See Drugs and Cosmetics Act (1940), S. 21 Andh Pra 99 B (C N 31)

— S. 192 — Stage at which transfer should be ordered — Cognisance of case taken — Enquiry directed against one of accused — No order made on enquiry report — Case transferred — Transfer legal

Pat 97 (C N 24)

— Ss. 205, 540-A — Exemption of accused from appearance — When can be refused

Mys 95 A (C N 21)

— Ss. 205 and 540-A — Exemption of accused from personal appearance when refused — Status of accused when disregarded

Mys 95 C (C N 21)

— Ss. 205, 540-A and 288 — Exemption from appearance granted to accused till stage of recording of evidence — Does not last till duration of enquiry when evidence is to be used under S. 288

Mys 95 D (C N 21)

— S. 209 (1) — Applicability — Provision does not enable a Magistrate to discharge accused regarding some of the offences and try them for others — He can either discharge the accused or try them or send them for trial before a Magistrate of competent jurisdiction

Ker 68 (C N 14)

CRIMINAL P. C. (contd.)

— S. 237 — Concurrent finding of facts — Interference in revision — See Criminal P. C. (1898), S. 439 Orissa 36 (C N 17)

— S. 238 — Concurrent findings of facts — Interference in revision — See Criminal P. C. (1898), S. 439 Orissa 36 (C N 17)

— S. 251 — Report by police officer in a non-cognisable case — Must be treated as a police report within the section — See Criminal P. C. (1898), S. 251-A

All 123 B (C N 23)

— Ss. 251, 252, 251-A — Cases instituted on 'Police Report' — Expression 'Police Report' — Meaning — Offences under Assam Opium Prohibition Act — Report of excise officer though he is invested with powers of a police officer for purposes of investigation of offences is not a police report — Procedure to be followed is one laid down by S. 251 (b) — Criminal Revision 108 of 1963 (Assam), D-17-1-1964, Overruled Assam 36 (C N 9)

— Ss. 251-A, 251, 252, 173, 190, 537 — Essential Commodities Act (1955), Ss. 7, 3 — Prosecution under — Offence, a non-cognisable offence — Report by police officer even though in non-cognizable case must be treated as police report within the meaning of Ss. 251, 251-A and 252 — Proceedings before Magistrate on basis thereof cannot but be under Section 251-A — Defect in investigation — Cognizance so taken is only in nature of error in proceeding antecedent to trial — Defect will be cured under S. 537

All 123 B (C N 23)

— S. 251-A — Cases instituted by police report — Expression 'Police report' — Meaning — Procedure to be followed in such cases — See Criminal P. C. (1898), S. 251

Assam 36 (C N 9)

— S. 252 — Report by police officer in a non-cognisable case — Must be treated as police report within the section — See Criminal P. C. (1898), S. 251-A

All 123 B (C N 23)

— S. 252 — Expression 'police report' — Meaning of — Report of Excise Officer, though invested with powers of a police officer for purposes of investigation is not a police report — See Criminal P. C. (1898), S. 251

Assam 36 (C N 9)

— S. 252 — Trial for violation of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Validity of procedure — See Essential Commodities Act (1955), S. 7

Pat 105 (C N 27)

— S. 255 — Trial for violation of R. 3, Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Procedure — Validity — See Essential Commodities Act (1955), S. 7

Pat 105 (C N 27)

— S. 256 (1) — Trial for violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Procedure — Validity — See Essential Commodities Act (1955), S. 7

Pat 105 (C N 27)

— S. 262 (1) — Violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Trial — Validity of procedure — See Essential Commodities Act (1955), S. 7

Pat 105 (C N 27)

CRIMINAL P. C. (contd.)

—Ss. 288 and 353 — Evidence recorded in absence of accused — Whether can be used as substantive evidence under S. 288 — S. 288 must be strictly complied with
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—S. 288 — Exemption from appearance — Duration — See Criminal P. C. (1898), S. 205

Mys 95 D (C N 21)
—S. 353 — Evidence recorded in absence of accused — Use of, as substantive evidence — Essential — See Criminal P. C. (1898), S. 288
Mys 95 B (C N 21)

—S. 367 — Lower Court's concurrent findings of conviction giving convincing reasons for placing reliance on prosecution witnesses and accepting prosecution case — Held there were no compelling reasons for differing from the concurrent findings — See Criminal P. C. (1898), S. 439
Orissa 36 (C N 17)

—Ss. 386 (1), Proviso and 401 — Penal Code (1860), Ss. 64, 68 and 69 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under S. 401 is illegal — Remission cannot amount to undergoing the whole term awarded
All 116 (C N 21)

—Ss. 386 (1) (b) (iii) and 501-A — Order for award of costs in contempt proceedings — Warrant ordered to be sent to Collector authorising him to realise the amount — Held, that the section had no application, but that the High Court had inherent power to execute and enforce its order
Pat 70 C (C N 17)

—S. 401 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under Section 401 is illegal — Remission cannot amount to undergoing the whole term awarded — See Criminal P. C. (1898), S. 386 (1), Proviso
All 116 (C N 21)

—S. 403 — Applicability — Secretary to Co-operative society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held, no bar to trial for offences under Penal Code — See Penal Code (1860), S. 408
Tripura 31 A (C N 8)

—Ss. 417, 423 — Appeal against acquittal — High Court can accept evidence disbelieved by lower Court
Raj 86 C (C N 18)

—S. 417 (3) — Right of complainant — Appeal against acquittal — Court can set aside the acquittal if it is incorrect — Lower Court's judgment need not be characterised as perverse
Tripura 31 C (C N 8)

—S. 423 — Appeal against acquittal — Powers of High Court same as in appeals

CRIMINAL P. C. (contd.)

against conviction — See Criminal P. C. (1898), S. 417
Raj 86 C (C N 18)

—Ss. 439, 367, 237 and 238 — Prosecution under Ss. 148, 149, 323, 324 and 426, I.P.C. — Conviction under Ss. 323 and 352, I.P.C. — Prosecution wanted to prove assault of serious nature — Lower courts on evidence of prosecution witnesses coming to finding that instead of committing graver offence accused have committed lesser offence — It cannot be said that substratum of prosecution is disbelieved and accused are convicted on reconstructed story made out by lower courts — Convincing reasons given by lower courts for placing reliance on prosecution witnesses and in accepting prosecution case as proved — Held there were no compelling reasons to differ from concurrent findings of fact
Orissa 36 (C N 17)

—Ss. 439 and 145 (4) — Property attached under Section 145 (4) — Subsequently Receiver appointed — Attachment order not challenged within prescribed time — Revision against such appointment — Question of emergency at the time of ordering attachment cannot be canvassed
Raj 82 B (C N 17)

—Ss. 517, 10 — Sessions Judge directing District Magistrate to deliver proceeds of sale of subject matter of offence to accused on his furnishing security bond to the satisfaction of the District Magistrate — Additional District Magistrate can accept the bond — Direction of Sessions Judge not mentioning in whose favour bond has to be executed — Bond in favour of State Government is not bad — Criminal Misc. Case No. 28 of 1964, D/16-6-1964 (Cal), Reversed
SC 189 A (C N 35)

—S. 517 — Scope — Merely provides summary method for maintaining status quo ante — Rival claims as to ownership and possession of idol — Idol in possession of accused since some time past not without any basis or right — Accused acquitted in complaint case under S. 406 Penal Code, but directed to deliver physical possession of idol to complainant — Direction held was wrong — Such rival claims could not be decided in criminal cases — Penal Code (1860), S. 406
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—S. 537 — Cognisance taken by Magistrate on basis of a report by police officer in a non-cognisable case — Defect in investigation — Defect will be cured under S. 537 — See Criminal P. C. (1898), S. 251-A
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—S. 537 — Complaint under S. 32 (1), Drugs Act — Investigation by unauthorised Inspector — Cognisance by Court — Trial, if bad — See Drugs and Cosmetics Act (1940), S. 21
Andhra Pra 99 B (C N 31)

—S. 537 — Trial for violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Prosecution and defence witnesses examined on same day — Trial illegal — No cure under S. 537 — See Essential Commodities Act (1955), S. 7
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—S. 540-A — Exemption of accused from appearance — When can be refused — See Criminal P. C. (1898), S. 205

Mys 95 A (C N 21)

—S. 540-A — Exemption of accused from personal appearance — When can be refused — Status of accused when disregarded — See Criminal Procedure Code (1898), S. 205

Mys 95 C (C N 21)

—S. 540-A — Exemption from appearance granted to accused — Duration — See Criminal P. C. (1898), S. 205

Mys 95 D (C N 21)

—S. 561-A — Conviction for contempt of Court — High Court has inherent powers to award costs — See Contempt of Courts Act (1952), S. 4

Pat 70 A (C N 17)

—S. 561-A — Award of costs in contempt proceedings — High Court has inherent power to execute and enforce its order — See Criminal P. C. (1898), S. 386 (1)

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DELHI HIGH COURT ACT (26 of 1966)

—S. 10 — Civil P. C. (1908), Section 2 (9)

— Judgment — Meaning of 'judgment' in Civil P. C. not helpful in ascertaining meaning of 'judgment' in Section 10

Delhi 85 A (C N 15) (FB)
—S. 10 — Judgment — Meaning of explained — See Letters Patent (Lahore) Cl. 10

Delhi 85 B (C N 15) (FB)
—S. 10 — Court-fees Act (1870), Sch. I, Art. 1, Sch. II, Art. 11 — Judgment of Single Bench is appealable under S. 10 — Determination of Court-fee on appeal — "Judgment", meaning of explained

Delhi 85 C (C N 15) (FB)
DRUGS AND COSMETICS ACT (23 of 1940)

—S. 21 — A appointed as Inspector for Hyderabad District — B appointed as Inspector for twin cities of Hyderabad and Secunderabad — Held, given a plain meaning to the term, Hyderabad District, it would include twin cities of Hyderabad and Secunderabad — Merely because B was appointed for twin cities it cannot be held that A was appointed for Hyderabad District excluding twin cities of Hyderabad and Secunderabad

Andh Pra 99 A (C N 31)

—Ss. 21, 22, 32 (1) — Criminal P. C. (1898), Ss. 156 (2), 190 (1), 537 — Complaint lodged by Inspector under Section 32 (1) — Investigation, however, made by another Inspector not authorised to investigate in the area — Power of Court to take cognizance — Trial, if bad

Andh Pra 99 B (C N 31)

—S. 22 — Complaint lodged by Inspector under Section 32 (1) on basis of investigation by an Inspector not authorised to do so in the area — Power of Court to take cognizance — See Drugs and Cosmetics Act (1940), Section 21

Andh Pra 99 B (C N 31)

—S. 22 — Criminal P. C. (1898), S. 156 (2) — Objections regarding irregularity in investigation must be raised at the earliest stage of trial

Andh Pra 99 D (C N 31)

DRUGS AND COSMETICS ACT (contd.)

—Ss. 23, 25 — Sample taken by person who is not authorised Inspector — Report of Government Analyst on such sample, if substantive evidence. AIR 1960 All 460, Dissent from Andh Pra 99 C (C N 31)

—S. 25 — Sample taken by unauthorised Inspector — Report of Analyst on such sample, if substantive evidence — See Drugs and Cosmetics Act (1940), S. 23

Andh Pra 99 C (C N 31)

—S. 32 (1) — Complaint under by Inspector — Investigation made by unauthorised Inspector — Cognisance — Trial — Validity — See Drugs and Cosmetics Act (1940), Section 21

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EASTERN BENGAL AND ASSAM EXCISE ACT (1 of 1910)

—S. 9 (4) — Cancellation of licence to sell potable foreign liquor granted by Excise Collector — Cancellation by Finance Secretary — Order is illegal — See Eastern Bengal and Assam Excise Act (1 of 1910), Section 32

Manipur 30 B (C N 12)

—Ss. 29, 9 (4) — Licence to sell potable foreign liquor granted by Excise Collector (Deputy Commissioner) to proprietor of restaurant — Cancellation of licence by Finance Secretary — Order is illegal — Board has also no authority suo motu to cancel licence

Manipur 30 B (C N 12)

—S. 32 — Licence to sell potable foreign liquor to proprietor of restaurant — Breach of some of the conditions by licensee — Proprietor of restaurant held not entitled to claim as a matter of right renewal of his licence — This is matter purely in the discretion of Chief Commissioner — Court cannot compel him to exercise discretion in favour of licensee — (Constitution of India, Article 226—Mandamus)

Manipur 30 C (C N 12)

EDUCATION**KERALA UNIVERSITY ACT (14 of 1957)**

—Statutes under — Statute I, Chapter VII, Cl. 3 (xxvii) — Constitution of India, Art. 226 — Misconduct by student in examination — Inquiry into — Show cause notice to student after inquiry — Report of inquiry not given to student — Not a breach of rule of natural justice — (Natural justice — Principles)

SC 198 B (C N 37)

—Ss. 19N, 28 and Statute I, Chapter VII, Cl. 3 (xxvii) — Misconduct by student in examination — Inquiry — Appointment of person other than Principal of the concerned College as Inquiry Officer — Legality — (Natural justice — Principles)

SC 198 A (C N 37)

—S. 28 — Misconduct by student in examination — Inquiry — Appointment of person other than Principal of concerned College as Inquiry Officer — Legality — See Education — Kerala University Act (14 of 1957), S. 19N

SC 198 A (C N 37)

—Statute I, Chapter VII, Cl. 3 (xxvii) — Misconduct by student in examination — Inquiry — Appointment of person other than Principal of concerned College as Inquiry

EDUCATION — KERALA UNIVERSITY ACT (contd.)

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SC 198 A (C N 37)

—KERALA EDUCATION ACT (6 of 1959)

—Ss. 11, 12 (2), 36 — Kerala Education Rules (1959), Rules 67, 75 and 77 — (as amended in 1965) — Disciplinary action against teachers — Rules constituting original authority in Officers (other than Manager of Schools) — Rules are void being repugnant to Sections 11 and 12 (2)

Ker 91 (C N 21) (FB)

—S. 12 (2) — Disciplinary action against teachers — Rules constituting original authority in Officers (other than Manager of Schools) Rules are void as being repugnant to Ss. 11 and 12 (2) — See Education — Kerala Education Act (6 of 1959), Section 11

Ker 91 (C N 21) (FB)

—S. 36 — Disciplinary action against teachers — Rules framed — Rules held void as being repugnant to Sections 11 and 12 — See Education — Kerala Education Act (6 of 1959), Section 11

Ker 91 (C N 21) (FB)

—KERALA EDUCATION RULES (1959)

—R. 67 — Validity — See Education — Kerala Education Act (6 of 1959), Section 11

Ker 91 (C N 21) (FB)

—R. 75 — Validity — See Education — Kerala Education Act (6 of 1959), S. 11

Ker 91 (C N 21) (FB)

—R. 77 (as amended in 1965) — Validity — See Education — Kerala Education Act (6 of 1959), S. 11

Ker 91 (C N 21) (FB)

ELECTRICITY ACT (9 of 1910)

—S. 3 (f), Sch. Cl. (12) — Bombay Electricity (Surcharge) Act, (as extended to Ajmer Merwara by Ajmer Merwara Extension of Laws Act, 1947) (19 of 1946), Sections 3, 4 — Competency of Legislature to provide for surcharge — No conflict in Clause 12 of Schedule in former Act and Sections 3 and 4 of latter Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act — F. A. No. 67 of 1936, D/-22-9-1964 (Raj), Reversed — (Constitution of India, Articles 246, 254, Section 7, List III, Entry 38)

SC 227 C (C N 42)

—S. 7 (Prior to its amendment in 1959) — Electricity (Supply) Act (1948), Section 71 (Prior to its repeal in 1959) — Right and option of State Government or local authority to purchase undertaking — State Electricity Board if can exercise such right

SC 239 B (C N 44)

—Section 7 (1), (2) and (4) (Prior to its amendment in 1959) — Purchase of undertaking — Exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps — Spl.

ELECTRICITY ACT (contd.)

Civil Appln. No. 94 of 1962, D/- 31-10-1963 (Guj.), Reversed.

SC 239 A (C N 44)

—Sch. Cl. (12) — Competency of Legislature to provide for surcharge — No conflict in Clause 12 of Schedule in former Act and Sections 3 and 4 of latter Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act — See Electricity Act (1910), Section 3 (f)

SC 227 C (C N 42)

ELECTRICITY (SUPPLY) ACT (54 of 1948)

—S. 71 (Prior to its repeal in 1959) — Right and option of State Government or local authority to purchase undertaking — State Electricity Board if can exercise such right — See Electricity Act (1910) (Prior to its amendment in 1959), Section 7

SC 239 B (C N 44)

EMPLOYEES' PROVIDENT FUNDS ACT (19 of 1952)

—S. 1 (3) (b) — Government Notification No. GSR 346 D/-7-3-62 — 'Trading or Commercial establishment' — Concerns selling only goods manufactured by them fall within 'Trading or Commercial establishment' within the meaning of the notification

Bom 95 B (C N 19)

—S. 1 (3) (b) and (a) — Expression "any other establishment" refers to any establishment not falling under Clause (a) whether it is a factory or not. AIR 1967 Madh Pra 157, Dissented from

Bom 95 C (C N 19)

ESTATE DUTY ACT (34 of 1953)

—S. 2 (15) — Property passing or deemed to pass on death — What is — See Estate Duty Act (1953), S. 6 Cal 139 A (C N 23)

—S. 2 (15) — Property of deceased — 'Converted from one species into another by any method' — Meaning of — Conversion contemplated by section indicated

Cal 139 C (C N 23)

—Ss. 6, 10 and 2 (15) — "Property passing or deemed to pass on his death" — Wife of X purchasing house in her own name and with her own funds under a registered sale-deed executed by owner 12 years before her husband's death — Title deed cannot be called benami — Wife living in house along with husband since date of purchase — No legal evidence to show that purchase money was advanced by husband or that he used house as his own dwelling house — House held could not pass or be deemed to pass on husband's death so as to be included in estate of deceased for purposes of estate duty

Cal 139 A (C N 23)

—S. 10 — Property passing or deemed to pass on death — Held that on facts and circumstances of the case house purchased by wife in her own name could not be included in principal value of the estate of deceased — See Estate Duty Act (1953), Section 6

Cal 139 A (C N 23)

—S. 10 — Scope and interpretation — Property taken under gift — When deemed to

ESTATE DUTY ACT (contd.)

pass on donor's death — Conditions for possession and enjoyment of property by donor should be in proprietary right and not in virtue of marital rights Cal 139 B (C N 23)

ESSENTIAL COMMODITIES ACT (10 of 1955)

—Ss. 3, 5 — U. P. Foodgrains Dealers Licensing Order (1964), Clauses 3 (2), 2 (a) — Presumption under Clause 3 (2) — Person engaged in business of selling and purchasing goods — Wheat found in his possession in excess of ten quintals — Presumption under Clause 3 (2) would be that it was stored for purpose of sale — He would be person engaged in business of selling or purchasing foodgrains All 123 A (C N 23)

—S. 3 — Non-cognisable case — Defect in investigation — Cognisance — Effect — See Criminal P. C. (1898), Section 251-A All 123 B (C N 23)

—S. 5 — Person engaged in business of purchasing and selling goods — Found in possession of wheat in excess of prescribed maximum — Presumption would be that it was stored for purposes of sale — See Essential Commodities Act (1955), Section 3 All 123 A (C N 23)

—S. 7 — Non-cognisable case — Defect in investigation — Cognisance — Effect — See Criminal P. C. (1898), S. 251A All 123 B (C N 23)

—Ss. 7 and 12A — Violation of Rule 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Cognisance taken on basis of report of magistrate deputed to search premises of accused — Prosecution and defence witnesses examined on same date — Trial illegal — No cure under Section 537, Cr. P. C. — (Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Rule 3) — (Criminal P. C. (1898), Sections 4 (1) (w), 190, 262 (1), 252, 255, 256 (1) and 587) Pat 105 (C N 28)

—S. 7 (1) (a), Proviso — Prosecution under Section 7 read with Section 3 — Sentence of fine only awarded — Reasons given by Magistrate being age of accused, his being first offender, length of trial and loss sustained by accused — Reasons held to be most unsatisfactory — Reduction of fines from Rs. 2,000 to Rs. 1,000 by Sessions Judge in appeal held not justified — Offences of this type deserve deterrent punishment All 123 C (C N 23)

—S. 12A — Violation of Rule 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Trial for — Validity — See Essential Commodities Act (1955), Section 7 Pat 105 (C N 27)

EVIDENCE ACT (1 of 1872)

—S. 3 — Evidence — Land acquisition proceedings — Market value of land — Reference by appellate Court after conclusion of arguments to documents which are not part of record is not permissible — They should be admitted as fresh evidence and parties given

EVIDENCE ACT (contd.)

opportunity to rebut them — Civil P. C. (1908), O. 20, R. 4, O. 41, R. 27. AIR 1964 Madh Pra 196, Reversed

SC 255 B (C N 47)

—S. 3 — Appreciation of evidence — Oral evidence — Civil cases — In assessing the value of the evidence Judges are bound to call in aid their experience of life and test the evidence on basis of probabilities — Evidence of only one party even when no evidence of rebuttal is led by opposite party need not necessarily be accepted

SC 255 C (C N 47)

—S. 3 — Proved — Appreciation of Evidence — See Trusts Act (1882), S. 19 Delhi 75 E (C N 14)

—Ss. 3, 18 — Statement of accused — It is not open to Court to dissect statement and pick up part which is incriminating and reject part which is exculpatory Guj 69 A (C N 14)

—S. 3 — Appreciation of evidence — Concurrent findings of facts — Interference in revision — See Criminal P. C. (1898), S. 439 Orissa 36 (C N 17)

—S. 5 — Information gathered as a result of illegal search and seizure — Admissibility in evidence — See Constitution of India, Art. 19 Delhi 91 O (C N 16)

—Ss. 17, 24 — Admission — What is — Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar — Registrar entitled to call for information under Ss. 54 and 60 (b) of the Bombay Co-operative Societies Act — Statement in reply in an admission under S. 17 and not hit by S. 24 — (Bombay Co-operative Societies Act (7 of 1925), Ss. 54, 60 (b) and (c)) Tripura 31 B (C N 8)

—S. 18 — Statement of accused — Court cannot dissect it and pick up part which is incriminating and reject part which is exculpatory — See Evidence Act (1872), S. 3 Guj 69 A (C N 14)

—S. 18 — Suggestions put in cross-examination Guj 69 B (C N 14)

—S. 23 — Admission by Counsel of party made without prejudice to his contention does not bind the party — An incorrect admission on a question of law also does not bind the party Manipur 23 B (C N 9)

—S. 24 — Admission — What is — Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar — Registrar entitled to call for information under Ss. 54 and 60 (b) of the Bombay Co-operative Societies Act — Statement in reply is an admission under S. 17 and not hit by S. 24 — See Evidence Act (1872), S. 17 Tripura 31 B (C N 8)

—S. 34 — Books of accounts — Relevancy Tripura 26 E (C N 7)

—Ss. 50 and 60 — Conduct of a member of family — Evidence of a person having special means of knowledge admissible — He need not be a member of the family — Person

EVIDENCE ACT (contd.)

watching the conduct of members to be treated as person with special means of knowledge — Such person's evidence must be admissible under S. 60 — Pat 82 (C N 20)

— S. 60 — Conduct of member of family — Person watching the conduct of members to be treated as person with special means of knowledge — Such person's evidence is admissible under S. 60 — See Evidence Act (1872), S. 50 — Pat 82 (C N 20)

— Ss. 63, 65 — Copy of copy not admissible — Tripura 26 F (C N 7)

— S. 65 — Certified copy of deed — When admissible — See Evidence Act (1872), S. 66 — Mys 103 C (C N 23)

— S. 65 — Copy of a copy, not admissible — See Evidence Act (1872), S. 63 — Tripura 26 F (C N 7)

— S. 65 (a) and (f) — Clause (a) is not controlled by Clause (f) — When case falls under Clause (a), any secondary evidence (a plain copy of the document) and not necessarily certified copy of document is admissible, though the case may also fall under Clause (f) — SC 253 (C N 46)

— Ss. 66 and 65 — Deed of Wakf — Plaintiff-mosque claiming possession of property as trustee — Defendant claiming the property as her own and knowledge of execution of wakf-nama by her deceased husband denied — Defendant giving in evidence that she might be in possession of the deed though she was not sure of it — Held, that the case fell under S. 62 (2) and no notice was required to be given and the certified copy of the deed was admissible in evidence — Mys 103 C (C N 23)

— S. 73 — Under Ss. 4 and 5 of Identification of Prisoners Act accused can be compelled to give his measurements — His refusal or resistance entitles authorities to use reasonable force to get measurements — Word "measurements" as defined in S. 2 (a) of that Act does not include "specimen handwriting and accused cannot be compelled to give specimen under Ss. 4 and 5 — However, a Magistrate has power under S. 73 of the Evidence Act to direct an accused to give finger impressions as well as specimen writing — Refusal will entail in prosecution under S. 188 Penal Code — Giving of thumb mark or specimen handwriting does not offend against Art. 20 (3) of Constitution — See Constitution of India, Art. 20 (3) — Manipur 22 (C N 8)

— S. 92 — Terms of agreement clear and unambiguous — No oral evidence could be permitted — See Forward Contracts (Regulation) Act (1952), S. 15 — Andhra Fra 88 (C N 29)

— Ss. 101 to 104 — Person setting up invalidity of transfer by way of exchange under S. 27 (1), Sonthal Parganas Settlement Regulation — Burden of proving that subject-matter of exchange was raiyati land situate in Sonthal Parganas lies on him — Discharge of onus — Onus shifts to other side to show that transfer comes within exception to rule laid down in S. 27 (1) and he must show that Record of Rights contained an entry authorising transferor

EVIDENCE ACT (contd.)

to transfer raiyati land — (Sonthal Parganas Settlement Regulation (3 of 1872), S. 27 (1)) — AIR 1964 Pat 254, Reversed

SC 204 B (C N 38)

— Ss. 101-104 — Suit for rendition of accounts against trustee — Death of trustee — Liability and duty of L. Rs. of deceased trustee — Burden of proof to show that monies were due from deceased is on the plaintiff — See Trusts Act (1882), S. 19 — Delhi 75 D (C N 14)

— Ss. 101-104 — Scope — If no or insufficient evidence is given, party who has to prove his case in order to succeed in an action, must fail (Obiter) — J and K 36 A (C N 10)

— Ss. 101-104 — Standard of proof — Standard of proof for establishing corrupt practice should be that of criminal case — See Representation of the People Act (1951), S. 129 — J and K 36 G (C N 10)

— Ss. 101-104 — See Limitation Act (1908), Art. 144 — Mad 96 D (C N 23)

— Ss. 101 to 104 — Allegation of fraud to save limitation — Burden of proof — See Limitation Act (1963), S. 17 — Orissa 63 C (C N 26)

— Ss. 101-104 — Storing agent — Liability to return goods — Burden of proof — See Contract Act (1872), S. 148 — Tripura 26 G (C N 7)

— S. 115 — Grant of certificate under O. 21, R. 94, Civil P. C., to representative of deceased purchaser — Estoppel — See Civil P. C. (1908), S. 11 — Mys 73 B (C N 16)

— S. 145 — Inconsistency between complainant's evidence and complaint petition on a point — Complainant's attention not drawn under S. 145 to such inconsistency — Complainant's evidence on such point corroborated by prosecution and even defence witnesses — Concurrent finding of fact of both lower courts on such point in favour of complainant — In revision, defence cannot take advantage of such inconsistency — Orissa 59 A (C N 25)

— Ss. 159, 160 — Use of writing for refreshing memory — Tripura 26 D (C N 7)

— S. 160 — Use of writing for refreshing memory — See Evidence Act (1872), S. 159 — Tripura 26 D (C N 7)

— S. 187 — Civil P. C. (1908), S. 99 — Land Acquisition proceeding — Compensation awarded by Land Acquisition Officer substantially enhanced by High Court relying on inadmissible evidence — Evidence of claimant rejected by High Court — No appeal by Government against enhancement of compensation — If inadmissible evidence were not relied, the compensation allowed by Land Acquisition Officer would have remained — Claimant cannot therefore complain against High Court that it has taken into consideration inadmissible evidence — SC 255 D (C N 47)

FORWARD CONTRACTS (REGULATION) ACT (74 of 1952)

— S. 2 (c) and (i) — Forward contract — "Ready delivery contract" — Construction

FORWARD CONTRACTS (REGULATION) ACT (contd.)

of — See Forward Contracts (Regulation) Act (1952), S. 15 Andh Pra 88 (C N 29)

Ss. 15, 2 (c) and 2 (i) — Forward Contract — 'Ready delivery contract' — Agreement to sell certain bales of cotton before 25-11-1955 entered into on 10-11-1955 — Payment to be made after weighment of bales — Construction of — Parties carrying on business of buying and selling ginned cotton but not members of any recognised association — Contract, held, was not a ready delivery contract and was hit by S. 15 read with S. 2 (c) — Terms of agreement being clear and unambiguous, no oral evidence could be permitted — Contract Act (1872), Ss. 10 and 72 — Evidence Act (1872), S. 92
Andh Pra 88 (C N 29)

FUNDAMENTAL RULES

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S. 6 — Effect of repeal — Exchange of raiyati land situate in Sonthal Parganas for land situate outside it — Transaction is invalid under S. 27 (1), Sonthal Parganas Settlement Regulation which was in force — Subsequent repeal of Ss. 27 and 28 by Sonthal Tenancy (Supplementary Provisions) Act (14 of 1949) cannot affect its invalidity and render it a valid and binding transaction

SC 204 E (C N 38)

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HINDU LAW

Adoption — Capacity to give and take Mad 72 C (C N 13)

Adoption — Widow's right to adopt Mad 72 B (C N 13)

Shebait — Income of shebait of an idol as such — Nature of — See Income-tax Act (1922), S. 2 (6AA)

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Widow — Adverse possession against Hindu widow not adverse against next rever-sioners — Suit by reversioner to recover pos-session — Starting point of limitation is widow's death — See Limitation Act (1908), Art. 141 SC 204 C (C N 38)

HINDU ADOPTIONS AND MAINTENANCE ACT (78 of 1956)

Preamble — Scheme of the Act and its relation to Hindu Succession Act — See Hindu Succession Act (1956), Preamble

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Ss. 4, 5, 7, 8, 11, 12, 14 — Effect of adoption — Adoption by widow — Adopted boy does not become adopted son of deceased husband conferring upon him rights of inheritance to estate of deceased husband AIR 1966 Bom 174 and AIR 1967 All 148; Dissent from Mad 72 E (C N 13)

S. 5 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

S. 7 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

S. 8 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

S. 9 — Proceedings under by husband — Whether could be stopped for arrears of main-tenance, order by the Court — See Hindu Marriage Act (1955), S. 24 Mys 76 (C N 17)

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S. 11 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

S. 12 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

S. 14 — Effect of adoption — See Hindu Adoptions and Maintenance Act (1956), S. 4 Mad 72 E (C N 13)

HINDU MARRIAGE ACT (25 of 1955)

S. 12 — Term "decree" in the Act is not equivalent to 'decree' defined in Civil P. C. — See Hindu Marriage Act (1955), S. 23 Punj 69 (C N 14)

Ss. 28, 28, 10 (1) (a) and 12 — Term 'decree' as used in the Act is not equivalent to 'decree' defined in Civil P. C. — Provisions of O. 41, R. 1, Civil P. C., are not applicable — Copy of decree need not accompany memo-randum of appeal — L. P. A. 263 of 1966, D/1-8-1966 (Punj), Reversed; E. A. O. No. 54 of 1954, D/20-9-56 (Punj), Overruled Punj 69 (C N 14)

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HINDU MARRIAGE ACT (contd.)

—S. 28 — Term 'decree' as used in the Act is not equivalent to 'decree' as defined in C. P. C.
— See **Hindu Marriage Act (1955)**, S. 23

Punj 69 (C N 14)

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—Preamble — Hindu Adoptions and Maintenance Act (1956), Preamble — Schemes of Acts and their relation with each other

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HOUSES AND RENTS**—BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT (3 of 1947)**

—S. 11-A — Scope — Application by landlord for deposit of rent by tenant and withdrawal of it — One composite order with regard to both reliefs not proper — Opportunity of hearing must be given on both occasions

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—BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (57 of 1947)

—Ss. 5, 14 and 15 (as amended by Bombay Act 49 of 1959) — Effect of — Leaseholder expressly authorising tenant to sub-let — Sub-letting by tenant after 21-5-1959 — Sub-lessee though lawful sub-tenant cannot claim status of head tenant under S. 14 or that of statutory tenant under S. 5 (11) (b)

Bom 103 A (C N 21)

—S. 5 (11) — Tenant — Contractual tenant and statutory tenant — Interpretation of Section 5 (11) (b) — Expression "who had derived title before the commencement of BombayOrdinance, 1959" qualifies 'any person' and not his predecessor' — (Transfer of Property Act (1882), S. 108 (j))

Bom 103 C (C N 21)

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(contd.)**

Magistrate has power under S. 73 of the Evidence Act to direct an accused to give finger impressions as well as specimen writing — Refusal will entail in prosecution under S. 186 Penal Code — Giving of thumb mark or specimen handwritings does not offend against Art. 20 (3) of Constitution — See Constitution of India, Art. 20 (3) Manipur 22 (C N 8) — S. 6 — Under Ss. 4 and 5 of Identification of Prisoners Act accused can be compelled to give his measurements — His refusal or resistance entitles authorities to use reasonable force to get measurements — Word "measurements" as defined in Sec. 2 (a) of that Act does not include specimen handwriting and accused cannot be compelled to give specimen under Ss. 4 and 6 — However, a Magistrate has power under S. 73 of the Evidence Act to direct an accused to give finger impressions as well as specimen writing — Refusal will entail in prosecution under S. 186 Penal Code — Giving of thumb mark or specimen handwritings does not offend against Art. 20 (3) of Constitution — See Constitution of India, Art. 20 (3)

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— Ss. 5 (1) (b) and 5 (2) — Prescribing Minimum Wages for Bidi Manufactory — Notification dated 6-6-1966 about proposed minimum rates published on 22-6-1966 in Assam Gazette — Objection invited to be received by Government for consideration on or before 20-8-1966 — Requirement of S. 5 (1) (b) not fulfilled — Final notification dated 12-10-1966 under S. 5 (2) silent about consideration by Government of any representation — Procedure laid down under Ss. 5 (1) (b) and 5 (2) not followed — All procedure laid down in Act must be strictly complied with by Government — Notifications held to be invalid and must be quashed under Art. 226 of Constitution — (Constitution of India Art. 226)
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— S. 6 — In fixing minimum wage incapacity of management to pay and carry on business, is no consideration — See Minimum Wages Act (1948), S. 3
SC 182 B (C N 34)

MOTOR VEHICLES ACT (4 of 1939)

— S. 47 — Recognised Association of Govt. Employees — Whether can apply under Art. 226 on behalf of its members — See Constitution of India, Art. 226
Cal 149 A (C N 25)

— S. 57 — Reorganisation of State of Punjab during pendency of application for extension of permit before R. T. A. Ambala — Entire route for which extension of permit sought falling under jurisdiction of R. T. A. Punjab — Absence of any provision either under the Act or Punjab Reorganisation Act (1966) authorising R. T. A. Ambala to grant extension in such situation — R. T. A. Ambala is not competent to grant extension
Punj 73 A (C N 15)

— S. 57 (3) — Rules framed under the Act, R. 4.6 — Notice, published under S. 57 (3), found defective in material respect — Re-publication with correct particulars is necessary
Punj 73 B (C N 15)

— S. 64 — Appeal — Limitation — Rules as to — Rule-making authority can pres-

MOTOR VEHICLES ACT (contd.)

cribe rules as to time and manner of presenting appeal — See U. P. Motor Vehicles Rules (1940), R. 72 All 119 A (C N 22) — S. 64 — Appeal against grant of permits to eight persons — Appellate authority while considering question if or not appellant was better entitled to permit as against grantees not judging relative merits of all grantees, vis-a-vis appellant — Grant of permit to appellant after cancelling permit of one of grantees — Order based on comparison between claim of appellant and that of the grantees — Order cancelling permit is vitiated All 119 B (C N 22)

—Ss. 64, 68 — State Transport Appellate Authority, being authority constituted under Act, in absence of authorisation to do so, cannot question validity of Act or rule framed thereunder Mad 93 (C N 21)

—S. 68 — State Transport Authority constituted under the Act — Cannot question validity of Act or Rule framed thereunder, unless authorised to do so — See Motor Vehicles Act (1939), S. 64

Mad 93 (C N 21)

MUNICIPALITIES**—AJMER MERWARA MUNICIPALITIES REGULATION (6 of 1925)**

—S. 233 — Civil P. C. (1908), S. 80 — Applicability — Suit against public Officer in respect of 'act' done in an official capacity — 'Act' includes illegal omissions — Omission must entail penal consequence for public officer — Non-discharge of official duty by official concerned must amount to illegal omission — Suit against Municipal Committee claiming amount as surcharge due under Notification issued under S. 3 (2) of Bombay Electricity (Surcharge) Act — Notice under S. 233 of Regulation is not necessary — F. A. No. 67 of 1956, D/-22-9-1964 (Raj) Reversed — Bombay Electricity (Surcharge) Act (19 of 1946), S. 3 (2) — Words and Phrases — "Act" includes illegal omissions — General Clauses Act (1887), S. 3 (2) SC 227 A (C N 42)

—BIHAR AND ORISSA MUNICIPAL ACT (7 of 1922)

—S. 4 — S. 390A is subject to provisions of both Ss. 4 and 5 — See Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 390A Pat 88 B (C N 22)

—S. 4 (1) (a) and (2) — Conversion of Notified Area into Municipality — Government must be satisfied that provisions of the section are fulfilled — See Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 390A Pat 88 A (C N 22)

—S. 4 (1) (a) — Conditions to be fulfilled under — Must be referable to facts as they exist at time of declaration of intention of State Government Pat 88 C (C N 22)

—S. 4 (1) (a) and (2) — Pre-conditions not fulfilled — Order null and void Pat 88 D (C N 22)

MUNICIPALITIES — BIHAR AND ORISSA MUNICIPAL ACT (contd.)

—S. 5 — Conversion of Notified Area into Municipality under S. 390A — Declaration of intention of State Government must be published in the locality in some manner other than publication in the official Gazette — See Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 390A Pat 88 A (C N 22)

—S. 5 — S. 390A is subject to provisions of Ss. 4 and 5 — See Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 390A Pat 88 B (C N 22)

—Ss. 390A, 4 (1) (a), 4 (2) and 5 — Conversion of Notified area into municipality under S. 390A — Government must be satisfied that provisions of Ss. 4 (1) (a), 4 (2) and 5 are fulfilled Pat 88 A (C N 22)

—Ss. 390A, 4 and 5 — S. 390A is subject to provisions of both Ss. 4 and 5 Pat 88 B (C N 22)

—MYSORE MUNICIPALITIES ACT (22 of 1964)

—S. 17 (2) — Election of Councillors — Fresh election can be held before vacancy occurs Mys 78 A (C N 19)

—MYSORE MUNICIPALITIES (ELECTION OF COUNCILLORS) RULES, 1965

—R. 8 — Elections — Returning Officer issuing election calendar — Mistake in calendar rendering the election illegal — New election calendar published — Held, it was competent for Returning Officer to issue fresh election calendar Mys 78 B (C N 19)

MUSLIM WAKF ACT (29 of 1954)
See under Wakf Act (29 of 1954)**—MUSSALMAN WAKF VALIDATING ACT (6 of 1913)**

—S. 3 — Wakf by Hanafi Mussalman in favour of Mosque — No possession given — Reservation made for executant during his lifetime — Wakf is valid, AIR 1927 All 255, Diss. Mys 103 D (C N 23)

—MYSORE MUNICIPALITIES ACT (22 of 1964)
See under Municipalities.**—MYSORE MUNICIPALITIES (ELECTION OF COUNCILLORS) RULES, 1965**
See under Municipalities.**—MYSORE RENT CONTROL ACT (22 of 1961)**
See under Houses and Rents.**NATURAL JUSTICE**

—Principles — Constitution of India, Article 226 — Misconduct by student in examination — Inquiry into — Show cause

NATURAL JUSTICE (contd.)

notice to student after inquiry — Report of inquiry not given to student — Not a breach of rule of natural justice — See Education — Kerala University Act (14 of 1957), Statutes under — Statute I, Chap. VII, Cl. 3 (xxvii) SC 198 B (C N 37)

— Principles — Disciplinary proceedings under — Requirements of principles of natural justice — Second inquiry after show cause notice or giving of copy of report — Not necessary in every case — See Constitution of India, Art. 311 SC 198 C (C N 37)

— Principles — Misconduct by student in examination — Inquiry — Appointment of person other than Principal of the concerned College as Inquiry Officer — Legality — See Education — Kerala University Act (14 of 1957), S. 19N SC 198 A (C N 37)

NEGOTIABLE INSTRUMENTS ACT (26 of 1881)

— S. 4 — Document reciting borrowing of money mortgaging certain land and also promise to repay loan within certain period — Document held not a promissory note but a simple mortgage — See Stamp Act (1899), S. 2 (22) Manipur 23 A (C N 9)

— S. 9 — Suit by indorsee — Death of principal — Effect — See Negotiable Instruments Act (1881), S. 48

Mad 83 A (C N 15)

— Ss. 48, 50, 9 — Indorsement for collection by principal — Indorsee filing suit — Death of principal — Suit is not affected

Mad 83 A (C N 15)

— Ss. 48, 50 — 'A' executing negotiable instrument in favour of 'B' — B endorsing it in favour of 'C' for collection — C filing suit against A — B, principal dying pendente lite — 'A' can be saved from possible further claim by heirs of 'B', by impleading them as parties Mad 83 B (C N 15)

— S. 50 — Indorsement for collection by Principal — Indorsee filing suit — Death of Principal — Suit not affected — See Negotiable Instruments Act (1881), S. 48

Mad 83 A (C N 15)

— S. 50 — Suit by indorsee of instrument — Death of principal pending suit — Effect — See Negotiable Instruments Act (1881), S. 48

Mad 83 B (C N 15)

OATHS ACT (10 of 1873)

— S. 12 — Constitutionality — Does not offend Art. 14 of the Constitution — Constitution of India, Art. 14

Mad 90 (C N 19)

PANCHAYATS**RAJASTHAN PANCHAYAT & NYAYA PANCHAYAT ELECTION RULES (1960)**

— Rr. 30 and 39 — Ballot paper translucent — Lines demarcating compartments and symbols clearly visible on back side — Ballot paper marked by voter on the reverse — Paper valid Raj 92 A (C N 20)

PANCHAYATS — RAJASTHAN PANCHAYAT & NYAYA PANCHAYAT ELECTION RULES (contd.)

— R. 30 — Ballot paper — Question of validity of, whether question of law — See Constitution of India, Art. 226

Raj 92 B (C N 20)

— R. 39 — Ballot paper — Validity of — See Panchayats — Rajasthan Panchayat and Nyaya Panchayat Election Rules (1960), R. 30 Raj 92 A (C N 20)

PARTNERSHIP ACT (9 of 1932)

— S. 42 — Death of partner before suit — Maintainability of suit — See Civil P. C. (1908), O. 30, R. 1 All 129 (C N 24)

PENAL CODE (45 of 1860)

— S. 26 — Expression "reason to believe" — Meaning of expression in the Code cannot be applied to that expression in S. 132 (1) of Income Tax Act, 1961 — See Income-tax Act (1961), S. 132 (1) (as amended by Act 1 of 1965) Delhi 91 A (C N 16)

— S. 53 — Punishment — Law is good but justice is better — Quantum of punishment should not exceed the interests of justice Cal 132 C (C N 22)

— S. 64 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under S. 401 is illegal — Remission cannot amount to undergoing the whole term awarded — See Criminal P. C. (1898), S. 386 (1) Proviso All 116 (C N 21)

— S. 68 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under S. 401 is illegal — Remission cannot amount to undergoing the whole term awarded — See Criminal P. C. (1898), S. 386 (1) Proviso All 116 (C N 21)

— S. 69 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under S. 401 is illegal — Remission cannot amount to undergoing the whole term awarded — See Criminal P. C. (1898), S. 386 (1) Proviso All 116 (C N 21)

— Ss. 141 and 143 — Unlawful assembly — Common object should be one of those specified in section 141 — Election meeting — Some persons carrying firearms — Do not become members of unlawful assembly merely on that ground — What prosecution has to prove — Assembly lawful at its inception when becomes unlawful All 130 A (C N 25)

— S. 141 — Unlawful character of assembly has to be determined under S. 141 —

PENAL CODE (contd.)

See Criminal P. C. (1898), S. 127

All 130 B (C N 25)

— S. 142 — Scope and interpretation — Being a member of an unlawful assembly — Conditions for applicability — Actual knowledge of facts rendering assembly into unlawful assembly and intentional joining or continuing in it essential — Assembly lawful at its inception — Some members forming themselves into unlawful assembly — Mere physical presence of all persons cannot make them members of unlawful assembly

All 130 C (C N 25)

— S. 143 — Unlawful assembly — Common object must be one of those specified in S. 141 — See Penal Code (1860), S. 141

All 130 A (C N 25)

— S. 148 — Concurrent findings of conviction — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 149 — Convictions under S. 362 — Concurrent findings by lower Courts — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 279 — Rash or negligent act — Meaning — See Penal Code (1860), S. 304A

Orissa 49 (C N 20)

— Ss. 304A, 279, 338 — Scope — Distinction — Rash or negligent act — Meaning

Orissa 49 (C N 20)

— S. 304-A — Fatal runover accident — Rashness and negligence cannot be presumed against driver — That death was direct result of rash and negligent driving must be proved — Motor driver aged sixty — Age shows experience — Stopping of vehicle within seven feet — Victim coming under rear wheel — All these facts do not show any negligence on part of driver

Raj 86 A (C N 18)

— S. 304-A — Runover accident — Rashness and negligence on part of driver not directly established — Some mechanical defect in vehicle not detectable without thorough examination — Criminal liability cannot be fastened on driver in case of fatal accident

Raj 86 B (C N 18)

— S. 323 — Convictions under — Concurrent findings by Lower Courts — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 324 — Concurrent findings under Ss. 323 and 352 by Lower Courts — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 338 — Rash or negligent act — Meaning — See Penal Code (1860), S. 304A

Pat 49 (C N 20)

— S. 352 — Concurrent findings about conviction by Lower Courts — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 379 — Sentence — Case of removal of crop from complainant's land — Co-accused, though associates of main accused, not found interested in land or in crop —

PENAL CODE (contd.)

Extent of deliberations with which they associated with crime not known — Fine of Rs. 100 each and in default to one month's rigorous imprisonment excessive for co-accused — Fine reduced to Rs. 50 each

Orissa 59 B (C N 25)

— S. 406 — Rival claims as to ownership and possession of idol — Accused acquitted in complaint under S. 406 but directed to deliver physical possession of idol to complainant — Direction held wrong — Such rival claims cannot be decided in criminal cases — See Criminal P. C. (1898), S. 517

Orissa 56 (C N 23)

— Ss. 408 and 477-A — Applicability — Secretary to Co-operative society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held no bar to trial for offences under Penal Code — (Bombay Co-operative Societies Act (7 of 1925), Ss. 60, 61, 63) — (Constitution of India, Art. 20) — (Criminal P. C. (1898), S. 403)

Tripura 31 A (C N 8)

— S. 426 — Concurrent findings of conviction under Ss. 323 and 352 — Interference in revision — See Criminal P. C. (1898), S. 439

Orissa 36 (C N 17)

— S. 477-A — Applicability — Secretary to Co-operative society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-op. Societies Act, held, no bar to trial for offences under Penal Code — See Penal Code (1860), S. 408

Tripura 31 A (C N 8)

— Ss. 482, 486 — Trade and Merchandise Marks Act (1958), Ss. 78, 79 — Offence of infringement of Trade Mark and that of infringement of property mark — Distinction — Complaint only of infringement of property mark — Sub-Magistrate held could try that offence

Mad 94 (C N 22)

— S. 486 — Offence of — Infringement of trade mark and infringement of property mark — Distinction — Complaint only of infringement of property mark — Sub-Magistrate held could try that offence — See Penal Code (1860), S. 482

Mad 94 (C N 22)

— S. 511 — "Attempt" — Act towards attempt need not be the penultimate act towards commission of offence — It can fall at any stage during series of acts which go to constitute offence

Raj 65 (C N 14)

PRESIDENCY SMALL CAUSE COURTS ACT (15 of 1882)

— S. 41 (as it stood prior to amendment by Maharashtra Act 41 of 1963) — Dismissal of ejectment application on ground that defendant was sub-tenant — Subsequent suit alleging licence given determined not barred — See Civil P. C. (1908), S. 11 Bom 111 A (C N 22)

— S. 43 (as it stood prior to Amendment by Maharashtra Act 41 of 1963) — Bar of res judicata — See Civil P. C. (1908), S. 11 Bom 111 A (C N 22)

— S. 46 (as it stood prior to Amendment by Maharashtra Act 41 of 1963) — Bar of res judicata — See Civil P. C. (1908), S. 11 Bom 111 (C N 22)

— S. 47 (as it stood prior to Amendment by Maharashtra Act 41 of 1963) — Bar of res judicata — See Civil P. C. (1908), S. 11 Bom 111 (C N 22)

— S. 49 (as it stood prior to Amendment by Maharashtra Act 41 of 1963) — Bar of res judicata — See Civil P. C. (1908), S. 11 Bom 111A (C N 22)

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

— S. 7 (1) — Prosecution under — Evidence and proof — See Prevention of Food Adulteration Act (1954), S. 10 (7) All 109 B (C N 19)

— S. 7 (1) — Punishment — See Prevention of Food Adulteration Act (1954), S. 16 All 109 D (C N 19)

— S. 7 (i) — Storing 'simpliciter' is not an offence — Storing for sale is punishable — See Prevention of Food Adulteration Act (1954), S. 16 (1) (a) Ker 79 (C N 19)

— S. 10 (7) — Prosecution for offences under S. 16 read with S. 7 (1) of the Act — Two persons called at the time the sample was taken — Their signature also taken by the Food Inspector — Held, the requirements of S. 10 (7) were fully complied with All 109 A (C N 19)

— Ss. 10 (7), 16 and 7 (1) — Prosecution under — Evidence and proof All 109 B (C N 19)

— S. 10 (7) — Criminal P. C. (1898), S. 103 — Taking sample of adulterated milk by Food Inspector — Witnesses — There is no requirement that they should be respectable persons as is the requirement under S. 103 Criminal P. C. in case of search — Irregularity if any cannot vitiate the taking of sample from the accused All 109 C (C N 19)

— S. 16 — Prosecution under — Evidence and proof — See Prevention of Food Adulteration Act (1954), S. 10 (7) All 109 B (C N 19)

— Ss. 16 and 7 (1) — Punishment All 109 D (C N 19)

— Ss. 16 (1) (a), 7 (i) — Storing "simpliciter" is not an offence — Storing for sale is punishable — AIR 1967 Cal 110, Diss. Ker 79 (C N 19)

PREVENTION OF FOOD ADULTERATION ACT (contd.)

— S. 16 (1) (b) (c) — Offence under S. 16 (1) (b) — Evidence and proof — Accused when called by inspector pouring milk and running away — Held (1) conviction under S. 16 (1) (b) could not be sustained in absence of evidence that Food Inspector had either expressed his intention to accused that he was going to take sample or that he had demanded the sample; (2) accused could have been prosecuted and convicted under S. 16 (1) (c) but as the complaint was not laid under Cl. (c) and opportunity to meet that charge was not given to him, conviction could not be altered to S. 16 (1) (c) Mad 85 (C N 17)

PREVENTIVE DETENTION ACT (4 of 1950)

See under Public Safety.

PROHIBITION**ASSAM OPIUM PROHIBITION ACT (22 of 1947)**

— S. 5 (a) — Offences under the Act — Procedure to be followed — See Criminal P. C. (1898), S. 251 Assam 36 (C N 9)

— S. 25 — Offences under the Act — Procedure to be followed — See Criminal P. C. (1898), S. 251 Assam 36 (C N 9)

— S. 26 — Offences under the Act — Procedure — See Criminal P. C. (1898), S. 251 Assam 36 (C N 9)

PUBLIC SAFETY**PREVENTIVE DETENTION ACT (4 of 1950)**

— S. 3 — Commissioner of Police, Calcutta has jurisdiction to make detention order in respect of suburban areas also Cal 157 B (C N 27)

— S. 3 (2) — Detenu set free under orders of Court not on considerations of merits but on technical defect — Subsequent order of detention on same grounds is competent Cal 157 A (C N 27)

PUNJAB MINOR MINERAL CONCESSION RULES, 1964

— R. 20 — Imposition of royalty — Nature of — See Mines and Minerals (Regulation and Development) Act (1957), S. 15 Punj 79 B (C N 17)

RAILWAY COACHING TARIFF RULES

— R. 108 (2) (8) — Coal consigned to Company by Colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945 which was then in force — Sanction and order at instance of Company — Wagons supplied

RAILWAY COACHING TARIFF RULES (contd.)

by Railway on order by Coal Commissioner — Refusal of Company to take delivery — Railway selling coal and suing company for demurrage — Normally consignee is liable — On facts also held, that Colliery acted as agent of company — Duty of Railway pointed out — Extent of liability of consignee — See Railways Act (1890), S. 56
SC 193 (C N 36)

RAILWAY ESTABLISHMENT CODE

See under Civil Services.

RAILWAYS ACT (9 of 1890)

— S. 56 — Coal consigned to Company by Colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945 which was then in force — Sanction and order at instance of Company — Wagons supplied by Railway on order by Coal Commissioner — Refusal of Company to take delivery — Railway selling coal and suing company for demurrage — Normally consignee is liable — On facts also held, that Colliery acted as agent of company — Duty of Railway pointed out — Extent of liability of consignee — Contract Act (1872), Ss. 2, 186 and 149 — Railway Coaching Tariff Rules, R. 108 (2) and (8) — Tort — Damages — Duty to minimise SC 193 (C N 36)

RAJASTHÁN CIVIL SERVICE RULES 1951

See under Civil Services.

RAJASTHAN PANCHAYAT AND NYAYA PANCHAYAT ELECTION RULES, 1960

See under Panchayats.

RAJASTHAN TENANCY ACT (3 of 1955)

See under Tenancy Laws.

REGISTRATION ACT (16 of 1908)

— S. 17 (2) (vi) — Proceedings under O. 21, R. 94, Civil P. C. for issue of sale certificate in respect of property 'A' — Compromise decree passed in suit filed by surviving partner against widow of deceased partner in respect of firm's property — Surviving partner agreeing to give up right in respect of property 'A' — Suit in which compromise decree was passed must be held to have included property 'A' — Hence such decree is exempted from registration under S. 17 (2) (vi) and is admissible in evidence in proceedings under O. 21, R. 94
Mys 73 C (C N 16)

— S. 47 — Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 — Right of reconveyance under S. 16 — Accrual of — It accrues only when registration of sale deed is completed as required by Ss. 60 and 61, Registration Act and not before — Application under S. 16 presented to Collector prior to such date —

REGISTRATION ACT (contd.)

Maintainability — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 SC 244 C (C N 45)

— S. 49 — Document reciting borrowing of money mortgaging certain land and also promise to repay loan — Document was a simple mortgage — It can be admitted in evidence by paying stamp duty and penalty — It can be relied on as evidence of money debt though not as simple mortgage — See Stamp Act (1899), S. 2 (22)

Manipur 23 A (C N 9)

— S. 50 — Partition by metes and bounds — Deed — Mistake is corrected by unregistered document — Effect of, on sale of his share under original deed — See Contract Act (1872), S. 62 Pat 110 (C N 29)

— S. 58 — Registration of document — Proof of execution — See Registration Act (1908), S. 60 Mys 103 B (C N 23)

— S. 59 — Registration of document — Proof of execution — See Registration Act (1908), S. 60 Mys 103 B (C N 23)

— S. 60 — Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962) S. 16 — Right of reconveyance under S. 16 — Accrual of — It accrues only when registration of sale deed is completed as required by Ss. 60 and 61, Registration Act and not before — Application under S. 16 presented to Collector prior to such date —

Maintainability — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 SC 244 C (C N 45)

— Ss. 60, 58, 59 — Registration of document — Proof of execution Mys 103 B (C N 23)

— S. 61 — Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 — Right of reconveyance under S. 16 — Accrual of — It accrues only when registration of sale deed is completed as required by Ss. 60 and 61, Registration Act and not before — Application under S. 16 presented to Collector prior to such date —

Maintainability — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 SC 244 C (C N 45)

REPRESENTATION OF THE PEOPLE ACT (33 of 1950)

— S. 30 — Election of respondent cannot be challenged as void on ground that electoral rolls are incorrectly or irregularly prepared — See Constitution of India, Art. 329 (b) Mys 84 A (C N 20)

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

— S. 22 (2) (as amended in 1956) — Powers of Asstt. Returning Officer — Nomination paper suffering from inherent defect apparent on face of nomination paper — Held on facts that its rejection by Return-

REPRESENTATION OF THE PEOPLE ACT (1951) (contd.)

ing Officer or even by Asstt. Returning Officer was not improper

J & K 36 C (C N 10)

— S. 36 (2) (a) — Rejection of nomination paper — Oath should be made and subscribed to before the date of the scrutiny: AIR 1968 Mys 18, Held no longer good law.

J & K 36 D (C N 10)

— Ss. 62 (1), 100 (1) (d) (iii) — Right to vote under S. 62 (1) — Improper refusal of right — Is not a sufficient ground under S. 100 (1) (d) (iii) to declare election void — Further proof that election is materially affected thereby is necessary

Mys 84 B (C N 20)

— S. 87 — Civil P. C. (1908), O. 17, R. 3 — Dismissal of election petition — Mere fact that case did not fall under O. 17, R. 3 does not mean that decision was not on merits

Raj 75 A (C N 16)

— S. 87 — Civil P. C. (1908), O. 9, R. 8 — High Court has power to dismiss election petition on non-appearance of election petitioner. AIR 1960 J and K 25 (FB) and AIR 1964 All 181, Dissent. from

Raj 75 B (C N 16)

— S. 100 — Scope — Returned candidate should not be unseated unless petitioner proves his case very very clearly

J & K 36 B (C N 10)

— S. 100 (1) (c) — Scope — Improper rejection of nomination paper — Election can be declared void on this ground alone — It is not necessary further to prove that election of returned candidate is materially affected

J & K 36 F (C N 10)

— S. 100 (1) (d) (iii) — Improper refusal of right to vote — No sufficient ground to declare an election void — See Representation of the People Act (1951), S. 62 (1)

Mys 84 B (C N 20)

— S. 100 (1) (d) (iv) — Correctness of electoral rolls cannot be challenged in an election petition under Art. 329 — See Constitution of India, Art. 329 (b)

Mys 84 A (C N 20)

— S. 129 — Standard of proof — Standard of proof for establishing corrupt practice should be that of criminal case

J & K 36 G (C N 10)

SALES TAX**MADRAS GENERAL SALES TAX ACT (1 of 1959)**

— S. 4 Proviso (prior to amendment by Act 6 of 1963) — 'Tax so levied shall be refunded' — For claiming refund, assessee need not pay tax — He can claim it as soon as it is levied

Mad 91 B (C N 20)

— S. 4 — Refund — Limitation — Validity of rule — See Sales Tax — Madras General Sales Tax Rules (1959), R. 23 (3) (i)

Mad 91 A (C N 20)

MADRAS GENERAL SALES TAX RULES (1959)

— R. 23 (3) (i) — Madras General Sales Tax Act (1 of 1959), S. 4. Proviso —

SALES TAX — MADRAS GENERAL SALES TAX RULES (contd.)

Prescribing period of limitation for refund under R. 23 (3) (i) is not valid and should be declared ultra vires, as main Act does not prescribe any period of limitation

Mad 91 A (C N 20)

SONTHAL PARGANAS SETTLEMENT REGULATION (3 of 1872)
See under Tenancy Laws.**SONTHAL TENANCY (SUPPLEMENTARY) PROVISIONS ACT (14 of 1949)**
See under Tenancy Laws.**SPECIFIC RELIEF ACT (47 of 1963)**

— S. 13 — Stipulation in lease deed about sale of property to lessee if lessor ever required to sell, and if lessee agreed to pay reasonable price — Stipulation not a completed contract — No question of specific performance of contract arises — See Contract Act (1872), S. 2 (h)

Assam 43 (C N 10)

— S. 39 — Executability of decree — See Civil P. C. (1908), S. 47

Andh Pra 92 C (C N 30)

— S. 39 — Injunctions — O. 21, R. 32 (5) applies only to mandatory injunctions but sub-rule (1) applies to both mandatory and prohibitory injunctions — See Civil P. C. O. 21, R 32 (5) Andh Pra 92 D (C N 30)

STAMP ACT (2 of 1899)

See under Stamp Duty.

STAMP DUTY**STAMP ACT (2 of 1899)**

— Ss. 2 (22), 35 and 60 (as applied to Manipur State) — Negotiable Instruments Act (1881), S. 4 — "Promissory note" — Document reciting borrowing of money mortgaging certain land and also promise to repay loan within certain period — Document held not a promissory note but a simple mortgage — It can be admitted in evidence after paying deficit stamp duty and penalty — Document can be relied on as evidence of money debt though not as simple mortgage — Question involved was not very intricate and lower court was not bound to make reference under S. 60 — Transfer of Property Act (1882), S. 58 — Registration Act (1908), S. 49

Manipur 23 A (C N 9)

— Ss. 3 and 36 — Compromise decree providing interest on amount payable by one party to another — Stamp on decree paid late — Interest for earlier period can be claimed

Mad 84 (C N 16)

— S. 35 — Document held to be simple mortgage — It is admissible in evidence after paying stamp duty and penalty — See Stamp Act (1899), S. 2 (22)

Manipur 23 A (C N 9)

— S. 36 — Stamp on decree, providing interest payable by one party to other.

STAMP DUTY — STAMP ACT (contd.)
 paid late — Interest for earlier period can be claimed — See Stamp Act (1899), S. 3
 Mad 84 (C N 16)
 — S. 60 (as applied to Manipur State) — Reference under — When Court bound to make — See Stamp Act (1899), S. 2 (22)
 Manipur 23 A (C N 9)

SUGAR-CANE CONTROL ORDER (1966)

— Cl. 6 — Order under Cl. 6 (1) (a) by Cane Commissioner Bihar at Patna, reducing area for sugar-cane purchase reserved for petitioner's sugar factory situate in U.P. — Another order allotting excluded area for respondent's Sugar Factory in Bihar — Allahabad High Court has no jurisdiction to entertain petition for quashing these orders as no part of cause of action arose within its territorial jurisdiction — Place of communication of order according to law or of consequence arising from order — If furnishes cause of action — See Constitution of India, Art. 226 (1A) All 105 A (C N 18)

— Cl. 6 (1) — Order under Cl. 6 (1) (a) reserving particular area for sugar factory — Effect of All 105 B (C N 18)

SUCCESSION ACT (39 of 1925)

— Ss. 106, 107 — Hindu testator — Bequest in favour of wife and daughter — Held, on construction of will, that bequest was not joint bequest. S. A. No. 15 of 1962 (Mad), Reversed Mad 96 A (C N 23)

— S. 106 — "Two persons jointly" — Interpretation Mad 96 B (C N 23)

— S. 106 — Section is not a rule of construction of a will, but a provision for devolution. AIR 1960 Andh Pra 368, Dissent. from Mad 96 C (C N 23)

— S. 107 — Hindu testator — Bequest in favour of wife and daughter — Held not joint — See Succession Act (1925), S. 106 Mad 96 A (C N 23)

— S. 306 — Suit for rendition of accounts against a trustee — Does not abate on death of trustee — Liability of L. R.s with regard to mode of accounting — See Trusts Act (1882), S. 19 Delhi 75 D (C N 14)

TENANCY LAWS

— BIHAR LAND REFORMS ACT (30 of 1950)

— Ss. 4 and 10 (1) — A clause for renewal of the lease at a future date is an 'encumbrance' and is not binding on the State SC 177 A (C N 32)

— S. 10 (1) — A clause for renewal of the lease at a future date is an 'encumbrance' and is not binding on the State — See Tenancy Laws — Bihar Land Reforms Act (30 of 1950), S. 4 SC 177 A (C N 32)

TENANCY LAWS (contd.)

— BIHAR LAND REFORMS (FIXATION OF CEILING AREA AND ACQUISITION OF SURPLUS LAND) ACT (12 of 1962)

— S. 16 — Object and scheme of section indicated SC 244 A (C N 45)

— S. 16 — Right of reconveyance under Section 16 — Accrual of — It accrues only when registration of sale deed is completed as required by Ss. 60 and 61, Registration Act and not before — Application under S. 16 presented to Collector prior to such date — Maintainability — (Registration Act (1908), Ss. 47, 60 and 61). 1968 Pat LJR 384, Reversed SC 244 C (C N 45)

— S. 16 — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), R. 19 and Form L. C. 13 — Compliance of — Whether directory or mandatory — Effect of non-compliance — Jurisdiction of Collector to entertain application for reconveyance accompanied with certified copy of sale-deed presented for registration not affected if he is satisfied as to compliance of conditions precedent to making such application. 1968 Pat LJR 384, Reversed SC 244 E (C N 45)

— BIHAR LAND REFORMS (FIXATION OF CEILING AREA AND ACQUISITION OF SURPLUS LAND) RULES (1963)

— Forms L. C. 12 — Object of indicated — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), R. 18 SC 244 B (C N 45)

— Forms L. C. 13 — Object of indicated — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963) R. 18 SC 244 B (C N 45)

— Form L. C. 13 — Compliance of — Whether directory or mandatory — Effect of non-compliance — Jurisdiction of Collector to entertain application for reconveyance accompanied with certified copy of sale-deed presented for registration not affected if he is satisfied as to compliance of conditions precedent to making such application — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16 SC 244 E (C N 45)

— Rules 18 and 19 and Forms L. C. 12 and 13 — Object of indicated SC 244 B (C N 45)

— R. 19 — Object of indicated — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), R. 18 SC 244 B (C N 45)

— R. 19 — Compliance of — Whether directory or mandatory — Effect of non-compliance — Jurisdiction of Collector to entertain application for reconveyance accompanied with certified copy of sale-deed presented for registration not affected if he

TENANCY LAWS — BIHAR LAND REFORMS (FIXATION OF CEILING AREA AND ACQUISITION OF SURPLUS LAND) RULES (contd.)

is satisfied as to compliance of conditions precedent to making such application — See Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), S. 16

SC 244 E (C N 45)

—BOMBAY PREVENTION OF FRAGMENTATION AND CONSOLIDATION OF HOLDINGS ACT (62 of 1947)

—S. 31 — Auction sale under Land Revenue Code — Acceptance of minor's bid — Sale whether contravenes the section — See Bombay Land Revenue Code (5 of 1879), S. 165

Bom 93 (C N 18)

—BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (67 of 1948)

—S. 88C — Enquiry under the section is quasi judicial — Guj 88 B (C N 18)

—S. 88D — Enquiry under the section is quasi judicial — Person whose exemption is to be revoked has to be given an opportunity — Guj 88 A (C N 18)

—J. & K. TENANCY ACT (2 of 1980 Smt)

—Ss. 2(5), 15A proviso, 85 first group (d) — Induction of tenant by mortgagee on mortgaged land — Tenancy ends with redemption of mortgage — No relationship of tenancy between mortgagor and tenant within meaning of S. 2(5) — Eviction of tenant of mortgagee under S. 15A — Civil Court has jurisdiction to pass decree — Section 85 first group (d) is not attracted

J. & K. 33 B (C N 9)

—S. 15A, proviso — Mortgage of land with delivery of possession — Induction of tenant on mortgaged land by mortgagee — Eviction of tenant by mortgagor on redemption — When possible

J. & K. 33 A (C N 9)

—S. 15-A proviso — Induction of tenant by mortgagee on mortgaged land — Tenancy ends with redemption of mortgage — No relationship of tenancy between mortgagor and tenant within meaning of S. 2(5) — Eviction of tenant of mortgagee under S. 15A — Civil Court has jurisdiction to pass decree — S. 85 first group (d) is not attracted — See Tenancy Laws — J. & K. Tenancy Act (2 of 1980 Smt), S. 2(5)

J. & K. 33 B (C N 9)

—S. 85 first group (d) — Induction of tenant by mortgagee on mortgaged land — Tenancy ends with redemption of mortgage — No relationship of tenancy between mortgagor and tenant within meaning of S. 2(5) — Eviction of tenant of mortgagee under S. 15A — Civil Court has jurisdiction to pass decree — S. 85 first group (d) is not attracted — See Tenancy Laws — J. & K. Tenancy Act (2 of 1980 Smt), S. 2(5)

J. & K. 33 B (C N 9)

TENANCY LAWS (contd.)**—M. P. ABOLITION OF PROPRIETARY RIGHTS (ESTATES, MAHALS AND ALIENATED LANDS) ACT (1 of 1951)**

—S. 28 — Applicability of section — Execution Court held had jurisdiction to decide — See Civil P. C. (1908) S. 47
Madh Pra 35 D (C N 12)

—RAJASTHAN TENANCY ACT (3 of 1955)

—S. 242 — Jurisdiction of civil court to try suit relating to tenancy rights — Some portion of claim made in plaint triable by civil Court and other portion triable by Revenue court — Civil Court can try suit and refer issue regarding claim for tenancy rights to revenue court

Raj 89 (C N 19)

—SONTHAL PARGANAS SETTLEMENT REGULATION (3 of 1872)

—Ss. 11 and 25-A — Effect of S. 11 — Question as to invalidity of exchange neither raised nor decided by settlement officer or Court — Bar of suit under S. 11 cannot apply — (Civil P. C. (1908), Ss. 9 and 11)

SC 204 F (C N 38)

—S. 25A — Effect of S. 11 — See Sonthal Parganas Settlement Regulation (3 of 1872), S. 11

SC 204 F (C N 38)

—S. 27 — Scope — New plea — Plea as to invalidity of exchange of raiyati holding under S. 27 — See Civil P. C. (1908) S. 100

SC 204 A (C N 38)

—S. 27 (1) — Person setting up invalidity of transfer by way of exchange under S. 27(1), Sonthal Parganas Settlement Regulation — Burden of proving that subject-matter of exchange was raiyati land situate in Sonthal Parganas lies on him — Discharge of onus — Onus shifts to other side to show that transfer comes within exception to rule laid down in S. 27(1) and he must show that Record of Rights contained an entry authorising transferor to transfer raiyati land — See Evidence Act (1872), Ss. 101 to 104

SC 204 B (C N 38)

—S. 27(1) — Section is wide enough to include exchange of lands as it involves transfer of property — (Transfer of Property Act (1882), S. 118 SC 208 D (C N 38)

—S. 27 (1) — See General Clauses Act (1897), S. 6

SC 204 E (C N 38)

—SONTHAL TENANCY (SUPPLEMENTARY) PROVISIONS ACT (14 of 1949)

—S. 27 — Effect of repeal — See General Clauses Act (1897) S. 6

SC 204 E (C N 38)

—S. 28 — Effect of repeal — See General Clauses Act (1897), S. 6

SC 204 E (C N 38)

TORT

—Damages — Duty to minimise — Coal consigned to Company by Colliery on orders

TORT (contd.)

and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order 1945 which was then in force — Sanction and order at instance of Company—Wagons supplied by Railway on order by Coal Commissioner — Refusal of Company to take delivery — Railway selling coal and suing company for demurrage — Normally consignee is liable—On facts also held that Colliery acted as agent of company — Duty of Railway pointed out — Extent of liability of consignee — See Railways Act (1890), S. 56
SC 193 (C N 36)

—Malicious prosecution — Suit for damages — Essentials to be proved — Accusation against plaintiff in respect of offence which defendant claims to have seen him commit — Trial ending in acquittal on merits — Presumption will be not only that plaintiff was innocent but also that there was no reasonable and probable cause for accusation Pat 102 A (C N 27)

—Malicious prosecution — Malice — What constitutes Pat 102 B (C N 27)

—Malicious prosecution — Suit for damages — Accusation against plaintiff by Karta of Joint Hindu Family — Other members also made defendants — That accusation was made on behalf of whole family not shown — Prosecution of plaintiff must be deemed to have been made by Karta himself in his personal capacity and other members will not be liable at all Pat 102 C (C N 27)

—Malicious prosecution — Suit for damages — Defendant belonging to scheduled caste & not possessed of enough properties from which claim of plaintiffs could be realised — Claim made though not exaggerated reduced to nominal sum which was held sufficient to vindicate rights of plaintiff Pat 102 D (C N 27)

TRADE AND MERCHANDISE MARKS ACT (43 of 1958)

—S. 78 — Infringement of trade mark and that of property mark — Distinction — See Penal Code (1860), S. 482

Mad 94 (C N 22)

—S. 79—Infringement of property mark and that of trade mark — Distinction — See Penal Code (1860), S. 482

Mad 94 (C N 22)

TRADE UNIONS ACT (16 of 1926)

—S. 13 — Recognised Association of Government Employees, whether can file a writ petition under Art. 226 on behalf of its members — See Constitution of India Art. 226 Cal 149 A (C N 25)

TRANSFER OF PROPERTY ACT (4 of 1882)

—S. 6(h) — Auction sale under Bombay Land Revenue Code — Acceptance of minor's bid — Effect — See Bombay Land Revenue Code (5 of 1879), S. 165

Bom 93 (C N 18)

TRANSFER OF PROPERTY ACT (contd.)

—S. 7 — Auction sale held under Bombay Land Revenue Code — Acceptance of minor's bid — Effect — See Bombay Land Revenue Code (5 of 1879), S. 165
Bom 93 (C N 18)

—Ss. 8 and 105 — Deed — Construction — Document on basis of which tenancy right is claimed — Interpretation of, is a question of law — Compromise purhhs satisfying requirements of a contract of tenancy — It is not necessary to state expressly in document that certain person was accepted as tenant Bom 103 E (C N 21)

—S. 8 — Deed — Benami — What is — See Estate Duty Act (1953), S. 6

Cal 139 A (C N 23)

—S. 41—Deed—Benami—What is — See Estate Duty Act (1953), S. 6

Cal 139 A (C N 23)

—S. 58 — Document reciting borrowing of money mortgaging certain land and also promise to repay loan within a certain period — Document held to be a simple mortgage — See Stamp Act (1899), S. 2 (22)
Manipur 23 A (C N 9)

—S. 60 — Lessor of mortgagor can redeem if enforcement is sought against leasehold rights Madh Pra 35 C (C N 12)

—S. 91 — Besides the mortgagor — Redemption of sub-mortgage — Mortgagor entitled to redeem sub-mortgage — Expression "property mortgaged" — Meaning AIR 1953 Trav-Co. 271 & (1896) ILR 20 Bom 549, Dissented from Ker 73 (C N 16)

—S. 105 — Document on the basis of which Tenancy right is claimed — Construction — See T. P. Act, S. 8

Bom 103 E (C N 21)

—S. 108 (J) — Contractual tenant and statutory tenant — Right to sublet — See Houses and Rents—Bombay Rents, Hotel & Lodging House Rates Control Act (57 of 1947), S. 5

Bom 103 C (C N 21)

—S. 108 (J) — Sub-lease — Validity — See Houses and Rents — Mysore Rent Control Act (22 of 1961), S. 21 (F)

Mys 100 (C N 22)

—S. 118 — Section is wide enough to include exchange of lands as it involves transfer of property — See Sonthal Parganas Settlement Regulation (3 of 1872), S. 27 (1)

SC 204 D (C N 38)

TRIPURA (COURTS) ORDER

—S. 34 — Subordinate Court following decision of High Court subsequently dissent ed from by the High Court — Revision against order of Subordinate Court is maintainable — See Civil P. C. (1908), S. 115

Tripura 19 E (C N 6)

TRUSTS ACT (2 of 1882)

—S. 19 — Suit by trustee against co-trustee for rendition of accounts — Maintainability — See Trusts Act (1882), S. 48

Delhi 75 A (C N 14)

TRUSTS ACT (contd.)

— S. 19 — Suit for rendition of accounts by a trustee against co-trustee in day to day charge of trust properties — Does not come within S. 92 C. P. Code — See Civil P. C. (1908), S. 92 Delhi 75 C (C N 14)

— S. 19 — Public Trusts — Suit for rendition of accounts against trustee — Suit does not abate with death of trustee — Liability of legal representatives with regard to mode of accounting

Delhi 75 D (C N 14)

— Ss. 19, 48, 44 — Public Trust — Suit for rendition of accounts by co-trustees against legal representatives of managing trustee — Books of accounts maintained by managing trustee in possession of plaintiff-co-trustees — Evidence revealing that account-books were prepared by managing trustee from his personal account-books and supporting vouchers had been retained by him — Held, simply because account-books were in custody of plaintiffs it could not be said that suit for accounts could not be proceeded against legal representatives of managing trustee Delhi 75 E (C N 14)

— Ss. 19, 48, 44, 46 — Public Trust — Suit by co-trustee against legal representatives of deceased managing-trustee for rendition of accounts — Co-trustee shown to have resigned his post earlier — Since for period during which co-trustee was trustee, he had right to call upon deceased managing-trustee and after him his legal representatives to render accounts of trust property and since notwithstanding his resignation co-trustee had not ceased to be trustee, suit by him held maintainable

Delhi 76 F (C N 14)

— Ss. 19, 44, 48 — Public Trust — Suit by co-trustee against legal representatives of deceased managing-trustee for rendition of accounts — Held, since liability of legal representatives was not onerous and was lighter than their predecessor there was no justification for restricting period of accounting

Delhi 75 G (C N 14)

— S. 44 — Public trust — Suit for rendition of accounts by co-trustees against L.R.s of deceased trustee — Maintainability — See Trusts Act (1882), S. 19

Delhi 75 E (C N 14)

— S. 44 — Public trust — Suit for rendition of accounts by co-trustee against L.R.s of deceased trustee — Maintainability — See Trusts Act (1882), S. 19

Delhi 75 F (C N 14)

— S. 44 — Public trust — Suit for rendition of accounts by co-trustee against L.R.s of deceased trustee — Restriction of period of accounts — Propriety — See Trusts Act (1882), S. 19

Delhi 75 G (C N 14)

— S. 46 — Public trust — Suit for rendition of accounts by co-trustee against L.R.s of deceased trustee — Maintainability — See Trusts Act (1882), S. 19

Delhi 75 F (C N 14)

— Ss. 48, 19 — Public Trust — Suit by trustee against co-trustee for rendition of

TRUSTS ACT (contd.)

accounts — Maintainability

Delhi 75 A (C N 14)

— S. 48 — Public Trust — In trust-deed author of trust naming one of trustees to be in day-to-day charge of income and expenditure of trust property — Provision does not in any way affect joint responsibility of trustees in respect of management and administration of trust.

Delhi 75 B (C N 14)

— S. 48 — Suit for rendition of accounts against trustee in day to day charge of trust properties, by his co-trustee — Does not fall within S. 92, C. P. Code — See Civil P. C. (1908), S. 92

Delhi 75 C (C N 14)

— S. 48 — Public trust — Suit for rendition of accounts by co-trustees against L.R.s of deceased trustee — Maintainability — See Trusts Act (1882), S. 19

Delhi 75 E (C N 14)

— S. 48 — Public trust — Suit for accounts by co-trustee against L.R.s of deceased trustee — Maintainability — See Trusts Act (1882), S. 19

Delhi 75 F (C N 14)

— S. 48 — Public trust — Suit for accounts by co-trustee against the L.R.s of deceased trustee — Restricting the period of accounting — Propriety — See Trusts Act (1882), S. 19

Delhi 75 G (C N 14)

— S. 78 — Power of revocation — Reservation to author — Power must have been reserved in the revocation deed itself

Bom 101 (C N 20)

U. P. FOODGRAINS DEALERS LICENSING ORDER (1964)

— Cl. 2 (a) — Presumption under Cl. 3 (2) — See Essential Commodities Act (1955), S. 3

All 123 A (C N 23)

— Cl. 3 (2) — Presumption under — Wheat found in possession of a person in excess of ten quintals — Person engaged in business of selling & purchasing goods — Presumption would be that it was stored for purpose of sale — See Essential Commodities Act (1955), S. 3

All 123 A (C N 23)

U. P. INDUSTRIAL DISPUTES ACT (28 of 1947)

— S. 6-S. (4) — Dismissal of workmen for participating in illegal strike — See Industrial Disputes Act (1947), S. 23

SC 235 (C N 43)

— S. 65 (4) — Dismissal of workmen for participating in illegal strike — Order based on warning given in respect of previous strike in disregard of settlement — Dismissal held mala fide and vindictive — See Industrial Disputes Act (1947), S. 23

SC 235 (C N 43)

U. P. MOTOR VEHICLES RULES (1940)

— R. 72 — Interpretation of — Rule is mandatory and not directory — Failure to implead persons to be affected, on date of

U. P. MOTOR VEHICLES RULES (contd.)
 appeal — Effect — Civil P. C. (1908), Pre.
 — Interpretation of Statutes — Motor Vehicles Act (1939), S. 64

All 119 A (C N 22)

WAKF ACT (29 of 1954)

— S. 3 (f) — Mutawalli — Definition of
 — It includes person who for time being
 manages wakf property

Mad 66 B (C N 11)

— S. 6 — Scope — Not resorting to remedy under section will preclude party from raising same question in writ proceedings

Mad 66 A (C N 11)

WEALTH TAX ACT (27 of 1957)

— S. 3 — Imposition of additional Wealth Tax on capital assets based on population of areas — Validity — See Constitution of India, Art. 14 Ker 69 (C N 15)

— S. 3 — Wealth tax — Not for making or earning income — It is not admissible deduction under Income-tax Act — See Income-tax Act (1961), S. 57 (iii)

Mad 69 (C N 12)

— S. 4 — Wealth tax — Nature of — See Income-tax Act (1961), S. 57 (iii)

Mad 69 (C N 12)

— Sch. Part I, Para A, Cl. (c) read with Rr. 1 and 2 of para B — Imposition of additional Wealth tax on capital assets — Validity — See Constitution of India, Art. 14 Ker 69 (C N 15)

WEST BENGAL KHADI AND VILLAGE INDUSTRIES BOARD ACT (14 of 1959)

— S. 33 (2) and (3) — Transfer to a post not created by resolution — Board has neither an inherent power to do so nor can

W. B. KHADI AND VILLAGE INDUSTRIES BOARD ACT (contd.)

it claim it as incidental to power of appointment Cal 152 A (C N 26)

WEST BENGAL KHADI AND VILLAGE INDUSTRIES REGULATIONS (1966)

— R. 9 — Transfer to a post not created by resolution — Power of Board — See West Bengal Khadi and Village Industries Board Act (14 of 1959), S. 33 (2)

Cal 152 A (C N 26)

WORDS AND PHRASES

— Act includes illegal omissions — See Municipalities — Ajmer Merwara Municipalities Regulation (1925), S. 233

SC 227 A (C N 42)

— 'Dealer' — Meaning of — Dealer means a trader or a person who buys goods and sells them without processing them

Bom 95 A (C N 19)

— 'Due' meaning of — See Mines and Minerals (Regulation and Development) Act (1957), S. 25 Madh Pra 48 (C N 16)

— "Judgment" — Meaning of — See Letters Patent (Lahore) Cl. 10

Delhi 85 B (C N 15) (FB)

— 'Paid', meaning of — See Industrial Disputes Act (1947), S. 33 (2) (b)

Mad 87 A (C N 18)

— Words "Includes" and "means" — Meaning and scope of — See Civil P. C. (1908), Pre.

Andh Pra 84 A (C N 28)

— Word "shall", meaning of — See Civil P. C. (1908), O. 41, R. 27

Mys 111 A (C N 24)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A.I.R. 1969 MARCH

DISS.=Dissented from in; OVER.=Overruled in; REVERS.=Reversed in

ARBITRATION ACT (10 of 1940)

— S. 2 (a) — AIR 1964 Tripura 27 — DISS. AIR 1969 Tripura 19 B (C N 6).

— S. 20 — AIR 1964 Tripura 27 — DISS. AIR 1969 Tripura 19 B (C N 6).

— Sch. I, Para 3 read with S. 3 — AIR 1951 Cal 78 — DISS. AIR 1969 Cal 167 A (C N 31).

— Sch. I, Para 3, read with S. 3 — (1941) 1 KB 396 — DISS. AIR 1969 Cal 167 A (C N 31).

BANKING COMPANIES ACT (10 of 1949)

— S. 45-B — AIR 1962 Cal 86 — OVER. AIR 1969 Cal 158 (C N 28).

BOMBAY ELECTRICITY (SURCHARGE) ACT (as extended to Ajmer Merwara under Ajmer Merwara Extension of Laws Act (19 of 1947))

— S. 3 — (64) F. A. No. 67 of 1956, D/- 22-9-1964 (Raj) — REVERS. AIR 1969 SC 227 B (C N 42).

BOMBAY ELECTRICITY (SURCHARGE) ACT (contd.)

— S. 4 — (64) F. A. No. 67 of 1956, D/- 22-9-1964 (Raj) — REVERS. AIR 1969 SC 227 B (C N 42)

— S. 6 — (64) F. A. No. 67 of 1956, D/- 22-9-1964 (Raj) — REVERS. AIR 1969 SC 227 B (C N 42).

CIVIL PROCEDURE CODE (5 of 1908)

— S. 9 — (67) Civil Revn. No. 208 of 1966, D/- 10-4-1967 (M. P.) — Govardhan v. Nathu — OVER. AIR 1969 Madh Pra 44 A (C.N. 14).

— S. 21 — (67) Civil Revn. No. 208 of 1966, D/- 10-4-1967 (M. P.) — OVER. AIR 1969 Madh Pra 44 A (C N 14).

— S. 100 — AIR 1964 Pat 254 — REVERS. AIR 1969 SC 204 A (C N 38).

— S. 115 — (67) Civil Revn. No. 208 of 1966, D/- 10-4-1967 (M. P.) — OVER. AIR 1969 Madh Pra 44 A (C N 14).

CIVIL P. C .(contd.)

- S. 115 — AIR 1945 Mad 103 — DISS.
AIR 1969 Mys 77 (C N 18).
— O. 6, R. 17 — AIR 1957 Andh Pra 10 —
DISS. AIR 1969 Ker 75 (C N 17).
— O. 6, R. 17 — AIR 1928 Mad 400 —
DISS. AIR 1969 Ker 75 (C N 17).
— O. 6, R. 17 — (1959) 1 Mad LJ 307 —
DISS. AIR 1969 Ker 75 (C N 17).
— O. 6, R. 17 — AIR 1953 Nag 273 —
DISS. AIR 1969 Ker 75 (C N 17).
— O. 7, R. 10 — AIR 1957 Andh Pra 10
— DISS. AIR 1969 Ker 75 (C N 17).
— O. 7, R. 10 — AIR 1953 Nag 273 —
DISS. AIR 1969 Ker 75 (C N 17).
— O. 21, R. 32 (5) — AIR 1919 Cal 674
— HELD NO LONGER GOOD LAW. AIR
1969 Andh Pra 92 D (C N 30).
— O. 21, R. 35 (2) — AIR 1955 Mad 288
— HELD IMPLIEDLY OVERRULED by
AIR 1966 SC 470 as interpreted. AIR 1969
Mad 81 (C N 14).
— O. 21, R. 35 (2) — AIR 1964 Mad 53
(FB) — HELD IMPLIEDLY OVERRULED
by AIR 1966 SC 470 as interpreted. AIR
1969 Mad 81 (C N 14).

— O. 21, R. 94 — AIR 1938 All 471 —
DISS. AIR 1969 Mys 73 A (C N 16).

— O. 21, R. 96 — AIR 1955 Mad 288 —
HELD IMPLIEDLY OVERRULED by AIR
1966 SC 470 as interpreted. AIR 1969 Mad
81 (C N 14).

— O. 21, R. 96 — AIR 1964 Mad 53 (FB)
— HELD IMPLIEDLY OVERRULED by
AIR 1966 SC 470 as interpreted. AIR 1969
Mad 81 (C N 14).

— O. 23, R. 1 — AIR 1957 AP 10 — DISS.
AIR 1969 Ker 75 (C N 17).

— O. 23, R. 1 — (1959) 1 Mad LJ 307 —
DISS. AIR 1969 Ker 75 (C N 17).

— O. 23, R. 1 — AIR 1953 Nag 273 —
DISS. AIR 1969 Ker 75 (C N 17).

— O. 23, R. 1 — (1959) 1 Mad LJ 307 —
DISS. AIR 1969 Ker 75 (C N 17).

— O. 42, R. 1 — AIR 1964 Pat 254 —
REVERS. AIR 1969 SC 204 A (C N 38).

CONSTITUTION OF INDIA

— Art. 14 — AIR 1964 Assam 1 (FB) —
DISS. AIR 1969 Delhi 91 M (C N 16).

— Art. 309, Proviso — Observations of
Dwivedi, J. in AIR 1962 All 328 — DISS.
AIR 1969 Andh Pra 109 (C N 33).

CONTEMPT OF COURTS ACT (32 of 1952)

— S. 1 — ('64) Cri. Misc. Case No. 28 of 1964
D/- 16-6-1964 (Cal) — REVERS. AIR 1969
SC 189 B (C N 35).

CRIMINAL PROCEDURE CODE (5 of 1898)

— S. 10 — ('64) Cri. Misc. Case No. 28 of
1964, D/- 16-6-1964 (Cal) — REVERS. AIR
1969 SC 189 A (C N 35).

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- S. 1 (3), (b) (a) — AIR 1957 Madh Pra
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- S. 3 — AIR 1964 MP 196 — REVERS.
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- S. 4 — AIR 1967 All 148 — DISS. AIR
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— S. 4 — AIR 1966 Bom 174 — DISS.
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- S. 5 — AIR 1968 Bom 174 — DISS. AIR 1969 Mad 72 E (C N 13).
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 — S. 12 — (66) L. P. A. 263 of 1966, D/- 1-8-1966 (Punj) — REVERS. AIR 1969 Punj 69 (C N 14).
 — S. 23 — (56) F. A. O. No. 54 of 1954, D/- 20-9-1956 (Punj) — OVER. AIR 1969 Punj 69 (C N 14).
 — S. 23 — (66) L. P. A. 263 of 1966, D/- 1-8-1966 (Punj) — REVERS. AIR 1969 Punj 69 (C N 14).

- S. 28 — (56) F. A. O. No. 54 of 1954, D/- 20-9-1956 (Punj) — OVER. AIR 1969 Punj 69 (C N 14).
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 — S. 28 — (66) L. P. A. 263 of 1966, D/- 1-8-1966 (Punj) — REVERS. AIR 1969 Punj 69 (C N 14).

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- S. 6 — AIR 1965 All 94 — REVERS. AIR 1969 SC 209 (C N 39).

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- S. 15 — (64) Civil Rule No. 433-W of 1963, D/- 8-7-1964 (Cal) — DISS. AIR 1969 Punj 79 B (C N 17).
 — S. 15 — AIR 1965 Pat 491 — DISS. AIR 1969 Punj 79 B (C N 17).

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- S. 3 — AIR 1927 All 255 — DISS. AIR 1969 Mys 103 D (C N 23).

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- S. 36 (2) (a) — AIR 1968 Mys 18 — HELD NO LONGER GOOD LAW AIR 1969 J and K 36 D (C N 10).
 — S. 87 — AIR 1964 All 181 — DISS. AIR 1969 Raj 75 B (C N 16).

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— S. 16 — 1968 Pat LJR 384 — REVERS.
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(67) AIR 1967 Cal 110: 1967 Cri LJ 329,
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- (53) AIR 1953 Trav-Co 271, Gouri v. Lekshmi DISS. AIR 1969 Ker 73 (C N 16).

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- (67) AIR 1967 Madh Pra 157: 1967 Jab LJ 88, Radhakrishnan Narayandas v. Provident Funds Commr., M. P. — DISS. AIR 1969 Bom 95 C (C N 19).

- (67) Civil Revn. No. 208 of 1966, D/- 10-4-1967 (M. P.), Govardhan v. Nathu — OVER. AIR 1969 Madh Pra 44 A (C N 14).

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- (20) AIR 1920 Mad 209: 21 Cri LJ 73, Gopala Aiyar v. Krishnaswamy Iyer — DISS. AIR 1969 Raj 82 A (C N 17).

- (28) AIR 1928 Mad 400: 54 Mad LJ 145, Singara Mudaliar v. Govindaswami Chetty — DISS. AIR 1969 Ker 75 (C N 17).

- (45) AIR 1945 Mad 103: (1945) 1 Mad LJ 4, A. Ramamurthy Iyer v. Meenashi Sundarammal — DISS. AIR 1969 Mys 77 (C N 18).

- (55) AIR 1955 Mad 288: (1955) 1 Mad LJ 414, Thavi Chettiar v. Dakshinamurthi Mudaliar — HELD IMPLIEDLY OVERRULED by AIR 1966 SC 470 as interpreted. AIR 1969 Mad 81 (C N 14).

- (1959) 1 Mad LJ 307, Nagutha Mohamed Nainar v. Vadavalli Ammal — DISS. AIR 1969 Ker 75 (C N 17).

- (62) S. A. No. 15 of 1962 (Mad) — REVERSED. AIR 1969 Mad 96 (C N 23).

- (62) W. P. No. 815 of 1962 (Mad) — OVER. AIR 1969 Mad 87 A (C N 18).

- (64) AIR 1964 Mad 53: (1963) 2 Mad LJ 162 (FB), Ramaganesan Pillai v. Rajah Ayyar

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- (55) AIR 1955 Pat 404: (1955) 27 ITR 643, Hiraluxmi v. I.T. Officer — HELD IMPLIEDLY OVERRULED by AIR 1966 SC 1068 as interpreted. AIR 1969 Orissa 58 (C N 24).

- (64) AIR 1964 Pat 254, Dhankisto Mandal v. Ram Kisto Mandal — REVERS. AIR 1969 SC 204 A, B, C (C N 38).

- (65) AIR 1965 Pat 491, Laddu Mal v. State of Bihar — DISS. AIR 1969 Punj 79 B (C N 17).

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- (33) AIR 1933 Lab 409: 34 Cr LJ 342, Prem Kuwar v. Benaras Das — DISS. AIR 1969 Raj 82 A (C N 17).

- (56) F. A. O. No. 54 of 1954, D/- 20-9-1956 (Punj), Jagdish Chand v. Vir Singh — OVER. AIR 1969 Punj 69 (C N 14).

- (56) F. A. O. No. 95 of 1954, D/- 18-9-1956 (Punj), Khazan Chand v. Hans Raj — OVER. AIR 1969 Punj 69 (C N 14).

- (66) L. P. A. No. 263 of 1966, D/- 1-8-1966 (Punj) — REVERS. AIR 1969 Punj 69 (C N 14).

- (66) AIR 1966 Punj 354: 1966 Cur LJ 203: ILR (1966) 2 Punj 498, Gondhara Transport Co. (P.) Ltd. v. State — DISS. AIR 1969 Raj 95 A (C N 21).

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- (64) AIR 1964 Tripura 27, Gupta R. D. v. Union of India — DISS. AIR 1969 Tripura 19 B (C N 6).

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- (1941) 1 KB 396: 110 LJKB 54, Issoifoglu v. Coumantaros — DISS. AIR 1969 Cal 167 A (C N 31).

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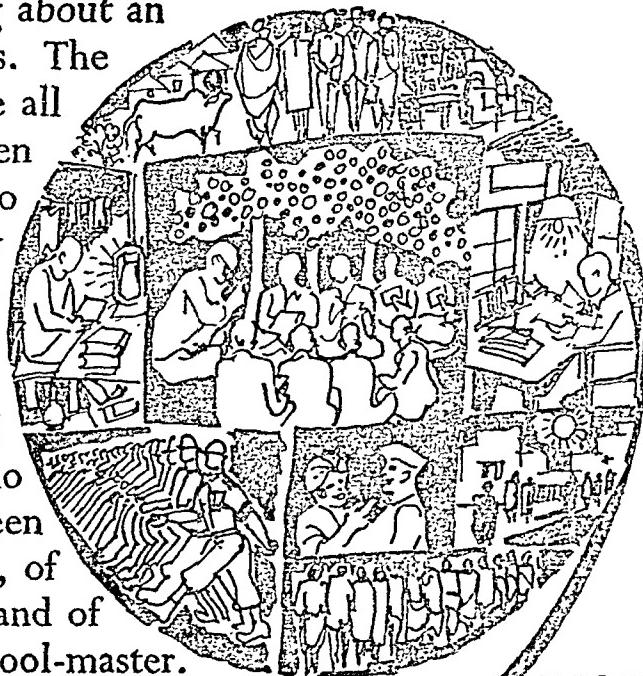
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Date 21st Feb. 1969.

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"Harijan", 1938

MAHATMA GANDHI



MAHATMA
GANDHI
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OCT 2, 1968 TO
FEB 22, 1970
મહાત્મા
ગાંધી
મનુષ્યાદ્ય
સર્વાદ્ય 2, 1968 થિ
ફર્ફરી 22, 1970

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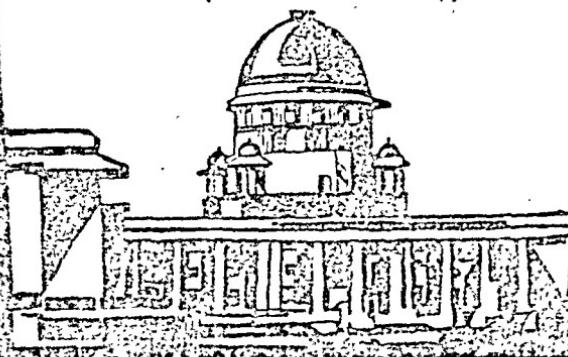


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17. Once the matter can be gone into the provisions of the additional part will have to be examined for reasonableness. Here the difficulties are many for the State. We mention only a few of them. There is nothing to show what are the requirements of action. The deprivation of property is made to depend upon the subjective determination of an officer. Take for example this case itself. Action is taken under the impugned part of S. 65. Agriculture includes growing of grass, and other definitions emphasise the need of growing grass by including the operation in the word 'cultivation'. Grass is as important for agricultural communities as foodgrains and fruits. Without the former the cattle must die just as without the latter there would be human starvation. The Act, therefore, gives importance to both, naming grass along with crops and garden produce and horticulture. If grass is being grown as an agricultural operation, one cannot just take grass lands and convert them into orchards. Similarly orchards cannot be taken and turned into pastures. Before action is taken it must be quite clearly established that the kind of agriculture which is being carried on is being carried on inefficiently or that there is some distinct advantage in the new management to carry on the new kind of agriculture. The Deputy Collector merely thinks that the land can grow grain or fruits. But so can any grass land or pasture. There is nothing to show that from an agrarian point of view grass grown in these lands was not necessary at all or was being inefficiently grown. A person is entitled to hold and enjoy his property as he thinks best. If regard is to be had for the benefits of society a clear law and a clear determination are required. Both the elements are missing. It is not said in what circumstances cultivation can be said to be inefficient. It is also not said what

would be considered efficient cultivation and what inquiries are needed to determine this. It is also not said under what circumstances different kind of cultivation can be imposed upon the land. The law does not provide for an opportunity to the cultivator to change his cultivation from one kind to another. It does not even require that the management should be efficient. After taking over the lands the Manager can lease them to others but it is not stated what conditions they have to observe. Merely on the opinion of an officer, land may be taken away because the officer thinks that wheat is to be preferred to fruits and fruits to grass and so on and so forth. The management is taken over without any clear limit of time. In these circumstances it is difficult to uphold the declarations made in these cases or to give them the protection of Art. 31-A (1) (b).

18. The appeals will, therefore, be allowed with costs and the orders of the Deputy Collector quashed. There shall be one set of hearing fee in each group, where same counsel appeared for all the appeals.

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AIR 1969 SUPREME COURT 177

(V 56 C 32)

(From: Patna)^o

J. C. SHAH AND V. RAMASWAMI, JJ.

Chhatu Ram Horil Ram Private Ltd.,
Appellant v. State of Bihar and another,
Respondents.

Civil Appeal No. 47 of 1965, D-
31-1-1968.

(A) Tenancy Laws — Bihar Land Reforms Act (30 of 1950), Ss. 4 and 10 (1) — A clause for renewal of the lease at a future date is an 'encumbrance' and is not binding on the State.

An agreement for renewal of a lease in future cannot be binding on the State Government after the vesting of the estate. The covenant in an Indenture of Lease granting an option of renewal of the lease on the expiry of the period of the lease outstanding is a covenant running with the land and it creates no interest in land. Therefore, such an agreement merely being in the nature of an encumbrance is extinguished by S. 4(a)

^o(A. F. O. D. No. 433 of 1959, D-
12-12-1962 — Patna).

of the Bihar Land Reforms Act. The original contractual lease comes to an end by the operation of S. 4(1) (a) of the Act, and a fresh statutory lease for the remainder of the term of that lease in favour of the lessee comes into being under S. 10 (1). (1959) ILR 38 Pat 1160, Rel. on. (Paras 4 to 6)

(B) Mineral Concession Rules (1949), R. 40 — Rule has no application to statutory leases created under S. 10 of Bihar Land Reforms Act (30 of 1950).

R. 40 of the Mineral Concession Rules manifestly applies to grants made by the Government: it has no application to statutory leases arising by reason of S. 10 of the Bihar Land Reforms Act. (Para 7)

At best, the duration of the "original lease" under R. 40 may be deemed to be no longer than the period between the date of vesting and the date on which the contractual lease expired. (Obiter). (Para 7)

Cases Referred: Chronological Paras (1959) ILR 38 Pat 1160 = 1960

BLJR 105, State of Bihar v. Indian Copper Corporation Ltd. 4

Mr. H. R. Gokhale, Senior Advocate, (M/s. S. N. Prasad and B. P. Singh, Advocates with him), for Appellant; and M/s. D. P. Singh, K. M. K. Nair and Shivapujan Singh Advocates, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: On September 30, 1940 the appellant — a private limited Company — obtained a lease from the owners of 3300 acres of mica bearing land in village Sapahi in the District of Gaya, for a period of fifteen years. Clause 29 of the indentures of lease read as follows:

"If on the expiry of the term of the thika we executant Nos. 1 and 2, first party, the lessors, desire to let out in thika the thika property or any portion thereof and if any other person wants to take it in thika, then in such circumstances it will be incumbent upon us, executant Nos. 1 and 2, first party, the lessors, to inform about it to executant No. 3, second party, the lessee, first. If on the same terms and stipulations and jama executant No. 3, second party, the lessee, wants to take it in thika then in that case, we executant Nos. 1 and 2, first party, the lessors, shall let it out in thika to him (executant No. 3), and we shall execute a fresh thika deed in respect thereof in favour of executant

No. 3, second party, the lessee, and executant No. 3, second party, the lessee, shall be competent to get the deed executed."

By virtue of a notification issued under Section 3 of the Bihar Land Reforms Act, 1950, the right of the owners in the lands, vested on June 27, 1953 in the State of Bihar. The appellant Company remained thereafter in occupation under a statutory lease deemed to be granted by the State for the remaining period of the contractual lease. On February 22, 1955, the Company served a notice upon the State exercising the option of renewal granted by Clause 29 of the indenture. On January 6, 1956, the State granted a lease to the appellant of 410 acres out of the lands for 20 years and the remaining area was granted in lease to one Sant Saran Bhadani a director of the appellant Company. In a writ petition moved by the one Sudha Devi the leases granted to the appellant company and Bhadani were set aside by order dated July 5, 1956, of the High Court of Patna, on the ground that in granting fresh leases to the appellant Company and Bhadani the State of Bihar had violated Rr. 67 and 68 of the Mineral Concession Rules, 1949.

2. The appellant Company then instituted in the Court of the Subordinate Judge, Second Grade, Gaya, an action for specific performance of the covenant of renewal in the indentures of lease dated September 30, 1940. The Subordinate Judge dismissed the action holding that by the stipulation in Cl. 29 a right of pre-emption and not of renewal was granted to the appellant Company. The High Court of Patna confirmed the decree passed by the Trial Court but on different grounds. The High Court held that the right granted by Cl. 29 gave rise to an "encumbrance" which was extinguished when the interest of the owners in the land vested in the State. With certificate granted by the High Court, this appeal has been preferred by the Company.

3. A notification under S. 3 (1) of the Bihar Land Reforms Act, 1952 (1950?), on June 27, 1953 was issued in respect of the land of the owners. Section 4 of the Act prescribes the consequences of the publication of the notification under Section 3 (1): it provides, insofar as it is relevant:

"Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of

the notification under sub-section (1) of Section 3, or sub-section (1) or (2) of Section 3-A, the following consequences shall ensue, namely:

(a) Such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutcherry for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, jalkars, hats, bazar, mela and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of raiyats and under-raiyats) shall, with effect from the date of vesting, vest absolutely in the State free from all encumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."

The opening words of this clause "Subject to the subsequent provisions of this Chapter" were omitted by Bihar Act 16 of 1959, but that omission has no practical significance in this case. Section 10 of the Act provides:

"(1) Notwithstanding anything contained in this Act, where immediately before the date of vesting of the estate or tenure there is a subsisting lease of mines or minerals comprised in the estate or tenure or any part thereof, the whole or that part of the estate or tenure comprised in such lease shall, with effect from the date of vesting, be deemed to have been leased by the State Government to the holder of the said subsisting lease for the remainder of the term of that lease, and such holder shall be entitled to retain possession of the leasehold property.

(2) The terms and conditions of the said lease by the State Government shall mutatis mutandis be the same as the terms and conditions of the subsisting lease referred to in sub-section (1), but with the additional condition that, if in the opinion of the State Government the holder of the lease had not, before the date of the commencement of this Act, done any prospecting or developing work, the State Government shall be entitled at any time before the expiry of one year from the

said date to determine the lease by giving three months' notice in writing:

Provided * * * * "

4. Counsel for the appellant Company contended that Cl. 29 created an interest in the demised land in favour of the Company and the State of Bihar as successor-in-title of the original owners took the land subject to that interest. In the alternative, counsel contended, the Company acquired immediately on execution of the indentures of lease an indefeasible right to obtain renewal and that right was enforceable against the owners and their successors-in-interest alike. We are unable to agree with those contentions. The covenant granting an option of renewal of the lease on the expiry of the period of the lease outstanding is a covenant running with the land: it creates no interest in land. In State of Bihar v. Indian Copper Corporation Ltd., (1959) ILR 38 Pat 1160 the High Court of Patna held that a clause for renewal of a lease on the expiry of its period has not the effect of a present demise nor does it operate to create an interest in land on the date on which the original lease was executed: a covenant for renewal is not tantamount to an actual demise and therefore "no leasehold interest is created for the renewed term when the original lease is granted." Under the terms of the lease dated September 30, 1940 the appellant Company became entitled to a lease for a period of fifteen years. On the expiry of that period the Company could have enforced their right to get a renewal of the lease for a period of fifteen years against the owners if their interest had not been extinguished. If the owners declined to carry out their obligation, the Company could sue for specific performance and claim a right to remain in possession for a period of fifteen years stipulated in Cl. 29. But the provisions of the Bihar Land Reforms Act intervened. By the express terms of S. 4 (a) of the Act all the interests of the owners in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of the lessee of mines and minerals comprised in such estate or tenure became vested in the State with effect from the date of vesting absolutely and free from all encumbrances. Even the interest of the lessees of the mines and minerals comprised in the estate therefore ceased, and all incumbrances on the interest of

the owner's estate were extinguished, and the State took the estate free from all the rights of the lessees. The original contractual lease came to an end by the operation of S. 4 (1) (a) of the Act, and a fresh statutory lease for the remainder of the term of that lease in favour of the lessee came into being under S. 10 (1) of the Act.

5. The appellant Company therefore acquired the rights of a statutory lessee for the period between June 27, 1953 and September 30, 1955, with terms and conditions mutatis mutandis the same as the conditions of the original lease granted by the owners on September 30, 1940. But by virtue of S. 4 that covenant by which the owners had agreed to renew the lease at the option of the lessee being merely of the nature of an incumbrance and not an interest in the land was extinguished, the land vested in the State free from the obligation created by the renewal clause.

6. We agree with the High Court that "a clause for renewal of the lease at a future date was a limitation imposed upon the lessor. His freedom as an absolute owner was sought to be curtailed by such agreement. It was thus an incumbrance and all incumbrances were wiped out by Section 4. *** Taking all these provisions into consideration, an agreement for renewal of a lease in future cannot be binding upon the State Government after the vesting of the estate."

7. Counsel for the appellant relied upon R. 40 of the Mineral Concession Rules, 1949, and contended that under the scheme of the Rules a lessee of a mining lease is entitled to at least one renewal. Rule 40, insofar as it is material, provides:

"(1) The period for which a mining lease may be granted shall be 30 years in the case of coal, iron-ore and bauxite for manufacture of aluminium, and 20 years in the case of any other minerals, unless the applicant himself asks for a shorter period. The lease shall be renewable at the option of the lessee, for one or two periods, each not exceeding the duration of the original lease, in the case of iron-ore and bauxite for manufacture of aluminium, and one period not exceeding the duration of the original lease in the case of other minerals."

But R. 40 has no application. Manifestly, the rule applies to grants made by the Government: it has no applica-

tion to statutory leases arising by virtue of S. 10 of the Bihar Land Reforms Act. Even assuming that R. 40 applies to such a statutory lease, the duration of the "original lease" may be deemed to be no longer than the period between the date of vesting and September 30, 1955. That period for which renewal may have been claimed has expired many years ago, and recognition of the rights of the appellant Company will be of no practical significance in this appeal.

8. The appeal fails and is dismissed with costs.

TVN/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 180
(V 56 C 33)

(From: Punjab AIR 1966 Punj 221)
J. C. SHAH, V. RAMASWAMI, AND
G. K. MITTER, JJ.

Raj Kumar, Appellant v. Union of India, Respondent.

Civil Appeal No. 2429 of 1966, D-18-4-1968.

Constitution of India, Arts. 309 and 311 — Government servant — Resignation — Acceptance by Government — Withdrawal of resignation not permissible even before communication of order of acceptance.

The petitioner, a member of Indian Administrative Service, asked the Government to relieve him from service. The Government accepted it. But before communication of the order accepting his resignation reached him, he withdrew his offer of resignation.

Held, that he had no locus paenitentiae to so withdraw his offer of resignation after it was accepted;

(2) that the principle that an order terminating employment is not effective until it is intimated to the employee could not apply to the facts of the case;

(3) that there is no rule framed under Art. 309 of the Constitution about when the resignation becomes effective;

(4) that Cls. (c) and (d) contained in the Government of India, Ministry of Home Affairs Memo dated 6-5-1958 have no statutory force; and

(5) that it being no order of dismissal, Art. 311 of the Constitution was not attracted. AIR 1966 SC 1313, Dist.

(Paras 3 to 6)

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 1313 (V 53) =
 1967 SCD 203, State of Punjab
 v. Amar Singh Harika 5

S. V. Gupte, Senior Advocate, (M/s. Sar-
 dar Bahadur, Vishnu B. Saharya, Miss
 Yogindra Kushalan, Advocates with him),
 for Appellant; R. H. Dhebar Advocate,
 for Respondent No. 1; A. K. Sen, Senior
 Advocate, (Mr. K. Baldev Mehta Advo-
 cate with him), for Respondent No. 2.

The following Judgment of the Court
 was delivered by

SHAH, J.: The appellant belonged to
 the Indian Administrative Service and
 was in August 1964 posted as Collector
 and District Magistrate, Kota. On
 August 21, 1964, he addressed a
 letter to the Chief Minister, Rajasthan,
 setting out several grievances and finally
 stated — "In conclusion I would only
 request that the Government may do me
 the kindness of accepting my resignation
 from the service which I am submitting
 separately as I am convinced that it
 would be impossible to continue in such
 an atmosphere without "being humiliat-
 ed from time to time". He also addressed
 a letter dated August 30, 1964, to the
 Chief Secretary to the Government of
 Rajasthan submitting his resignation
 "from the Indian Administrative Service
 for early acceptance", and requested that
 it may be forwarded to the Government
 of India with the remarks of the State
 Government. The State Government re-
 commended that the resignation be ac-
 cepted. On October 31, 1964, the Gov-
 ernment of India accepted the resigna-
 tion of the appellant and requested the
 Chief Secretary to the Government of
 Rajasthan "to intimate the date on which
 the appellant was relieved of his duties
 so that a formal notification could be
 issued in that behalf."

2. After some time the appellant
 changed his mind and by letter dated
 November 27, 1964, the appellant re-
 quested the Chief Secretary to the Gov-
 ernment of Rajasthan to recommend "ac-
 ceptance of the withdrawal" of his re-
 signation from the Indian Administra-
 tive Service. He also addressed a separate
 letter to the Secretary to the Govern-
 ment of India, Ministry of Home Affairs,
 intimating that he was withdrawing his
 resignation from the Indian Administra-
 tive Service. On March 29, 1965, an
 order accepting the resignation of the ap-
 pellant from the Indian Administra-
 tive Service was issued and the appellant was

directed to hand over the charge to the
 Additional Collector, Kota. The appellee
 then moved a petition in the High
 Court of Punjab at Delhi for the issue of
 a writ of certiorari calling for the record
 of the case and quashing the order passed
 by the Government of India accepting
 the resignation of the appellant, and
 also quashing the order dated March 29,
 1965 issued by the State of Rajasthan.
 The High Court rejected the petition
 holding that the resignation became
 effective on the date on which it was ac-
 cepted by the Government of India, and
 a subsequent withdrawal of the resigna-
 tion was ineffective, even if acceptance
 of the resignation was not intimated to
 the appellant.

3. In this appeal, with certificate
 granted by the High Court, counsel for
 the appellant contends that the appellant
 could, so long as acceptance of the re-
 signation was not communicated to him,
 withdraw the resignation submitted by
 him. Counsel invited our attention to a
 circular memorandum issued on May 6,
 1958, under the signature of the Deputy
 Secretary to the Government of India,
 Ministry of Home Affairs, setting out the
 procedure to be followed in dealing with
 resignation from service. Clauses (c) and
 (d) of the circular stated:

(c) "The competent authority should
 decide the date with effect from which
 the resignation should become effective.
 In cases covered by (b) (i) above, the
 date would be that with effect from
 which alternative arrangements can be
 made for filling the post. Where an
 officer is on leave, the competent autho-
 rity should decide whether he will ac-
 cept the resignation with immediate
 effect or with effect from the date fol-
 lowing the termination of the leave.
 Where a period of notice is prescribed
 which a Government servant should give
 when he wishes to resign from service,
 the competent authority may decide to
 count the period of leave towards the
 notice period. In other cases also it is
 open to the competent authority to de-
 cide whether the resignation should be-
 come effective immediately or with effect
 from some prospective date.

(d) "A resignation becomes effective
 when it is accepted and the officer is re-
 lieved of his duties. Where a resigna-
 tion has not become effective and the
 officer wishes to withdraw it, it is open
 to the authority which accepted the re-
 signation either to permit the officer to

withdraw the resignation or to refuse the request for such withdrawal. Where, however, a resignation has become effective, the officer is no longer in Government service and acceptance of the request for withdrawal of resignation would amount to re-employing him in service after condoning the period of break.

Counsel says that under the instructions issued by the Government of India resignation of an officer from service becomes effective after it is accepted and the officer is relieved of his duties and not till then. But the circular letter has no statutory force. It is not a rule made under Art. 309 of the Constitution. It contains merely instructions set out by the Ministry of Home Affairs about the procedure to be followed in respect of resignation from service. Our attention has not been invited to any statutory rule or regulation relating to resignation by members of the Indian Administrative Service, especially as to the date on which the resignation becomes effective.

4. The letters written by the appellant on August 21, 1964, and August 30, 1964, did not indicate that the resignation was not to become effective until acceptance thereof was intimated to the appellant. The appellant informed the authorities of the State of Rajasthan that his resignation may be forwarded for early acceptance. On the plain terms of the letters, the resignation was to become effective as soon as it was accepted by the appointing authority. No rule has been framed under Art. 309 of the Constitution which enacts that for an order accepting the resignation to be effective, it must be communicated to the person submitting his resignation.

5. Our attention was invited to a judgment of this Court in State of Punjab v. Amar Singh Harika, AIR 1966 SC 1313 in which it was held that an order of dismissal passed by an authority and kept on its file without communicating it to the officer concerned or otherwise publishing it did not take effect as from the date on which the order was actually written out by the said authority; such an order could only be effective after it was communicated to the officer concerned or was otherwise published. The principle of that case has no application here. Termination of employment by order passed by the Government does not become effective until the order is intimated to the employee. But where a public servant has invited by his letter

of resignation determination of his employment, his services normally stand terminated from the date on which the letter of resignation is accepted by the appropriate authority and in the absence of any law or rule governing the conditions of his service to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Till the resignation is accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus paenitiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation has not been accepted. In the present case the resignation was accepted within a short time after it was received by the Government of India. Apparently the State of Rajasthan did not immediately implement the order, and relieve the appellant of his duties, but the appellant cannot profit by the delay in intimating acceptance or in relieving him of his duties.

6. The alternative ground raised by counsel that acceptance of the resignation amounts to dismissal from employment and failure to comply with the requirements of Article 311 of the Constitution vitiates the order accepting the resignation has no force. The order complained of did not purport to be one of dismissal: the Government of India accepted the resignation submitted by the appellant, they did not purport to terminate the appointment for any misconduct on the part of the appellant, or as a measure of penalty.

7. The appeal fails and is dismissed. There will be no order as to costs.
TVN/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 182
(V 56 C 34)

(From: Industrial Tribunal, Maharashtra Bombay)*

S. M. SIKRI, J. M. SHELAT AND
V. BHARGAVA, JJ.

M/s. Hydro (Engineers) Pvt. Ltd., Appellant v. The Workmen, Respondent.
Civil Appeal No. 1934 of 1967, D-30-4-1968.

*Ref. (IT) No. 54 of 1967, D/- 15-9-1967
—I. T., Maharashtra—Bom.)

(A) Minimum Wages Act (1948), Section 4 (2) — Concept of minimum wage takes into account the prevailing cost of essential commodities — Linking up scales of minimum wage with cost of hiring is not alien to concept of minimum wage — Industrial Disputes Act (1947), Sch. III, Item 1.

The concept of minimum wage, as indicated in Section 4 does take in the factor of the prevailing cost of essential commodities whenever such minimum wage is to be fixed. The idea of fixing such wage in the light of cost of living at a particular juncture of time and of neutralising the rising prices of essential commodities by linking up scales of minimum wages with the cost of living index cannot, therefore, be said to be alien to the concept of a minimum wage. Furthermore, in the light of spiralling of prices in recent years, if the wage scales are to be realistic, it may become necessary to fix them so as to neutralise at least partly the price rise in essential commodities. (Para 6)

(Held that the award could not be attacked on the ground that the Tribunal linked up the wage scales with the living cost because had it not been done, the wage scales would have again gone unreal once the index had gone up as it at the time threatened to do.) (Para 8)

(B) Minimum Wages Act (1948), Sections 3, 4, 6 — In fixing minimum wage incapacity of management to pay and carry on business is no consideration — Industrial Disputes Act (1947), Sch. III, Item 1.

In fixing the minimum wage the fact that an employer might find it difficult to carry on his business on the basis of minimum wages is an irrelevant consideration. The Act contemplates that minimum wage rates must ensure not merely the mere physical need of the worker which would keep him just above starvation but must ensure for him not only his subsistence and that of his family but also preserve his efficiency as a workman. It should, therefore, provide not merely for the bare subsistence of his life but for the preservation of the worker and so must provide for some measure of education, medical requirements and amenities. AIR 1955 SC 33 and AIR 1962 SC 12 and AIR 1958 SC 578 and (1964) 1 Lab LJ 415 (SC), Ref.; (1962) 1 Lab LJ 271 (SC), Distinguished. (Para 8)

Therefore an award cannot be attacked on the ground that the Tribunal failed to take into consideration the financial capacity, the fact of the Company having made losses during the past years and its difficulties in importing raw materials. (Para 8)

(C) Industrial Disputes Act (1947), Section 17A — Tribunal has discretion to direct award to come into effect retrospectively from date of workers' demand.

It is a matter of discretion for the Tribunal to decide from the circumstances of each case from which date its award should come into operation. No general rule can be laid down as to the date from which a Tribunal should bring its award in force. AIR 1963 SC 1332, Ref. (Para 10)

Where the Tribunal gave effect to its award fixing minimum wages retrospectively from the date of the demand and not from the date of the reference, as by that time the cost of living index had already gone up considerably and not to have done so would have been to deprive the workmen of the minimum wages commensurate with that rise, if the Tribunal has exercised its discretion and no substantial ground was made out to show that it was unreasonably exercised, the mere fact that it has retrospectively enforced its award from the date of the demand would hardly be a ground for interference with the award. (1960) 2 Lab LJ 71 (SC) and (1961) 2 Lab LJ 75 (SC), Ref. (Para 10)

(D) Industrial Disputes Act (1947), Sch. III, Item 5 — Gratuity — Concept of — Qualifying period should be fairly long — Ten years service is usual, though no hard and fast rule can be laid down — Qualifying period in case of termination of service — Criterion for fixing.

It is now well settled that gratuity is a reward for good, efficient and faithful service rendered for a fairly substantial period and that it is not paid to the employee gratuitously or merely as a matter of boon but for long and meritorious service. AIR 1962 SC 673 and AIR 1958 SC 578, Ref. (Para 12)

Since the justification for gratuity is a long and meritorious service, schemes of gratuity framed by the tribunals and approved of by the Supreme Court have always provided some qualifying period. (1956) 1 Lab LJ 435 (LATI—Mad.) and AIR 1958 SC 578, Ref. (Para 12)

184 S. C. Hydro (Engineers) Pvt. Ltd. v. Workmen (Shelat J.)

A fairly long minimum period for qualifying for gratuity in the case of resignation or retirement is necessary to prevent the workmen leaving one concern after another after putting in the short minimum service for qualifying for gratuity. AIR 1967 SC 1286 and AIR 1966 SC 732, Ref. (Para 12)

Though no hard and fast rule can be laid down and each case must be decided on its own circumstances, the general trend is in favour of ten years of qualifying service.

Held that the Tribunal in the absence of any substantial reason, was not right in reducing the period from ten to eight years. As regards the deletion of four years minimum period in cases where the employer terminated the service also, there was no legitimate ground for the alteration of the scheme. (Para 12)

That if such a period is provided for in a scheme, it was possible that an employer would terminate the services of a workman even though the employee wants to render continuous service to enable him to earn the gratuity is not a legitimate apprehension for unless the employer is in a position to establish misconduct justifying termination of service under a standing order, he cannot put an end to the service only to deprive the workman of gratuity. On the other hand, there is the danger that whereas in the case of retirement or resignation the workman would have to put in ten years of service, if no minimum period is provided for in the case of termination by the employer it would be possible for a workman to commit some misconduct and earn gratuity within a shorter time than the one who after a long period of meritorious service retires or resigns. Since doing away with the qualifying period is likely to result in such an anomaly, it is necessary to have some qualifying minimum period. (Para 12)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1286 (V 54) =

(1967) 2 Lab LJ 1, Calcutta Insurance Co. Ltd. v. Their Workmen

(1966) AIR 1966 SC 732 (V 53) = 1966-2 SCR 523, British Paints v. Its Workmen

(1964) 1964-1 Lab LJ 415 (SC), Airlines Hotel v. Its Workmen

(1963) AIR 1963 SC 1832 (V 50) = (1964) 1 SCR 234, Hindustan Times Ltd. v. Their Workmen

(1962) AIR 1962 SC 12 (V 49) = (1962) 1 SCR 946, Unichovi v. State of Kerala

(1962) AIR 1962 SC 673 (V 49) = 1961-1 Lab LJ 518, Garment Cleaning Works v. Its Workmen

(1962) 1962-1 Lab LJ 271 = (1962) 4 Fac LR 224 (SC), Novex Dry Cleaners v. Workmen

(1961) 1961-2 Lab LJ 75 = 1961-2 Fac LR 581 (SC), United Collieries v. Its Workmen

(1960) 1960-2 Lab LJ 71 = (1960-61) 19 FJR 128 (SC), Jhagrakhand Collieries (Private) Ltd. v. C. G. I. T. Dhanbad

(1958) AIR 1958 SC 578 (V 45) = 1959 SCR 12, Express Newspapers (Private) Ltd. v. Union of India

(1956) 1958-1 Lab LJ 435 (LATI-Mad), Indian Oxygen and Acetylene Co. Ltd. Employees Union v. Indian Oxygen and Acetylene Co.

(1955) AIR 1955 SC 83 (V 42) = (1955) 1 SCR 752, Bijay Cotton Mills Ltd. v. State of Ajmer

I. N. Shroff, for Appellant; M/s. Narayan B. Shetye and K. Rajendra Chaudhury, Advocates, for Respondent.

The following Judgment of the Court was delivered by

SHELAT, J.: The appellant company is a private limited company of which the authorized capital is Rs. 1 lac and the subscribed capital Rs. 50,000. Its business is to manufacture milk cans. According to the Company, it has not been able to maintain, much less increase, its production owing to the control orders restricting the import of raw materials required for its manufacturing process. The Company was started in 1942 but except for a few years when it made some profits, it has had to suffer losses during the rest of the years, the total loss suffered up to 1964-65 being Rs. 1,66,912. The Company is a small unit having on its roll 53 workmen.

2. In 1958, a reference was made under Section 10 (1) (d) of the Industrial Disputes Act, 1947 in respect of the demands made by its employees for increase in the wage scales. The reference ended in a settlement dated May 27,

8 1959 whereunder a slight increase in the wage scales was made. It also provided for an ad hoc increase in the wages of those getting Rs. 2.44 or more per

day. The revised wages were to come into force retrospectively from October 1, 1958. In 1961, another reference was made which also resulted in a settlement dated September 11, 1961. Under that settlement the workmen were classified into four categories and consolidated wage scales for each of the categories with a provision for increments were agreed upon. Since these were consolidated wage scales, the demand for dearness allowance was not pressed. An award was made in terms of the said

Unskilled	— Rs. 4.15	— Rs. 5.15.
Semi Skilled	— Rs. 4.75	— Rs. 6.25.
Skilled II	— Rs. 5.50	— Rs. 8.00.
Skilled I	— Rs. 6.50	— Rs. 9.50.
Apprentices	— Rs. 8.25	— Rs. 4.25.

The award provided that the increments in the revised scales were to be annual and were to start from April 1, 1965. The award was made effective from November 9, 1964 which was the date of the reference. It, however, rejected the Union's demand to link up the wage scales with the index of cost of living. By April 1, 1967, therefore, the workmen had received two annual increments and consequently the wages paid to the first four categories were Rs. 4.35, 5.05, 6.00 and 7.10 per day respectively. It is thus clear that the Bilgrami award took the scales previously fixed as its basis when the cost of living index stood at 450 and increased them taking into consideration the fact that the said figure had gone up by about 94, that is by raising it by 1 n. p. for every point.

3. On June 17, 1967, the Union served a notice of demand which called for (a) revised scale of wages with effect from July 1, 1966; (b) for certain adjustments; (c) for linking up the scales with cost of living index; (d) revision in the existing gratuity scheme and (e) for bonus for the year 1964-65. We are not concerned in this appeal with the last demand as the impugned award does not deal with that demand. The demand for revision of wage scales was based on the fact that the Bilgrami award had fixed the wage scales on the footing of the cost of living index being then 538 while that figure had shot up since then to 675 and that if the rise were to be neutralised as it was done by the Bilgrami award, the scale of unskilled workmen would come to Rs. 5.30 per day. So far as the gratuity scheme was concerned, the demand required that the qualifying period for the retiral gratuity

should be reduced from ten to eight years and the qualifying period in case of termination of service by the employer should be done away with. The Company resisted the demand and the conciliation proceeding having failed, the State Government referred the dispute to the Tribunal.

4. The Tribunal took note while considering the demand for revision of scales and their linking up with the index of cost of living of the fact (a) that the Bilgrami award itself had sought to neutralise the rise in the living cost by raising the scales in proportion to the rise in the cost of living by then; and (b) that though that award was made in 1964, the wage scales thereunder fixed had already become unreal in the sense that the index had gone up to 675 by the time the Union filed its statement of claim, that is, March 25, 1967 and had reached the figure of 710 in July 1967 when the award was made. In these circumstances, the Tribunal thought that the Union had made out a case for revision, that it was necessary to make the wage scales realistic and therefore to link them up with cost of living index though the Bilgrami award had declined to do so. What the Tribunal did, therefore, was to retain the scales fixed by Mr. Bilgrami and treating them on the basis of 538 index of living cost, directed that they should be linked up with the index so that the scales would automatically go up as the index rose or fell. The award also directed that effect should be given to it as from July 1, 1966, the notice of demand having been served on June 17, 1966. The gratuity scheme framed in 1961 provided that ten days wages for every year of service should

be paid as gratuity in case of death, retirement or resignation, provided the workmen had put in the minimum period of ten years of service. For the workmen whose services would be terminated by the employer, the qualifying period was four years of service. The Tribunal revised the scheme in two particulars; (a) it reduced the period from ten to eight years in case where the workman has died or resigned or retired; and (b) it deleted the qualifying period of four years altogether where his service has been terminated by the employer. The Tribunal considered the financial position of the Company and came to the conclusion that though it had been making losses, it was of a fairly long standing that the losses incurred in the past years were a temporary phase, that the Company's future was not black and, though not prosperous, it was in a satisfactory financial position. This appeal by special leave disputes the correctness of the award made by the Tribunal.

5. Counsel for the Company objected to the aforesaid observation regarding the Company's financial position and pointed out that its position cannot at all be said to be satisfactory in view of the fact that barring only a few years, it had made substantial losses all throughout. Taking a cue from this fact, he contended that (1) the reasons which impelled the Bilgrami Tribunal to refuse to link up the wage scales with the cost of living index still held good; (2) the Tribunal took a wrong view as to what would constitute a minimum wage; (3) it ignored the financial capacity of the Company; (4) it failed to take into consideration the principle of region-cum-industry and (5) there was no jurisdiction in reducing the qualifying period for the retiral benefit of gratuity from ten to eight years and for deleting the qualifying period in the case of termination of service by the employer. We propose to deal with contentions 1 to 4 first and consider separately the changes made by the Tribunal in the existing gratuity scheme.

6. The Minimum Wages Act XI of 1948 does not define 'minimum wages' presumably because it would not be possible to lay down a uniform minimum wage for all industries throughout the country on account of different and varying conditions prevailing from industry to industry and from one part of the country to another. The legislature also thought it inexpedient to apply the Act

to all industries at a time and, therefore, it applied the Act to certain employments only specified in the Schedule thereto leaving it to the appropriate government to add by notification to that effect, industries in the said Schedule at suitable time and in appropriate conditions. But Section 4 of the Act provides that the minimum rates of wages may consist of a basic rate of wages and a special allowance at a rate to be adjusted or a basic rate of wages with or without the cost of living allowance and cash value of concessions in respect of supplies of essential commodities at concession rates where so authorised or an all inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions if any. Sub-section (2) of Section 4 provides that the cost of living allowances and the value of the concessions in respect of supplies of essential commodities at concession rates shall be computed by the competent authority at such intervals and in accordance with such directions as may be given by the appropriate Government. It is thus clear that the concept of minimum wage does take in the factor of the prevailing cost of essential commodities whenever such minimum wage is to be fixed. The idea of fixing such wage in the light of cost of living at a particular juncture of time and of neutralising the rising prices of essential commodities by linking up scales of minimum wages with the cost of living index cannot, therefore, be said to be alien to the concept of a minimum wage. Furthermore, in the light of spiralling of prices in recent years, if the wage scales are to be realistic, it may become necessary to fix them so as to neutralise at least partly the price rise in essential commodities. Indeed, when the Bilgrami award revised the wage scales it took as aforesaid, into account the rise in the cost of living index and neutralised that rise by approximately raising them by 1 n. p. for every point in the rise though it declined to join up the scales with the index of cost of living.

7. What the present award does is to fix the minimum wage scales and not to fix fair wages. That is clear from the fact that it retains the scales fixed by the earlier award and taking them on the basis of the index figure at 538 it provides for automatic rise or fall therein with the corresponding change in the index of living cost. Presumably, the Tribunal thought it necessary to do so

because by the time it came to make the award, the index figure had already gone up to 710. If the Tribunal were to refuse to link up the scales with the index of cost of living, the neutralisation it sought to do would again go out of gear making once again the scales unreal and reduce them even below the floor-level. That the Tribunal fixed the consolidated minimum wages and not fair wages is clear from the fact (1) that it retained the scales fixed by the previous award which had increased them from Rs. 3.20 per day for an unskilled workman to Rs. 4.15 per day as by that time the index had gone up from 450 to 538; and (2) by its observation that the Company has to pay the minimum wages irrespective of its ability to bear the additional burden.

8. The fact that an employer might find it difficult to carry on his business on the basis of minimum wages is an irrelevant consideration is now a well settled principle: (cf. Bijay Cotton Mills Ltd. v. State of Ajmer, (1955) 1 SCR 752 = (AIR 1955 SC 752), Unichovi v. State of Kerala, (1962) 1 SCR 946 = (AIR 1962 SC 12) and Express Newspapers (Pvt.) Ltd. v. Union of India, 1959 SCR 12 = (AIR 1958 SC 578)). While considering the distinction between minimum and fair wages this Court in the case 1962-1 SCR 946 = (AIR 1962 SC 12) observed at p. 957 (of SCR) = (at p. 17 of AIR) that the policy of the Minimum Wages Act, 1948 was to prevent employment of sweated labour in the general interest and so in prescribing the minimum wage rates, the capacity of the employer need not be considered as the State assumes that every employer must pay the minimum wage before he employs labour. It also observed that the Act contemplates that minimum wage rates must ensure not merely the mere physical need of the worker which would keep him just above starvation but must ensure for him not only his subsistence and that of his family but also preserve his efficiency as a workman. It should therefore, provide, as the Fair Wages Committee appointed by the Government recommended, not merely for the bare subsistence of his life but for the preservation of the worker and so must provide for some measure of education, medical requirements and amenities. This concept of the Committee has been accepted by industrial adjudication in the country and was expressly approved of in Express Newspapers (Pvt.) Ltd., 1959

SCR 12 = (AIR 1958 SC 578). Counsel for the Company, however, cited before us the decisions in Airlines Hotel v. Its Workmen, (1964) 1 Lab LJ 415 (SC) and Novex Dry Cleaners v. Its Workmen, 1962-1 Lab LJ 271 (SC) where the question of capacity and the wage scales prevailing in comparable industries in the region were considered relevant factors. But those were not cases where minimum wage rates were fixed but were cases of fair wages where those two factors had to be taken into account. The Company's contention that the Tribunal failed to take into consideration the financial capacity, the fact of the Company having made losses during the past years, its difficulties in importing raw materials and had also failed to apply the region-cum-industry principle and therefore the award was vitiated, has no merit. We cannot also accept the contention that the Tribunal erred in linking up the wage scales with the living cost because had it not been done, the wage scales would have again gone unreal once the index had gone up as it then threatened to do. We find, therefore, no reason to interfere with the minimum wage rates fixed by the Tribunal.

9. A subsidiary contention raised by the Company that by reason of the Bilgrami award having provided for incremental scales, the workmen under the present award will get double advantage, namely, increment and the rise in the wage scales during the same period has also no substance. The incremental scale was fixed in that award on the basis of the index figure being 538. Those scales have been retained. The two increments that the workmen have earned in 1965 and 1966 were on the footing of those scales which, as aforesaid, were fixed on the basis of the index figure of 538. What the present award directs is to pay the workmen as from July 1, 1967, the wage scales calculated in accordance with the rise in the index of living cost which had taken place since the last award. The increments earned having been on the footing of the index figure of 538, there is no question of the workmen getting a double advantage.

10. The next objection to the award was that the Tribunal erred in giving effect to the award retrospectively as from July 1, 1966, that is, approximately from the date of the demand and that if at all it wanted to give such retrospective effect, the utmost that it could do was to enforce it from the date

of the reference. In some cases retrospective effect, no doubt, has been given from the date of the reference. But it is a matter of discretion for the Tribunal to decide from the circumstances of each case from which date its award should come into operation. No general rule can be laid down as to the date from which a Tribunal should bring its award in force: [see Hindustan Times v. Their Workmen, 1964-1 SCR 234 = (AIR 1963 SC 1332)]. Presumably, the Tribunal gave effect to its award from July 1966 as by that time the cost of living index had already gone up considerably and not to have done so would have been to deprive the workmen of the minimum wages commensurate with that rise in Jharkhand Collieries (Private) Ltd. v. C. G. I. T. Dhanbad, 1960-2 Lab LJ 71 (SC) and United Collieries v. Workmen, 1961-2 Lab LJ 75 (SC) the awards were made operative from the respective dates of demands and this Court did not interfere with those awards on the ground that there was thereby any breach of any recognised principle. If the Tribunal has exercised its discretion and no substantial ground is made out to show that it was unreasonably exercised, the mere fact that it has retrospectively enforced its award from the date of the demand is hardly a ground for interference with the award.

11. We now turn to the changes made by the Tribunal in the existing gratuity scheme framed by the Savarkar Tribunal. In our view, there is force in the Company's contention that the changes, namely, reduction of the qualifying period from ten to eight years in the case of termination of service by death, retirement or resignation and deletion of the qualifying period of four years in the case of termination of service by the employer were not justified. The Tribunal in fact has not given any specific reasons which necessitated the two changes.

12. It is now well settled that gratuity is a reward for good, efficient and faithful service rendered for a fairly substantial period and that it is not paid to the employee gratuitously or merely as a matter of boon but for long and meritorious service: cf. Garment Cleaning Works v. Its Workmen, 1961-1 Lab LJ 513 = (AIR 1962 SC 673) and 1959 SCR 12 = (AIR 1958 SC 578). Since the justification for gratuity is a long and meritorious service, schemes of gratuity

framed by the tribunals and approved of by this Court have always provided some qualifying period. In Indian Oxygen and Acetylene Co. Ltd., Employees Union v. Indian Oxygen and Acetylene Company, 1956-1 Lab LJ 435 (LATI-Mad.) and 1959 SCR 12 = (AIR 1958 SC 578) the qualifying period for gratuity on termination of service by resignation or retirement was fixed as 15 years. In 1961-1 Lab LJ 513 = (AIR 1962 SC 673) though the Company objected to the period of ten years and contended on the analogy of the aforesaid two decisions that it should be fifteen years, this Court gave its approval to the period of ten years in case of retirement or resignation. On the other hand in British Paints v. Its Workmen, (1966) 2 SCR 523 = (AIR 1966 SC 732) the period of five years provided by the award was changed into ten years on the ground that a fairly long minimum period for qualifying for gratuity in the case of resignation or retirement was necessary to prevent the workmen leaving one concern after another after putting in short minimum service for qualifying for gratuity. Similarly, modification from five to ten years was made in a recent decision of this Court in Calcutta Insurance Co., Ltd. v. Their Workmen, 1967-2 Lab LJ 1 = (AIR 1967 SC 1286). Though no hard and fast rule can be laid down and each case must be decided on its own circumstances the general trend as seen from a long series of decisions is in favour of ten years of qualifying service. The Tribunal in the absence of any substantial reason, was, therefore, not right in reducing the period from ten to eight years. As regards the deletion of four years minimum period in cases where the employer terminates the service also we do not find any legitimate ground for the alteration of the scheme. It was, however, said that if such a period is provided for in a scheme, it was possible that an employer would terminate the services of a workman even though the employee wants to render continuous service to enable him to earn the gratuity. This does not appear to be a legitimate apprehension for unless the employer is in a position to establish misconduct justifying termination of service under a standing order, he cannot put an end to the service only to deprive the workman of gratuity. On the other hand, there is the danger that whereas in the case of retirement or resignation the work-

man would have to put in ten years of service, if no minimum period is provided for in the case of termination by the employer it would be possible for a workman to commit some misconduct and earn gratuity within a shorter time than the one who after a long period of meritorious service retires or resigns. Since doing away with the qualifying period is likely to result in such an anomaly, it is necessary to have some qualifying minimum period. As the period of four years provided in the scheme is not under challenge before us, there is no reason to interfere with it. We, therefore, set aside the two changes made by the Tribunal in the gratuity scheme. The scheme for gratuity will therefore remain the same as framed by the Savarkar award.

13. In the result, except for the aforesaid modifications in the award, we find no reason to interfere with the award. The appeal except to the extent aforesaid, fails and is dismissed. There will be no order as to costs.

RGD. Appeal allowed in part.

**AIR 1969 SUPREME COURT 189
(V 56 C 35)**

(From Calcutta)*

M. HIDAYATULLAH, C. J., V. RAMA-SWAMI AND C. A. VAIDIA-LINGAM, JJ.

Debabrata Bandopadhyay and others, Appellants v. The State of West Bengal and another, Respondents.

Calcutta High Court, Intervener.

Criminal Appeal No. 55 of 1965, D/-2-7-1968.

(A) Criminal P. C. (1898), Ss. 517, 10 — Sessions Judge directing District Magistrate to deliver proceeds of sale of subject matter of offence to accused on his furnishing security bond to the satisfaction of the District Magistrate — Additional District Magistrate can accept the bond — Direction of Sessions Judge not mentioning in whose favour bond has to be executed — Bond in favour of State Government is not bad — Criminal Misc. Case No. 28 of 1964, D/- 16-6-1964 (Cal), Reversed.

*(Criminal Misc. Case No. 28 of 1964, D/- 16-6-1964—Cal.)

Where the Sessions Judge by his order directed the Magistrate to deliver the sale proceeds of the subject matter of the offence which were in deposit in the Court, to the accused on the accused's furnishing bond of the amount covered by the sale proceeds "to the satisfaction of the District Magistrate, Nadia":

Held that the Additional District Magistrate under the Code of Criminal Procedure could accept the bond. The practice of courts in Bengal was also against the proposition that such bonds could only be accepted by the District Magistrate, because such bonds were usually accepted by Additional District Magistrate. (Para 5)

Held further that no particular form was prescribed for the bond. It had to be devised for the purpose. There was nothing in S. 517 which excluded the use of an indemnity bond. In the absence of any order by the Sessions Judge to take the bond in the name of any particular court, a bond given by the accused in the name of the Government of West Bengal substantially (if not wholly) complied with the order of the Sessions Judge. Such a bond could be enforced against the accused without any trouble. Criminal Misc. Case No. 28 of 1964, D/- 16-6-1964 (Cal), Reversed. (Para 5)

(B) Contempt of Courts Act (1952), Section 1 — Disobedience of stay order which is ineffective. Cri. Misc. Case No. 28 of 1964, D/- 16-6-1964 (Cal), Reversed.

Payment of money in deposit in court ordered by Sessions Judge to be paid to accused. Pay order issued and accused depositing pay order in bank. Stay of pay order by Sessions Judge and High Court pending disposal of revision. Actual payment made to accused before date of issue of stay order by Sessions Judge — High Court holding officers responsible for payment guilty of contempt on ground that payment was made as result of well thought out scheme and conspiracy. Held by Supreme Court that for a conspiracy to be hatched there must be some foundation of gain or purpose. The conspirators (if they knew anything) would at least know that there was nothing to be gained by delaying the orders since the money was already paid out. The stay orders were ineffective since there was nothing to stay. The officers (one and all) could not be said to have been actuated by a motive to frustrate the stay orders. There was thus no question of undermining the authority

of the Court of Sessions Judge or of bringing the administration of justice in the District to ridicule. Nor would it be said that there was a deliberate interference with or obstruction of due course of justice. There was no doubt some delay but that was a different matter and could be dealt with in other ways than punishment for an imaginary contempt of court. Criminal Misc. Case No. 28 of 1964, D-16-6-1964 (Cal), Reversed. (Para 6)

(C) Contempt of Courts Act (1952), Sec. 4 — Contemner must offer an apology and that too clearly and at earliest opportunity — Person offering belated apology runs the risk that it may not be accepted, for such an apology hardly shows contrition which is the essence of purging of contempt — However, a man may have the courage of his convictions and may stake his all on proving that he is not in contempt and may take the risk. (Here the persons ran gauntlet of such risk and fairly succeeded).

(Para 7)

(D) Contempt of Courts Act (1952), Sections 3, 1 — Nature of contempt proceedings — Duty of court — Delay in transmission of orders of superior court to subordinate court — Contempt proceedings are not proper.

A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another, in the matter of transmission of orders of the superior courts. The remedy for it is reform and punishment departmentally. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged.

(Para 9)

Their Lordships however cautioned all concerned that orders of stay, bail, injunctions received from superior courts must receive close and prompt attention and unnecessary delay in despatching or dealing with them may well furnish

grounds for an inference that it was due to a natural disinclination to deal with the matter born of indifference and sometimes even of contumaciousness.

(Para 10)

Mr. Debabrata Mukherjee, Senior Advocate, (Mr. P. K. Chakravarthy, Advocate with him), for Appellants; Mr. D. N. Mukherjee, for Mr. P. K. Bose, Advocate, for Respondent No. 1; Mr. Niren De, Solicitor General of India and B. Sen, Senior Advocate (Mr. G. S. Chatterjee, Advocate with them), for Intervener.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The five appellants are District Magistrate of Nadia and his four assistants who have been found guilty of contempt of the High Court of Calcutta and the Sessions Court of Nadia and sentenced to fines with imprisonment in default of payment. They now appeal by special leave granted by this Court. The facts are long and need a full narration.

2. One Birendra Kumar Sarkar, Sub-Agent of Phosphate Co., Ltd. Krishnagar District Nadia, was prosecuted for contravention of the Fertiliser Control Order read with Section 7 (1) of the Essential Commodities Act and on his own plea was convicted and sentenced to Rs. 20 fine or simple imprisonment for 10 days. We are not concerned with his conviction. The fertiliser seized during investigation was sold by order of the Court and the sale proceeds held in deposit. On the conviction of Birendra Kumar the amount in deposit (Rs. 4215) was directed on March 11, 1963 to be returned to him. The same day the Phosphate Co. Ltd., applied to take out the amount and the Magistrate reversed the earlier order and directed that the amount be paid to the Company. Birendra Kumar appealed to the Sessions Judge, Nadia under Section 520 of the Code of Criminal Procedure. This appeal succeeded and on December 23, 1963, the Sessions Judge directed the magistrate to deliver the amount to Sarkar upon his furnishing security and executing a bond to the satisfaction of the District Magistrate, Nadia. On January 3, 1964 Sarkar produced a certified copy of this order and asked to be allowed to take out the amount and furnished a bond. The bond was found in order by N. C. Mookerjee Magistrate 1st Class, who recommended its acceptance. It was then accepted by A. Sen, Additional District Magistrate, Nadia. On

January 11, 1964 the accountant attached to the Court of N. C. Mookerjee reported and the latter directed issuance of a pay order. Sarkar received the pay order the same day and deposited it with his bankers (State Bank of India) on January 13, 1964.

2. On January 8, 1964 the Company expressed to the Sessions Court, its intention of moving an application for revision in the High Court at Calcutta against the order of December 23, 1963 and asked for stay. Stay was not immediately granted but notice was issued to Sarkar to show cause on January 16, 1964. Later a stay order was also sent. On January 13, 1964 the High Court issued a rule and also directed stay of operation of the Sessions Judge's order of December 23, 1963.

3. It will be seen from the above narration that the actual payment of money was made under the orders of the Sessions Judge passed on December 23, 1963 as far as back as January 11, 1964. The High Court has considered the question of the contempt of the Sessions Judge's order from the angle of the kind of bond which was accepted, and the Officers who accepted it. We shall come to it later. We shall now trace the progress of the orders which were passed by the Sessions Judge and the High Court in proceedings subsequent to January 1964. For this purpose it is sufficient to extract the summary of the events made by the High Court itself:

".....The stay order dated 14th of January, 1964 was communicated by the Sessions Judge by his Memo No. 170 and it was received by the District Magistrate's Office on 16th of January, 1964. On 20th January, 1964 Memo No. 443 Jm. containing the direction to carry out the order of the Sessions Judge dated 23rd December, 1963 was drafted by Pulak Kumar De and it was signed by another Magistrate Shri Jyotirmoy Ghose. On 22nd January, 1964 on which date the Rule issued by this Court in Criminal Revision No. 60 of 1964 was also received in the District Magistrate's Office. It was sent to the trial Magistrate's Court with Memo. No. 549 Jm. only on 29th January, 1964 and was received in the trial Magistrate's Court on 30th January, 1964. In the meantime Sessions Judge's Memo No. 170 that had been received in the District Magistrate's Office on 16th of January 1964 was also despatched to the trial Magistrate's Court on 29th of January, 1964 by Memo.

No. 554 Jm. and the trial Magistrate received it on 30th January, 1964. Sessions Judge's Memo. No. 108 dated 11th January, 1964 which was received in the District Magistrate's Office on 15th January, 1964 and is said to have been despatched to the trial Magistrate's Court on 22nd January, 1964 with Memo. No. 443 Jm. is said to have been received by the Bench Clerk of the trying Magistrate on 25th January, 1964 and put up before the Magistrate only on 1st February, 1964."

On the above facts the High Court framed the following questions:-

(1) Has there been disobedience of the order of the Sessions Judge, Nadia that money should be given to Birendra Kumar Sarkar on a Bond to the satisfaction of the District Magistrate, Nadia?

(2) Was the Bond upon which pay order for the money had been made a document that complies with the order for the Sessions Judge of Nadia dated 23rd December, 1963?

(3) Was Memo. No. 443 Jm. dated 20th January, 1964 directing to carry out Sessions Judge's order dated 23rd December, 1963 after the order of stay made by the Sessions Judge on 14th January, 1964 was received in the District Magistrate's office on 16th January 1964 by Memo. No. 108 dated 11th January 1964 an intentional violation of the stay order?

4. The first two questions were treated as interconnected and dealt with together. The High Court found fault with the bond and also opined that none else save the District Magistrate could accept the bond. With all respect, the High Court erred on both the aspects. The bond is reproduced below:

BOND

"A bond is made this day by Sri Birendra Kumar Sarkar son of late Bilash Chandra Sarkar of Chand Sarak, Krishnagar, District Nadia is hereby agreed and received Rs. 4,125 (Rupees four thousand one hundred and twenty-five only) which has been deposited in the Court in connection with C. R. Case No. 338 of 1961 and the said amount has been ordered by the Sessions Judge of Nadia in case (Criminal Appeal No. 75 of 1963), I, Birendra Kumar Sarkar s/o late Bilash Chandra Sarkar bind myself and my heirs, executors, administrators and representatives to refund the entire money if dispute arises to the Government of West Bengal or its successors.

I bind myself, my heirs, executors, administrators and representatives firmly by this bond signed in my own hand dated this the 3rd day of January, 1964.

Sd/- Birendra Kumar Sarkar,
3-1-1964

Signature of the executant
Signed in my presence
and identified.

Rajendranath Biswas,
Muktgarh.

Krishnagar, 3-1-1964."

5. Now it is admitted that there is no prescribed form of bond applicable to the case. The form had to be devised for the purpose. The bond which was taken is an ordinary indemnity bond. There is nothing in the words of Section 517, Criminal Procedure Code, which excluded the use of an indemnity bond. The Sessions Judge did not order that the bond should be taken in the name of any particular court. A bond in the name of the Government of West Bengal substantially (if not wholly) complied with the order of the Sessions Judge. It could be enforced against Sarkar without any trouble. The further point that only the District Magistrate could accept the bond ignores the powers of the Additional District Magistrate under the Code of Criminal Procedure. The practice of courts in Bengal is also against the proposition because such bonds are usually considered for acceptance by Additional District Magistrates. The High Court apparently thinks that the District Magistrate was a persona designata for the purpose. We are unable to read such an inference in the order of the Sessions Judge which read:

"The learned Magistrate be directed to deliver the sale proceeds which are now deposit (sic) in Court to the accused on the accused's furnishing bond of the amount covered by the sale proceeds to the satisfaction of the District Magistrate, Nadia."

In our judgment the High Court could not base any action on such material. It may be pointed out that the High Court did not throw into the balance the acceptance of the bond by the Additional District Magistrate holding that there was room for an error there but took serious note of the fact that the bond was not in the proper form. We do not agree with the High Court.

6. This brings us to the last question. The fact here is that the orders took some time before reaching their destina-

tion. While we do not condone such delays, we think that the High Court was taking too strict a view of the matter. Two things seem to have played a prominent part in the drawing of the inference against the concerned officers. The first is that there was an intentional disobedience of the orders. This the High Court visualised in the following terms:

"That by itself bespeaks of a well throughout (sic) scheme to achieve an end and that end is the cherished goal to make over the money to Birendra Kumar Sarkar by violating the stay order of the Sessions Judge dated 14th January, 1964. For carrying out that scheme the file in which the order sheet started on 3rd January, 1964, was started separately and to seclude the features in that file it was withheld from this Court when return was made to the Rule in Criminal Revision Case No. 60 of 1964 until it was thought useful for making a defence in this Contempt Rule. No other view of the matter could be suggested by the three learned Advocates appearing for the several parties or the learned Advocate for the State, Mr. Fanindra Mohan Sanyal, and no other view is possible." Now it seems quite impossible to subscribe to this opinion. For a conspiracy to be hatched there must be some foundation of gain or purpose. The conspirators (if they knew anything) would at least know that there was nothing to be gained by delaying the orders since the money was already paid out. Once that had happened some fresh order would be necessary to demand back the amount from Sarkar or the bond would be enforced. The stay orders were ineffective since there was nothing to stay. To think that the officers (one and all) were actuated by a motive to frustrate the stay orders is to imagine a state of affairs for which there was no warrant at all. There was thus no question of 'undermining the authority of the Court of Sessions Judge' or of bringing the 'administration of justice in the District of Nadia to ridicule'. Nor can it be said that there was a deliberate interference with or obstruction of due course of justice. There was no doubt some delay but that was a different matter and could be dealt with in other ways than punishment for an imaginary contempt of court.

7. The second point which the High Court unfortunately placed at the very forefront was failure to offer an apology

and noted with great show of emotion that none was offered. Of course, an apology must be offered and that too clearly and at the earliest opportunity. A person who offers a belated apology runs the risk that it may not be accepted for such an apology hardly shows the contrition which is the essence of the purging of a contempt. However, a man may have the courage of his convictions and may stake his all on proving that he is not in contempt and may take the risk. In the present case the appellants ran the gauntlet of such risk and may be said to have fairly succeeded.

8. The High Court was extremely hard upon the appellants in his case. Details collected from the files of the case having no bearing upon the question of contempt were freely used. They carry no convincement. There are observations which in their tone do show that the matter was not approached in that cool manner in which the High Court considers contempt of itself or of courts subordinate to it. This is a matter of regret to this Court.

9. A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. It behoves the court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate practices in courts and tribunals. It is only when a clear case of *contumacious conduct* not explainable otherwise, arises that the contemner must be punished. It must be realised that our system of courts often results in delay of one kind or another. The remedy for it is reform and punishment departmentally. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority. To take action in an unclear case is to make the law of contempt do duty for other measures and is not to be encouraged.

10. In this case, no doubt there was some avoidable delay but as pointed out above it was the result of our system of transmission of orders of superior courts which must pass through several hands and not the product of design or defiance of the superior courts. In these circumstances, it cannot be said that there was contempt of the authority of the High Court or of the Sessions Judge and the several appellants could not be convicted or punished. In this view of the matter

we set aside their convictions and order for refund of their fines. We, however, caution all concerned that orders of stay, bail, injunctions received from superior courts must receive close and prompt attention and unnecessary delay in despatching or dealing with them may well furnish grounds for an inference that it was due to a natural disinclination to deal with the matter born of indifference and sometimes even of *contumaciousness*.

RGD

Convictions set aside.

**AIR 1969 SUPREME COURT 193
(V 56 C 36)**

(From Patna: AIR 1963 Pat 46)
J. C. SHAH AND V. BHARGAVA, JJ.
Kuchwar Lime and Stone Co. (in both the Appeals), Appellant v. M/s. Dehri Rohtas Light Railway and Co. Ltd., and another (in both the Appeals), Respondents.

Civil Appeals Nos. 987 and 988 of 1965, D/- 15-7-1968.

Railways Act (1890), S. 56 — Coal consigned to Company by Colliery on orders and sanction of Deputy Coal Commissioner (Distribution) under Colliery Control Order, 1945 which was then in force — Sanction and order at instance of Company — Wagons supplied by Railway on order by Coal Commissioner — Refusal of Company to take delivery — Railway selling coal and suing company for demurrage — Normally consignee is liable — On facts also held, that Colliery acted as agent of company — Duty of Railway pointed out — Extent of liability of consignee — Contract Act (1872), Ss. 2, 186 and 149 — Railway Coaching Tariff Rules, R. 108 (2) and (8) — Tort — Damages — Duty to minimise.

At the material time coal was a controlled commodity; supply and delivery of coal could be made only under orders issued by the Coal Controller. Sale and delivery of coal were governed by the Colliery Control Order, 1945 issued under Rule 81 of the Defence of India Rules and continued under the Essential Supplies (Temporary Powers) Act, 1946, and the Bihar Coal Control Order, 1947. Coal could not be sold by a Colliery except under an order of the Coal Commissioner or his Deputy. The Deputy Coal Commissioner (Distribution) issued

an order, sanctioning the supply of steam coal by the East Keshalpur Colliery to the appellant Company. By that order a priority supply of wagons was also sanctioned in favour of the Company for transport of coal to the Banjari railway station. It was also recorded in the order that the quantity of coal mentioned in the order "had been sanctioned on the account of the Company" and that sanction for priority supply of wagons had also been accorded, and the Company was advised to instruct the Colliery to indent for wagons accordingly and to quote the sanction number given in the order when so indenting. Pursuant to the allotment of coal an order was placed on July, 14, 1954 on behalf of the Company, for supply of steam coal to the Company at Banjari railway station. Colliery despatched coal by railway. The wagons of coal arrived at Banjari Railway Station. The Company declined to take delivery and intimated the Colliery and the Railway by their letters that it was not liable for loss resulting from the detention of wagons. After waiting for sometime, the Railway informed the Company that they had decided to dispose of the consignment of coal under the Railways Act by public auction and claimed that they were entitled to demurrage which had accrued due till then. The Coal Controller Bihar, advised the Railway to dispose of the coal lying undelivered "according to prevailing railway rules" by public auction. The Railway thereafter sold the consignment of coal and sued the Company in a sum representing demurrage. It was contended by the Company that it being a consignee of the goods booked by the Colliery there was no privity of contract between the Company and the Railway and no claim for demurrage or freight lay at the instance of the Railway against the Company:

Held that normally the liability for payment of demurrage charges lay upon the consignee for whose convenience the wagon was detained. Even where the consignee did not ultimately take delivery, if the wagon was detained for his benefit, normally the Railway would be entitled to hold him liable for demurrage. (Para 7)

Having regard, however, to the circumstances in which the goods were loaded by the Colliery, there could be no doubt that the Colliery was acting as an agent of the Company for the purpose of arranging for transport of coal in

which the property had, under the orders of the Coal Commissioner, passed to the Company. Under the forwarding notes the freight was made payable by the Company. In the circumstances, it would be reasonable to infer that the Colliery acted as an agent for the Company in entering into the contract of consignment and the liability for payment of freight and of demurrage charges for failure to take delivery of the goods was upon the Company. (Para 8)

Held further that the Railway had undoubtedly power to sell the consignment of coal under S. 56 of the Railways Act after serving notice upon the owner. But the Railway was after expiry of a reasonable period which might be necessary for taking delivery, in the position of a bailee qua the Company and was bound to minimise the loss: it could not unreasonably detain the wagons and claim demurrage. Even granting that in view of the Colliery Control Orders, without the sanction of the Coal Commissioner, the Railway could not sell coal (on this question their Lordships expressed no opinion), the Railway could have unloaded the coal from the wagons and put the wagons to use. After the wagons were unloaded the consigned would be liable only for wharfage. Under Part I of the Coaching Tariff, R. 108 provides for the treatment and disposal of unclaimed articles. Clause (2) of Rule 108 provides for rate of wharfage for unclaimed booked articles. The Company had given intimation that it will not take delivery of the goods and therefore it was the duty of the Railway to sell the goods by public auction without delay. In failing to take any action for more than six months the Railway did not act reasonably. The Railway having regard to all the circumstances, was entitled to demurrage for detention of the wagons for one month only and not for 202 days as claimed by it. (Paras 9, 10)

Mr. S. V. Gupte, Senior Advocate, (Mr. P. K. Chatterjee, Advocate, with him), for Appellant (in both the Appeals); Mr. R. Gopalakrishnan, Advocate, for Respondent No. 1; Mr. K. K. Sinha, Advocate, for Respondent No. 2 (in both the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.: The East Keshalpur Colliery—hereinafter called 'the Colliery—booked, in the months of July-August

1954, a consignment of steam coal at the Kusunda railway station on the Eastern Railway for carriage by rail to the Banjari station on the Dehri Rohtas Light Railway. The coal was consigned to the Kuchwar Lime and Stone Company—hereinafter called 'the Company'—and the company was to pay the freight. Out of the five wagons in which the coal was loaded three reached Banjari and coal was delivered to the Company, and no dispute arises with regard to those three wagons in these appeals. The contents of the remaining two wagons weighing 60 tons were re-loaded en route into six smaller wagons of the Dehri Rohtas Light Railway—hereinafter called 'the Railway'. The consignment reached Banjari railway station on November 12, 1954. The Company declined to accept the consignment. There was thereafter correspondence between the Railway Administration, the Coal Controller, the Colliery and the Company. Ultimately the Railway Administration served a notice on April 28, 1955, on the Company and the Colliery that they intended to sell the coal of which delivery was not taken, and on June 2, 1955, the coal was sold for Rs. 1,050. Claiming that it was entitled to demurrage for 202 days during which its wagons were detained at the rate of Rs. 90 per day, the Railway filed an action against the Colliery and the Company in the Court of the Subordinate Judge, Sasaram, for a decree for Rs. 17,625/14/- being the charges for demurrage and freight payable in respect of the consignment less Rs. 1,050 realised from sale of the coal. The suit was decreed by the Subordinate Judge against the Company for Rupees 1,620/10/- with interest thereon at the rate of 6 per cent per annum from December 19, 1957 till realization and proportionate cost. The suit was dismissed against the colliery.

2. Against the decree, the Company and the Railway appealed to the High Court of Patna. The High Court modified the decree passed by the Trial Court and decreed the claim of the Railway against the Company in full. With certificate granted by the High Court under Article 133 (1) (c) of the Constitution these two appeals have been preferred by the Company which have been consolidated for trial.

3. Two contentions are raised in support of these appeals:

(1) that the Company being a consignee of the goods booked by the Col-

liery there was no privity of contract between the Company and the Railway and no claim for demurrage or freight lay at the instance of the Railway against the Company; and

(2) that in any event the Railway ought to be awarded demurrage for only 22 days out of the total period for which the wagons were detained.

4. At the material time coal was a controlled commodity: supply and delivery of coal could be made only under orders issued by the Coal Controller. Sale and delivery of coal were governed by the Colliery Control Order, 1945 issued under Rule 81 of the Defence of India Rules and continued under the Essential Supplies (Temporary Powers) Act, 1946, and the Bihar Coal Control Order, 1947. It was common ground that coal could not be sold by a Colliery except under an order of the Coal Commissioner or his Deputy. On July 13, 1954, the Deputy Coal Commissioner (Distribution) issued an order addressed to the Divisional Superintendent, Eastern Railway, sanctioning the supply of 110 tons of steam coal by the East Kesharpur Colliery to the Company. By that order a priority supply of wagons was also sanctioned in favour of the Company for transport of coal to the Banjari railway station. It was also recorded in the order that the quantity of coal mentioned in the order "had been sanctioned on the account of the Company" and that sanction for priority supply of wagons had also been accorded, and the Company was advised to instruct the Colliery to indent for wagons accordingly and to quote the sanction number given in the order when so indenting. Copies of the order were sent to the Colliery and the Company. Pursuant to the allotment of coal an order was placed on July 14, 1954 by the Coal Suppliers Ltd., acting on behalf of the Company, for supply of steam coal to the Company at Banjari railway station. In July and August forwarding notes were submitted by the Colliery for despatch of steam coal III-B to the Company. The Company received three wagons of Coal sometime in August 1954. The Company was not satisfied with the quality of coal supplied, and made complaints in that behalf to the Colliery by their letters dated August 18, 1954 and September 1, 1954. The balance of the consignment reached Banjari on November 12, 1954, but the Company declined to take delivery and intimated the Col-

liery and the Railway by their letter dated November 23, 1954 that it was not liable for loss resulting from the detention of wagons. On November 30, 1954 the Company wrote a letter to the Deputy Coal Commissioner (Distribution) requesting that the Coal Controller, Bihar, be moved to sanction disposal of coal of which delivery was not taken. A copy of the letter was sent to the Company. On January 24, 1955 the Railway wrote to the Coal Area Superintendent, Eastern Railway, intimating that the Company had refused to take delivery of coal, and asked for immediate instructions of the Colliery for its disposal. On February 21, 1955 the Railway again wrote to the Coal Area Superintendent stating that the goods will be sold by auction if nothing (was?) heard from him within a fortnight from that date. On April 28, 1954, the Railway informed the Company that they had decided to dispose of the consignment of coal under the Indian Railways Act by public auction and claimed that they were entitled to demurrage which had accrued due till then. On May 18, 1955, the Coal Controller Bihar, advised the Railway to dispose of the coal lying undelivered "according to prevailing Railway rules" by public auction. The Railway thereafter sold the consignment of coal on June 2, 1955.

5. The Colliery Control Order, 1945, was issued in exercise of Rule 81 of the Defence of India Rules and was continued thereafter under the Essential Supplies (Temporary Powers) Ordinance, 1946 which was replaced by the Essential Supplies (Temporary Powers) Act, 1946. By Clause 5 of the Order it was provided that no colliery owner, and no person acting on behalf of a colliery owner shall sell, agree to sell, or offer to sell, coal at a price different from the price fixed in that behalf under Cl. 4. By Clause 6 (1) it was provided that where a colliery owner has signified to the Deputy Coal Commissioner (Distribution) in writing his willingness to sell direct to consumers and an allotment is made by the Deputy Coal Commissioner (Distribution) to a consumer with his consent for such direct sale, the coal shall be delivered to the consumer at the price fixed under Clause 4. Clause 8 of the order provides that the Central Government may from time to time issue such directions as it thinks fit to any colliery owner in regulating the disposal of his stocks of coal or of the expected

output of coal in the colliery during any period including directions as to the person or class or description of persons to whom coal shall or shall not be disposed of, the order of priority to be observed in such disposal, and the staking of coal on Government account. The order issued by the Coal Controller was in exercise of the power under Clause 8 of the Colliery Control Order. No reference to any specific provision of the Bihar Coal Control Order need be made, because counsel have placed no reliance thereon.

6. Having regard, however, to the circumstances in which the goods were loaded by the Colliery, there can be no doubt that the Colliery was acting as an agent of the Company for the purpose of arranging for transport of coal in which the property had under the orders of the Coal Commissioner passed to the Company. The Colliery arranged to load the coal at the Kusunda Railway station pursuant to the order for supply of coal sanctioned by the Coal Commissioner to the Company in the wagons allotted to the Company for transporting coal to Banjari. It is clear that the Colliery supplied coal in pursuance of the "sanction order" in favour of the Company and arranged to transport it to Banjari in wagons which were allotted for that purpose by order of the Deputy Coal Commissioner. Under the forwarding notes the freight was made payable by the Company. In the circumstances, it would be reasonable to infer that the Colliery acted as an agent for the Company in entering into the contract of consignment and the liability for payment of freight and of demurrage charges for failure to take delivery of the goods lay upon the Company.

7. Normally the liability for payment of demurrage charges lies upon the consignee for whose convenience the wagon is detained. As stated in Halsbury's Laws of England, 3rd Edn., Vol. 31, at p. 724:

"The party primarily liable to pay the demurrage is the party for whose convenience the wagons are detained."

We are unable to accept the argument of Mr. Gupte on behalf of the Company that it is only in those cases where delivery of goods is taken by the consignee that the liability to pay demurrage may be imposed upon him. Even where the consignee does not ultimately take delivery, if the wagon is detained for his benefit, normally the Railway would be

entitled to hold him liable for demurrage. We are unable, therefore, to hold that the Company was not liable to pay freight or demurrage charges, because the Colliery had entered into the contract of consignment with the Railway.

8. But in our view the High Court was in error in holding that the Company was liable to pay demurrage for the full period of 202 days. The six wagons containing 60 tons of coal reached Banjari railway station on November 12, 1954. Before that date and thereafter the Company had declined to take delivery of the coal. The Railway had undoubtedly power to sell the consignment of coal under Section 56 of the Railways Act after serving notice upon the owner. But the Railway was, after expiry of a reasonable period which may be necessary for taking delivery, in the position of a bailee qua the Company and was bound to minimise the loss: it could not unreasonably detain the wagons and claim demurrage. Even granting that in view of the Colliery Control Orders, without the sanction of the Coal Commissioner, the Railway could not sell coal (on that question we express no opinion), the Railway could have unloaded the coal from the wagons and put the wagons to use. After the wagons were unloaded the consignee would be liable only for wharfage. Under Part I of the Coaching Tariff, Rule 108 provides for the treatment and disposal of unclaimed articles. Under Clause (2) of Rule 108 it is provided that for unclaimed booked articles, wharfage of two annas per maund or part of a maund for 24 hours or part of 24 hours with a minimum charge for one maund is levied, if they are not removed from railway premises within 48 hours from midnight of the day of arrival. By Clause (8) it is provided:

"Public sales by auction will be held from time to time of all unclaimed or lost property which has remained in the possession of the railway for the period mentioned below:—

(i) unclaimed or lost property other than foodgrains which has remained in the possession of the railway for over three months;

(ii) unclaimed foodgrains which have remained in the possession of the railway for two months.

At least 15 days previous notice of each

auction will be given by advertisement in a newspaper."

9. Clause 20 in Part II of the Goods Tariff provides:

"(a) On all goods brought on to a railway station and waiting for despatch without any forwarding note tendered for the same and all goods not removed from a railway station although the same is available for delivery a wharfage charge is made on the Dehri Rohtas Light Railway at the following rate:"

(Then follows a schedule of rates, which is not material.)

10. The Railway apparently made a claim of demurrage for detention of wagons for 202 days on the footing that the coal was not unloaded from the wagons until it was sold by public auction. It was, however, the duty of the Railway to minimise the loss by unloading the coal after expiry of a reasonable period after arrival of the consignment and to take early steps to sell the coal. The Company had given intimation that it will not take delivery of the goods and therefore it was the duty of the Railway to sell the goods by public auction without delay. The value of the coal was not more than Rs. 500 and the freight payable was approximately Rs. 500. When sold in the month of June 1955 the coal fetched Rs. 1,050. In failing to take any action for more than six months in our judgment, the Railway did not act reasonably. We are of the view that the Railway having regard to all the circumstances, is entitled to demurrage for detention of the wagons for one month only. On that footing the Railway is entitled to Rs. 2,700 as demurrage and Rs. 495-14-0 which is payable by the Company as freight, less Rs. 1,050 realised by sale of coal. The Railway is accordingly entitled to a decree for Rs. 2,145/14/-.

11. We accordingly modify the decree passed by the High Court and decree the claim of the Railway for Rs. 2,145/14 with proportionate costs throughout. The Railway will pay the costs of the Company proportionate to the amount for which its claim has been dismissed in all the three Courts. The order passed by the Trial Court in favour of the Colliery directing the Railway to pay the costs is maintained. There will be one hearing fee in this Court. There will be no order as to costs of the Colliery in this Court.

Decree modified.

AIR 1969 SUPREME COURT 198
(V 56 C 37)

(From Kerala: AIR 1968 Ker 223)

J. M. SHELAT AND K. S. HEGDE, JJ.

Suresh Koshy George, Appellant v.
University of Kerala and others, Respondents.Civil Appeal No. 990 of 1968, D/- 15-
7-1968.

(A) Education — Kerala University Act (14 of 1957), Sections 19N, 28 and Statute I, Ch. VII, Cl. 3 (xxvii) — Misconduct by student in examination — Inquiry — Appointment of person other than Principal of the concerned College as Inquiry Officer — Legality — (Natural Justice — Principles).

The rule under which the Vice-Chancellor was required to request the Principal of the concerned college to appoint an Inquiry Officer is not a statutory rule. It is one of the Rules framed by the Syndicate merely for the guidance and which could not be framed under Section 28 of the Act. Where, therefore, under the powers so delegated by the Syndicate, the Vice Chancellor of the University appoints a retired Principal of certain Engineering College to inquire into the misconduct of a student in an examination, instead of the Principal of the College concerned who was the father of the examinee, it cannot be said that by appointing the other Principal as the Inquiry Officer, the Vice Chancellor had either breached any statutory rule or contravened any principle of natural justice. (Para 6)

(B) Education — Kerala University Act (14 of 1957) — Statutes under — Statute I, Chap. VII, Cl. 3 (xvii) — Constitution of India, Article 226 — Misconduct by student in examination — Inquiry into — Show cause notice to student after inquiry — Report of inquiry not given to student — Not a breach of rule of natural justice — (Natural Justice — Principles).

The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions. (1949) 1 All ER 109 and 1915 AC 120, Rel. on. (Para 7)

The requirements of natural justice in case of an enquiry of this kind are, first,

that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. There is really nothing more. 1918 AC 557 and (1958) 2 All ER 579, Rel. on. (Para 11)

Thus where in the case of misconduct of a student in a University Examination there was a fair inquiry against the student; the officer appointed to inquire was an impartial person; he could not be said to have been biased against the student; the charge against the student was made known to him before the commencement of the inquiry; the witnesses who gave evidence against him were examined in his presence and he was allowed to cross-examine them and lastly he was given every opportunity to present his case before the Inquiry Officer;

Held that it could not be contended that there was any breach of the principles of natural justice even if the Vice-Chancellor did not make available to the student a copy of the report submitted by the Inquiry Officer particularly when the examinee had not asked for it. Case law referred to. (Para 11)

(C) Constitution of India, Article 311 — Disciplinary proceedings under — Requirements of principles of natural justice — Second inquiry after show cause notice or giving of copy of report — Not necessary in every case — (Natural Justice — Principles).

The impression that Article 311, particularly as it stood before its amendments required that every disciplinary proceeding must consist of two inquiries, one before issuing the show cause notice to be followed by another inquiry thereafter, is not correct. Such is not the requirement of the principles of natural justice. Law may or may not prescribe such a course. Even if a show cause notice is provided by law, from that it does not follow that a copy of the report on the basis of which the show cause notice is issued should be made available to the person proceeded against or that another inquiry should be held thereafter. (Para 15)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 875 (V 53) = 1963 (3) SCR 767, Board of the High School and Intermediate Education U. P. v. Baleshwar Prasad

- (1962) 1962 AC 322 = 1962-2
WLR 1153, B. Surinder Singh
Kanda v. Govt. of the Federation
of Malaya
- (1960) 1960-1 All ER 631 = 1960-1
WLR 223, University of Ceylon
v. Fernando
- (1958) AIR 1958 SC 398 (V 45) =
1958 SCR 1240, Nagendra Nath
Bora v. Commr. of Hills Division
- (1958) 1958-2 All ER 579 = 1958-1
WLR 762, Byrne v. Kinemato-
graph Renters Society
- (1957) AIR 1957 SC 232 (V 44) =
1957 SCR 98, New Prakash Trans-
port Co. v. New Suwarna Trans-
port Co. Ltd.
- (1949) 1949-1 All ER 109 = 65 TLR
225, Russel v. Duke of Norfolk
- (1943) 1943-2 All ER 337 = 1943
AC 627, General Council of
Medical Education and Regis-
tration of the United Kingdom v.
Spackman
- (1918) 1918 AC 557, De Verteuil
v. Knaggs
- (1915) 1915 AC 120 = 84 LJKB
72, Local Govt. Board v. Arlidge
- (1911) 1911 AC 179 = 80 LJKB
796, Board of Education v. Rice

Mr. S. V. Gupte, Senior Advocate (Mr. A. S. Nambiar and Miss Lily Thomas, Advocate, with him), for Appellant; Dr. V. A. Seyid Muhammad, Senior Advocate (Mr. P. Kesava Pillai, Advocate for Mr. M. R. K. Pillai, Advocate, with him), for Respondents (Nos. 1 and 3).

The following Judgment of the Court was delivered by

HEGDE, J.: This appeal by special leave from the decision of the Division Bench of the Kerala High Court arises from the disciplinary action taken by the Kerala University against the appellant. He was a student in the 1st year Degree Course of the Five Year Integrated course of Engineering, in the Engineering College, Trichur during the academic year 1964-1965. The Vice Chancellor of the said University came to the conclusion that he was guilty of malpractice during the examination held in April 1965 and consequently debarred him from appearing in any examination till April 1966.

2. In the examination in question the appellant had to appear in two papers in Mathematics. In this case we are concerned with the mathematics I paper. The Additional Examiner who valued

that paper awarded the appellant 14 per cent marks but the Chief Examiner gave him 64 per cent in that paper. The appellant had answered questions Nos. 1 (a), 5 (a), 9 (a) and 4 (a) in the main answer book and secured 0, 2 out of 6, 0 and 0 marks respectively from the Additional Examiner. Pages 6-11 of his main answer book were left blank. There were some additional answer books certain pages of which were also left blank. Two of the additional answer books were also unused and left blank. In the used additional answer book questions 1 (a) and 9 (a) which the appellant had already answered in the main answer book and for which he had secured 0 marks from the Additional Examiner were found re-answered and for these he secured 100 per cent marks from the Chief Examiner. The Chairman of the Board of Examinations, noticing this unusual feature reported the matter to the Board of Examiners in Mathematics. The Board suggested that the University should take up the matter. The University thereafter called for the answer books of the appellant and the same were handed over to the Dean of the Faculty of Science who is the Convener of the Standing Committee for Examinations of the University for scrutiny. That official suspected that the additional books must have been inserted after the Additional Examiner had valued the paper and therefore suggested to the University that a high powered committee should be constituted to go into the matter. Accordingly a committee consisting of the Chairman of the Board of Engineering Examinations who is the Dean of the Faculty of Engineering, Chairman of the Mathematics Section of the Engineering Examinations, the Dean of Faculty of Science who is the Convener of the Standing Committee on Examinations, and the Registrar of the University was constituted to go into the matter. That committee after inquiry in which the Additional Examiner, the Chief Examiner as well as the appellant were examined came to the conclusion that the appellant was guilty of malpractice which called for disciplinary action. Consequently the Vice Chancellor ordered a formal inquiry as required by rules. He appointed the second respondent, a retired Principal of the University College, Tri-
vandrum as Inquiry Officer for conducting the inquiry. After inquiry the second respondent submitted a report holding the appellant guilty of malpractice during

the examination in question. He opined that subsequent to the valuation of the paper by the Additional Examiner, the appellant had inserted additional answer books with the collusion of the Chief Examiner. On the basis of that report a show-cause notice was issued to the appellant by the Vice Chancellor. The appellant submitted his explanation in response to that notice. Not being satisfied with that explanation the Vice Chancellor passed an order debarring the appellant from appearing for any examination till April, 1966. The same was subsequently approved by the Syndicate. The Order of the Vice Chancellor was impugned before the High Court in a Petition under Article 226 of the Constitution. A Single Judge of the High Court who heard the matter at the first instance allowed the petition and set aside that order but his decision was reversed in appeal by a Division Bench of that High Court. The appellant appeals to this Court against that decision.

3. Before the High Court as well as in this court the impugned order was assailed on two grounds viz.—(1) the formal inquiry required under the rules should have been conducted by an officer designated by the Principal of the College in which the appellant appeared for his examination i. e., the Examination Centre and hence there was no proper inquiry and (2) the impugned order was invalid inasmuch as no copy of the report made by the second respondent was made available to the appellant before he was called upon to submit his explanation in response to the show-cause notice issued to him by the Vice-Chancellor.

4. Those contentions appealed to the learned Single Judge but the Judges of the Division Bench found no merit in them. Those very contentions have again been repeated before us.

5. Before examining those contentions it is necessary to mention a few more facts. The Kerala University is governed by Kerala University Act, 1957. The Engineering College, Trichur is affiliated to the Kerala University. Under Section 19N of the Kerala University Act, the control over the discipline of the students is vested with the Syndicate of the University. Clause (V) of that section empowers the Syndicate to delegate any of its powers to the Vice Chancellor. Clause 3 (xxvii) of Chapter VII of the 1st Statutes says:

XX XX XX

The Syndicate shall, in addition to the powers and duties conferred and imposed on it by the Act and subject to the provisions thereof, have and exercise the following powers and functions:—

(xxvii) subject to the provisions in the Laws, to take cognizance of any misconduct by any student in a college or institution or in a hostel or approved lodging or by any student who seeks admission to a University course of study or by any candidate for any university Examination, brought to the notice of the Syndicate by the head of the institution or by a member of any Authority of the University or by the Registrar of the University or by a Chairman of a Board of Examiners or by a Chief Superintendent at any centre of examination and to punish such misconduct by exclusion from any University Examination or from any University course in a college or in the University or from any Convocation for the purpose of conferring degrees, either permanently or for a specified period, or by the cancellation of the University examination for which he appeared or by the deprivation of any University scholarship held by him or by cancellation of any University prize or medal awarded to him or by such other penalty as it deems fit."

Admittedly the Syndicate delegated the above power to the Vice Chancellor under Exh. Rule 5, a set of rules framed by the Syndicate. These rules are not statutory rules. They are merely rules for guidance. They could not have been framed under Section 28 of the Kerala University Act. No other provision in that Act empowers the Syndicate to frame rules. But the delegation of powers made under those rules is valid as no fixed procedure is prescribed in that regard. Those rules provide that on the receipt of a complaint against a student the Vice Chancellor should get an inquiry made in respect of that complaint by an officer designated by the Principal of the College in which the concerned student appeared for his examination. They further provide that on receipt of the report of the Inquiry Officer the Vice Chancellor after consultation with the sub-Committee on discipline should take a provisional decision, that decision should be communicated to the student who should be called upon to show cause against the provisional decision and after receiving his repre-

sentation, if any, the Vice Chancellor should pass appropriate final orders.

6. In this case the Principal of the College in which the appellant appeared for his examination was not requested to appoint an Inquiry Officer. The Inquiry Officer was directly appointed by the Vice Chancellor himself. The reason for this course is obvious. The Principal in question was the father of the appellant. The Vice Chancellor therefore thought it proper that he himself should appoint some independent person as the Inquiry Officer. We have earlier seen that the rule under which the Vice Chancellor was required to request the Principal of the concerned college to appoint an Inquiry Officer is not a statutory rule. That rule merely laid down a convenient procedure. Hence the Vice Chancellor cannot be said to have contravened any law in appointing the Inquiry Officer. It cannot be said and it was not said that the steps taken by the Vice Chancellor were in contravention of the principles of natural justice. The second respondent as mentioned earlier is a retired Principal of an Engineering College, a responsible person and highly qualified for the task entrusted to him. His disinterestedness was never challenged at any stage of the inquiry. In our opinion, the Division Bench of the High Court rightly negatived the contention that by appointing the second respondent as the Inquiry Officer, the Vice Chancellor had either breached any statutory rule or contravened any principle of natural justice.

7. The only other contention that was taken before the Division Bench and repeated in this Court was that inasmuch as the Vice Chancellor did not make available to the appellant a copy of the report submitted by the second respondent before he was called upon to make his representations against the provisional decision taken by him, there was breach of the principles of natural justice. The appellant had been duly informed of the charge against him long before the inquiry began; the inquiry was held after due notice to him and in his presence; he was allowed to cross-examine the witnesses examined in the case and he was permitted to adduce evidence in rebuttal of the charge. No rule either statutory or otherwise was brought to our notice which required the Vice Chancellor to make available to the appellant a copy of the report submitted by the Inquiry Officer. It is not the case of the appellant

that he asked for a copy of that report and that was denied to him. The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions.

8. In *Russel v. Duke of Norfolk*, 1949-1 All ER 109 at p. 118, Tucker, L. J. observed:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

9. In *Local Government Board v. Arlidge*, 1915 AC 120, Viscount Haldane, L. C. observed:

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must become to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the

interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education v. Rice*, 1911 AC 179 he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus."

10. In the above case the Local Government Board acted solely on the basis of a report submitted by one of the Housing Inspectors of the Board after a public inquiry. The House of Lords held that the procedure adopted did not contravene the principles of natural justice. In *De Verteuil v. Knaggs*, 1918 AC 557, the Judicial Committee of the Privy Council observed while considering the scope of the powers of the Governor under Section 2 of the Immigration Ordinance of Trinidad:

"Their Lordships are of opinion that in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice."

11. In *Byrne v. Kinematograph Renters Society Ltd.*, 1958-2 All ER 579 Lord Harman, J. observed:

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

The decision of the Judicial Committee in *University of Ceylon v. Fernando*, 1960-1 All ER 631 appears to go much further than what was laid down in the aforementioned cases. For the purpose of this case it is not necessary to take assistance from the ratio of that decision. Suffice it to say that in the case before us there was a fair inquiry against the appellant; the officer appointed to inquire was an impartial person; he cannot be said to have been biased against the appellant; the charge against the appellant was made known to him before the commencement of the inquiry; the witnesses who gave evidence against him were examined in his presence and he was allowed to cross-examine them and, lastly he was given every opportunity to present his case before the Inquiry Officer. Hence we see no merit in the contention that there was any breach of the principles of natural justice. It is true that the Vice Chancellor did not make available to the appellant a copy of the report submitted by the Inquiry Officer. Admittedly the appellant did not ask for a copy of the report. There is no rule requiring the Vice Chancellor to provide the appellant with a copy of the report of the Inquiry Officer before he was called upon to make his representation against the provisional decision taken by him. If the appellant felt any difficulty in making his representation without looking into the report of the Inquiry Officer, he could have very well asked for a copy of that report. His present grievance appears to be an after-thought and we see no substance in it.

12. Mr. S. V. Gupte, the learned counsel for the appellant, in support of his contention that the failure of the Vice Chancellor to make available to the appellant a copy of the report submitted by the Inquiry Officer is an infringement of the principles of natural justice, placed strong reliance on the decision of the Judicial Committee in *B. Surinder Singh Kanda v. Government of the Federation of Malaya*, 1962 AC 322. There-

in, at the instance of the Commissioner of Police, a preliminary inquiry was held against S. S. Kanda. Thereafter a formal inquiry was ordered. On the basis of the conclusions reached at the formal inquiry Surinder Singh Kanda was dismissed. Kanda challenged his dismissal in an action brought in the High Court of Malaya. During the pendency of that proceeding, it came to light that the report made by the Board which held the preliminary inquiry,—a report which was highly prejudicial to Kanda—had been placed in the hands of the officer who held the formal inquiry but neither the copy of that report nor its substance had been made available to Kanda. That report was likely to have prejudiced the Inquiry Officer against Kanda. Under those circumstances the Judicial Committee came to the conclusion that the inquiry held was not fair and consequently quashed the order dismissing Kanda. The ratio of that decision has no application to the present case. The decision of the House of Lords in General Council of Medical Education and Registration of the United Kingdom v. Spackman, 1943-2 All ER 337 does not bear on the question under consideration. Therein the House of Lords held that the General Medical Council was not right in declining an opportunity being given to Dr. Spackman to show that the conclusion of the Divorce Court that he was guilty of infamous conduct was not correct. In that case the General Medical Council took action against Dr. Spackman solely on the basis of the conclusions reached by the Divorce Court in Pepper v. Pepper. Dr. Spackman wanted to negative the court's finding of adultery by tendering evidence which though available was not called in the divorce proceedings. The House of Lords held that the Council's refusal to take fresh evidence prevented there being the due inquiry required by Section 29 of the Medical Act, 1858 and therefore an order of certiorari was granted.

13. The scope of the principles of natural justice as explained by the English Courts was adopted by this court in a large number of cases. See New Prakash Transport Co. v. New Suvarna Transport Co., 1957 SCR 98 = (AIR 1957 SC 232) and Nagendra Nath Bora v. The Commissioner of Hills Division, 1958 SCR 1240 at p. 1261 = (AIR 1958 SC 398 at p. 409).

14. Before closing this case we would like to recall the observations made by Gajendragadkar, J. (as he then was) speaking for the court in Board of High School and Intermediate Education, U. P. v. Bagleshwar Prasad, 1963 (3) SCR 767 at p. 775 = (AIR 1966 SC 875 at p. 878). His Lordship observed:

"In dealing with petitions of this type, it is necessary to bear in mind that educational institutions like the Universities or appellant No. I set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates, and normally it is within the jurisdiction of such domestic tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, courts should be slow to interfere with the decisions of domestic Tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by Universities under Article 226, the High Court is not sitting in appeal over the decision in question; its jurisdiction is limited and though it is true that if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic Tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves and in holding such enquiries, the Tribunal must scrupulously follow rules of natural justice; but it would, we think, not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary courts of law. In the present case, no animus is suggested and no mala fides have been pleaded. The enquiry has been fair and the respondent has had an opportunity of making his defence. That being so, we think the High Court was not justi-

held in interfering with the order passed against the respondent."

15. There seems to be an erroneous impression in certain quarters evidently influenced by the provisions in Art. 311 of the Constitution particularly as they stood before the amendment of that Article that every disciplinary proceeding must consist of two inquiries, one before issuing the show cause notice to be followed by another inquiry thereafter. Such is not the requirement of the principles of natural justice. Law may or may not prescribe such a course. Even if a show cause notice is provided by law, from that it does not follow that a copy of the report on the basis of which the show cause notice is issued should be made available to the person proceeded against or that another inquiry should be held thereafter.

16. For the reasons mentioned above the appeal fails and is dismissed with costs.

DRR

Appeal dismissed.

**AIR 1969 SUPREME COURT 204
(V 56 C 38)**

(From Patna: AIR 1964 Pat 254)

J. M. SHELAT AND K. S. HEGDE, JJ.

Ram Kristo Mandal and another, Appellants v. Dhankisto Mandal, Respondent.

Civil Appeal No. 1123 of 1965, D/15-7-1963.

(A) Civil P. C. (1908), S. 100 and O. 42, R. 1 — New plea — Plea as to invalidity of exchange of raiyati holding under S. 27 Sonthal Parganas Settlement Regulation raised at stage of arguments in second appeal — High Court held was bound to take notice of it and was not justified in refusing to entertain it. AIR 1964 Pat 254, Reversed.

The language of S. 27 (1) of the Regulation is clear and unambiguous. It prohibits any transfer of a holding by a raiyat either by sale, gift, mortgage or lease or by any other contract or agreement. The section is comprehensive enough to include a transfer of the holding by way of an exchange. Sub-section (2) of S. 27 in clear terms also enjoins upon the courts not to recognise any such transfer. Therefore, even if the contention as to the invalidity of the exchange under S. 27 is raised for the

first time before the High Court, the language of sub-s. (2) being absolute and clear, the High Court has to take notice of such a contention and is bound to hold such an exchange as invalid if it is shown that sub-s. (1) of S. 27 applied to that transaction.

Held on the facts of the case that the High Court was in error in disallowing the contention on either of the two grounds suggested by it. AIR 1964 Pat 254, Reversed.

(Paras 7 to 10)

(B) Evidence Act (1872), Ss. 101 to 104 — Person setting up invalidity of transfer by way of exchange under S. 27 (1), Sonthal Parganas Settlement Regulation — Burden of proving that subject-matter of exchange was raiyati land situate in Sonthal Parganas lies on him — Discharge of onus — Onus shifts to other side to show that transfer comes within exception to rule laid down in S. 27 (1) and he must show that Record of rights contained an entry authorising transferor to transfer raiyati land — (Sonthal Parganas Settlement Regulation (3 of 1872), S. 27 (1)) — AIR 1964 Pat 254, Reversed.

(Para 10)

(C) Limitation Act (1908), Art. 141 — Adverse possession against Hindu widow not adverse against next reverers — Suit by reverer to recover possession — Starting point of limitation is widow's death — (Hindu Law — Widow) — AIR 1964 Pat 254, Reversed.

A person who has been in adverse possession for twelve years or more of property inherited by a widow from her husband by any act or omission on her part is not entitled on that ground to hold it adversely as against the next reverers on the death of such a widow. The next reverer is entitled to recover possession of the property, if it is immoveable, within twelve years from the widow's death under Article 141. This rule does not rest entirely on Article 141 but is in accord with the principles of Hindu law and the general principle that as the right of a reverer is in the nature of spes successionis and he does not trace that title through or from the widow, it would be manifestly unjust if he is to lose his right by the negligence or sufferance of the widow. AIR 1964 Pat 254, Reversed.

(Para 11)

(D) Sonthal Parganas Settlement Regulation (3 of 1872), S. 27 (1) — Section is wide enough to include exchange of lands as it involves transfer of property

— (Transfer of Property Act (1882), S. 118).

Though S. 27 of the Regulation does not in express terms mention an exchange, a transaction of exchange is not beyond the scope of that section. A transfer of property in completion of an exchange as contemplated by S. 118 T. P. Act can be made only in the manner provided for the transfer of such property by sale. It is not, therefore, right to say that an exchange does not involve transfer of property, and therefore, does not fall within the scope of S. 27. The language of S. 27 (1) is comprehensive enough to include any agreement or contract of exchange. (Para 12)

(E) General Clauses Act (1897), S. 6 — Effect of repeal — Exchange of raiyati land situate in Sonthal Parganas for land situate outside it — Transaction is invalid under S. 27 (1), Sonthal Parganas Settlement Regulation which was in force — Subsequent repeal of Ss. 27 and 28 by Sonthal Tenancy (Supplementary Provisions) Act (14 of 1949) cannot affect its invalidity and render it a valid and binding transaction. (Para 12)

(F) Sonthal Parganas Settlement Regulation (3 of 1872), Ss. 11 and 25-A — Effect of S. 11 — Question as to invalidity of exchange neither raised nor decided by settlement officer or Court — Bar of suit under S. 11 cannot apply — (Civil P. C. (1908), Ss. 9 and 11).

The only effect of S. 11 of the Regulation is that a decision of a settlement officer under the Regulation has the force of a decree of a Civil Court and such a decision can only be challenged subsequently in a Court of law to the limited extent provided by S. 25-A. Where the question as to invalidity of exchange by reason of S. 27 was neither agitated before, nor determined by, any settlement officer or court the bar of suit under S. 11 cannot apply. (Para 13)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 605 (V 50) =

1963 Supp 1 SCR 13, Jyotish Thakur v. Tarakant Jha 9

(1958) AIR 1953 SC 125 (V 40) = 1953 SCR 503, Kalipada Chakraborti v. Palani Bala Devi 11

Mr. B. P. Jha, Advocate, for Appellants; Mr. R. C. Prasad, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SHELAT, J.: This appeal, by special leave, raises the question whether an

exchange of land situate in Sonthal Parganas for land situate elsewhere is invalid by reason of the provisions of S. 27 (1) of the Sonthal Parganas Settlement Regulation, 3 of 1872. It is not in dispute that the lands in question, set out in Schedule B to the plaint were raiyati lands and were governed by the said Regulation.

2. The appeal arises from a suit filed by the appellants for a declaration of title and possession of lands described in Schedules B, C and D to the plaint. The lands belonged to one Tonu Mandal who died several years ago leaving him surviving two daughters, Manoda and Nilmoni Dasi. Manoda died in 1940 and Nilmoni Dasi died in 1948. On the death of the said Tonu Mandal, the two daughters inherited his property as limited owners. There was a settlement thereafter between them as a result of which the said Manoda got 10 annas share and the said Nilmoni Dasi got 6 annas share in the said properties. On Manoda's death, Nilmoni Dasi succeeded to her share. Consequently, Nilmoni Dasi was possessed of the entire property of Tonu Mandal as a limited owner. The said Nilmoni Dasi had four sons, all of whom died during her lifetime. She left, however, grandsons surviving her. These grandsons were defendants first party in the suit and Schedule D properties were in their possession at the time when the suit was filed. The said Nilmoni Dasi had executed a sale deed in 1314 Bengali Sambat Year in respect of Schedule C properties in favour of the predecessors-in-title of the defendants third party and these defendants were in possession of those properties at the date of the suit. In 1295 Bengali Sambat Year, she had also executed a deed of exchange in favour of one Premmoyee Dasi under which she gave away Schedule B properties in exchange for Schedule E properties situate in village Sokrul. In accordance with the said exchange, the names of the two ladies were recorded as raiyats of the respective properties. The descendants of the said Premmoyee Dasi were defendants of the second party and were in possession of Schedule B properties at the date of the suit. The defendants of the first party were in possession of Schedule E properties.

3. The said Tonu Mandal had two brothers, Santusta Mandal and Bhim Mandal. Plaintiff 2 was the sole surviving descendant of Bhim Mandal when

the said Nilmoni Dasi died, and plaintiff 1 and the defendants of the fourth party, Kalipada and Gobind, were the surviving descendants of the said Santusta Mandal at that time. Under the Dayabhaga law by which the parties were governed, the two appellants (plaintiffs) and the defendants of the fourth party were the nearest reversioners of the said Tonu Mandal after the death of Nilmoni Dasi and were entitled to succeed to his estate, the share of the appellants and that of the defendants of the fourth party being equal. The said Gobind Mandal died while the suit was pending and his sons and widow were brought on record as his legal representatives.

4. The appellants' case was that the said sale deed in favour of the defendants of the third party and the said deed of exchange in favour of the said Premmoyee Dasi were not valid and binding on them, being neither for legal necessity nor for the benefit of the estate of Tonu Mandal and that defendants of the first party had no right, title or interest to the properties in their possession after Nilmoni Dasi died. The defendants, on the other hand, contended that the said sale and the said exchange were for legal necessity or for the benefit of the estate and that as they were in possession of the said properties for a very long time their title thereto had ripened in any event by adverse possession. The trial court and the District Court in appeal concurrently found that the said Nilmoni Dasi was in possession of Schedules D and E properties and though the defendants of the first party took possession on her death of the said properties, they had no right, title or interest therein and were trespassers. Both the courts also rejected the plea of adverse possession on the ground that Article 141 of the Limitation Act, 1908 applied enabling the appellants, as reversioners, to file a suit for possession within twelve years after the death of the said Nilmoni Dasi. They also concurrently found that the said sale deed in favour of defendants of the third party and the said deed of exchange in favour of the said Premmoyee Dasi, the mother of defendant 6, were neither for legal necessity nor for the benefit of the estate of Tonu Mandal. The trial Court, on these findings, passed a decree, which was confirmed by the District Court, in favour of the appellants declaring their title to an 8 annas share in Schedules B,

C and D properties and granted joint possession thereof along with defendants of the fourth party. The District Court while confirming the decree passed by the trial court clarified that in view of the finding that the said deed of exchange was not valid and binding on the appellants, the respondent (defendant 6) was entitled to fall back upon Schedule E properties.

5. Aggrieved by the said judgment and decree passed by the District Court, the respondent filed second appeal No. 1467 of 1958 and the two grandsons of the said Nilmoni Dasi, Tribhangra Gorain and Pawan Gorain, preferred second appeal No. 1468 of 1958 in the High Court. The High Court dismissed second appeal No. 1468 of 1958 on the ground that it was not entitled to interfere with the concurrent findings of fact arrived at by the trial court and the District Court. So far as second appeal No. 1467 of 1958 was concerned, the High Court came to the conclusion that the said deed of exchange executed by Nilmoni Dasi was valid and binding on the appellants and consequently set aside the decree in relation to Schedule B properties and dismissed the appellants' suit in regard thereto.

6. Before the High Court, the appellants raised two contentions in regard to Schedule B properties: (1) that the said exchange was neither for legal necessity nor for the benefit of the estate of Tonu Mandal; and (2) that in any event S. 27 of the said Regulation, 3 of 1872, as it stood at the date of the said transaction, governed Schedule B properties which were admittedly raiyat properties and forbade any transfer thereof and, therefore, the said exchange was invalid. As regards the first contention, the High Court held that though the said exchange could not be said to be for legal necessity, it was for the benefit of the estate. Regarding the second contention, the High Court disallowed the contention on the ground that it was raised for the first time during the arguments before it and it could not allow it to be raised as it involved an investigation of certain facts, namely, (a) that the respondents could have shown if the contention had been raised earlier, that as provided by S. 27 (1), the record of rights had set out the right of Nilmoni Dasi to transfer the said lands and that if that were so, S. 27 would not bar transfer of the said lands by such a person; and (b) that the respondents

could also have contended that if the said exchange was invalid by reason of S. 27 (1), they held the lands after the said exchange adversely to the reversioners of Nilmoni Dasi and that they being in possession for more than twelve years their title was completed by adverse possession.

7. The High Court, however, was not correct in its view that the contention based on S. 27 (1) was raised for the first time in the course of arguments before it. It is clear from the judgment of the District Court that the contention based on S. 27 was in fact canvassed before it. That is clear from the fact that the District Judge, in the course of his judgment, has clearly drawn a distinction between lands situate in Sonthal Parganas, that is, Schedule B properties, and the lands situate in village Birbhum, that is, Schedule E properties and has observed that whereas S. 27 applied to the former it did not apply to the latter. The High Court, therefore, was not right in disallowing the said contention on the ground that it was not raised earlier.

8. Section 27 of the Regulation laid down an absolute bar to sales of the rights of a raiyat. As aforesaid, it is not in dispute that the said Nilmoni Dasi was a raiyat in relation to the lands in Schedule B properties. The section provided that

"No transfer by a raiyat of his right in his holding or any portion thereof by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the Record of Rights and then only to the extent to which such right is recorded."

Sub-section (2) of that section provided that "No transfer in contravention of sub-section (1) shall be registered or shall be in any way recognised as valid by any court whether in the exercise of civil, criminal or revenue jurisdiction." The language of S. 27 is clear and unambiguous. It prohibits any transfer of a holding by a raiyat either by sale, gift, mortgage or lease or by any other contract or agreement. The section is comprehensive enough to include a transfer of the holding by way of an exchange. The Schedule B properties were admittedly of raiyat character and were, therefore, inalienable. Sub-section (2) of S. 27 in clear terms enjoins upon the courts not to recognise any transfer of such lands by sale, mortgage, lease, etc.

or by or under any other agreement or contract whatsoever. Therefore, even assuming that the contention as to the invalidity of the said exchange under S. 27 was raised for the first time before the High Court, the language of sub-s. (2) being absolute and clear, the High Court had to take notice of such a contention and was bound to hold such an exchange as invalid if it was shown that sub-s. (1) of S. 27 applied to that transaction.

9. The prohibition against transfers of raiyati lands situate in Sonthal Parganas has its roots in the peculiar way of life of Sonthal villages, which favoured the emergence of a powerful village community with its special rights over all the lands of the village. This community of village raiyats has preferential and reversionary rights over all lands in the village, whether cultivated or uncultivated. There is also in the majority of the villages of this district a headman, who, in addition to performing certain village duties, collects rent from the raiyats and pays it to the proprietor. One of his duties in his capacity as the headman is to arrange for settlement of lands in his village which may fall vacant and be available for settlement. All the raiyats in the village are included in the Jamabandi prepared for the village and it is the headman's duty to settle the available land to one of the Jamabandi raiyats. It is manifest that the interest of the village community as also of the headman would suffer if the land, which as raiyati land would be included in the Jamabandi, is allowed to be taken out of the total quantity of the raiyati lands. If once these lands are allowed to lose their raiyati character, it is certain the village may find in the course of a few years the total stock of land available for settlement to resident raiyats dwindling before their eyes. It was in this state of things that the alienation of a raiyati holding in any form was interdicted by Government orders in 1887. These orders had the effect of checking the practice of open transfers. But transfers in disguised forms continued as is clear from a note by McPherson to the settlement report of the Sonthal Parganas wherein he warned against such disguised transfers. His note was accepted by Government and the result was the amendment of the Regulation by which S. 27 was inducted therein: [see Jyotish Thakur v. Tarakant Jha, 1963 Supp 1

SCR 13 at pp. 20, 21 = (AIR 1963 SC 605 at pp. 608, 609).]

10. Section 27 having thus laid down a prohibition against transfer of raiyati land, the burden of showing that it applied and, therefore, the said exchange was invalid was, no doubt, upon the appellants. But once it was shown that the subject-matter of the exchange, namely, Schedule B properties, was raiyati land situate in Sonthal Parganas, if the respondent wanted to show that the prohibition did not apply by relying upon the exception to the rule laid down by sub-s. (I) the burden to prove that exception would shift on to the respondent. It was, therefore, for the respondent to establish that the record of rights contained an entry to the effect that the transferor in respect of those lands had the right to transfer them. The High Court, therefore, was not justified in disallowing the contention raised by the appellants either on the ground that the said contention was raised for the first time before it or on the ground that if raised earlier, the respondent could have shown that there was such an entry in the Record of Rights as to the transferor's right to transfer the said lands.

11. The High Court also was not correct in disallowing the said contention on the ground that the respondent could have shown that he had completed his title to Schedule B properties by adverse possession if the said exchange was invalid under S. 27. Such a plea was in fact raised by the respondent and was rightly rejected by the District Court on the ground that Art. 141 of the Limitation Act, 1908 applied and that the suit having been filed only two years after the death of Nilmoni Dasi, their claim to a declaration and possession was not barred. A person who has been in adverse possession for twelve years or more of property inherited by a widow from her husband by any act or omission on her part is not entitled on that ground to hold it adversely as against the next reversioners on the death of such a widow. The next reversioner is entitled to recover possession of the property, if it is immoveable, within twelve years from the widow's death under Article 141. This rule does not rest entirely on Article 141 but is in accord with the principles of Hindu law and the general principle that as the right of a reversioner is in the nature of *spes successionis* and he does not trace that title through or from the widow, it would be manifestly

unjust if he is to lose his right by the negligence or sufferance of the widow. [cf. *Kalipada Chakraborti v. Palani Bala Devi*, 1953 SCR 503 = (AIR 1953 SC 125) and Mulla's Hindu Law, 13th ed. 233]. The High Court was thus in error in disallowing the said contention on either of the two grounds suggested by it.

12. Counsel for the respondent, however, contended that S. 27 does not in express terms mention an exchange and, therefore, a transaction of exchange was beyond the scope of that section. Under S. 118 of the Transfer of Property Act, 1882, a transaction is exchange when two persons mutually transfer the ownership of one thing for the ownership of another provided it is not an exchange of money only. A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale. It is not, therefore, right to say that an exchange does not involve transfer of property and, therefore, does not fall within the scope of S. 27. As aforesaid, the language of S. 27 (1) is comprehensive enough to include any agreement or contract of exchange and, consequently it must be held, given the other conditions of that section, that that section would apply to a transaction of exchange. It is true that Sections 27 and 28 of the Regulation were repealed by the Sonthal Tenancy (Supplementary Provisions) Act, 14 of 1949. But Section 27 was in force when the said transaction of exchange was made and governed the transaction made by Nilmoni Dasi and Premmoyee Dasi. That transaction being invalid and void, the fact that S. 27 was subsequently repealed made no difference as the repeal could not have the effect of rendering an invalid and void transaction a valid and binding transaction.

13. The next contention was that by reason of S. 11 of the Regulation, the appellants' suit was not maintainable as the validity of the said exchange could not be agitated in a Court once the settlement Court had made an entry in regard thereto. Section 11 lays down that except as provided in S. 25A no suit shall be filed in any civil Court regarding any matter decided by any settlement officer and his decisions and orders regarding the interests and rights abovementioned shall have the force of a decree of a Court. But neither S. 11 nor S. 25A of the Regulation has any application to the facts of the instant case. The only effect

of S. 11 is that a decision of a settlement officer under the Regulation has the force of a decree of a civil Court and such a decision can only be challenged subsequently in a Court of law to the limited extent provided by S. 25A. However, the question whether the said exchange of Schedule B properties for Schedule E properties was invalid or not by reason of S. 27 was neither agitated before, nor determined by, any settlement officer or Court and, therefore, the bar of S. 11 cannot apply to the present suit. That being the position, we do not see any merit in the contention raised by counsel on the basis of S. 11.

14. For the reasons aforesaid, the High Court was in error in interfering with and setting aside the decree passed by the trial Court and confirmed by the District Court. The District Court was also right in holding that in view of the appellants being entitled to Schedule B properties, they were not entitled to their alternative claim in respect of Schedule E properties and that consequently the successors-in-title of the said Premmoyee Dasi would be entitled to Schedule E properties. We, therefore, allow the appeal, set aside the judgment and decree passed by the High Court and restore the decree passed by the trial Court and confirmed by the District Court. The respondents will pay to the appellants the costs of this appeal and in the High Court.

K.S.B.

Appeal allowed.

AIR 1969 SUPREME COURT 209

(V 56 C 39)

(From Allahabad: (1) AIR 1965 All 94; (2) 1965-56 ITR 423 (All)).

J. C. SHAH, V. RAMASWAMI AND
A.N. GROVER, JJ.

(1) Civil Appeal No. 1761 of 1967: Commr. of Income-tax, U. P., Appellant v. Jagannath Mahadeo Prasad, Respondent.

(2) Civil Appeal No. 1762 of 1967: Commr. of Income-tax, U. P., Appellant v. Gauri Dutt Bhagwan Dass and Co., Respondent.

Civil Appeals Nos. 1761 and 1762 of 1967, D/- 2-8-1968.

Income-tax Act (1922), Ss. 24 (1) First Proviso, Explan. (1), 10, 6 — Scope of

AM/AM/D609/68

proviso — Speculative losses cannot be set off against profits from any other business activity under S. 10 in spite of first proviso to S. 24 (1) — AIR 1965 All 94, Reversed — (Civil P. C. (1908), Pre. — Interpretation of statutes — Proviso — Language clear and unambiguous).

Where the language is quite clear and no other view is possible it is futile to go into the question whether the proviso to S. 24 (1) operates as a substantive provision or only by way of an exception to S. 24 (1). The proviso says in unmistakable and unequivocal terms that any losses sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits or gains in any other business consisting of speculative transactions. This has to be read with Explanation (1) according to which where the speculative transactions carried on are of such a nature as to constitute a business the business shall be deemed to be distinct and separate from any other business.

(Para 5)

Thus, the speculative losses sustained by the assessee in speculative dealings in silver through a firm during accounting year relevant to assessment year 1953-54, cannot be set off against profits from any other business activity under S. 10 in spite of first proviso to S. 24 (1) of Income-tax Act, 1922. AIR 1965 All 94, Reversed; AIR 1967 SC 632, Followed; AIR 1960 Madh Pra 106 and AIR 1960 Punj 520 and AIR 1962 Punj 318 (FB) and 1963-47 ITR 809 (A. P.) and 1963-48 ITR 915 (Cal) and 1964-51 ITR 322 (Ker), Approved.

(Para 6)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 632 (V 54) = 1967-63 ITR 318, Commr. of Income-tax, Gujarat v. Kantilal Nathu Chand	4
(1964) 1964-51 ITR 322 (Ker), Joseph John v. Commr. of Income-tax Kerala	8
(1963) 1963-47 ITR 809 = ILR (1963) Andh Pra 1071, Jummar Lal Surajkaran v. Commr. of Income-tax Andhra Pradesh	3
(1963) 1963-48 ITR 915 (Cal), Hanuman Investment Co. v. Commr. of Income-tax, West Bengal, Calcutta	3
(1962) AIR 1962 Punj 318 (V 49) = 1962-45 ITR 248 (FB), Commr. of Income-tax v. Ram Sarup	8

- (1960) AIR 1960 Madh Pra 106
 (V 47) = 1960-38 ITR 193,
 Commr. of Income-tax, Nagpur
 and Bhandara v. Ram Copal
 Kanhaiya Lal
 (1960) AIR 1960 Punj 520 (V 47) =
 1962-44 ITR 618, Manoharlal
 Munshi Lal v. Commr. of Income-
 tax, New Delhi
 (1957) AIR 1957 Bom 20 (V 44) =
 1957-31 ITR 7, Keshavlal Prem-
 chand v. Commr. of Income-tax
 Bombay

2, 3

Mr. B. Sen, Senior Advocate, (M/s.
 B. D. Sharma and R. N. Sachthey, Ad-
 vocates, with him), for Appellants (in
 both the Appeals); M/s. G. C. Sharma,
 V. C. Rishi and P. K. Mukherjee, Advo-
 cates, for Respondent (in C. A. No. 1761/
 1967).

The following Judgment of the Court
 was delivered by

GROVER, J.: The common question
 which arises in these appeals by certi-
 ficate, is whether speculative losses can
 be set off against profits from any other
 business activity under S. 10 in spite of
 the first proviso to S. 24 (1) of the In-
 come-tax Act, 1922.

2. The facts in C. A. 1761/67 in
 which the question in the above form
 was referred, the language of the ques-
 tion being somewhat different in the
 other appeal, may be stated. The asses-
 seee who is an individual derived income
 from three sources i.e. property, shares
 in joint stock companies and commission
 agency business and shares in partner-
 ship firms. The accounting year relevant
 to the assessment year 1953-54 was
 the period from October 20, 1951 to
 October 8, 1952. In the personal business
 of commission agency, the assessee re-
 turned a net profit of Rs. 2761/- . In ar-
 riving at this figure the net share of loss
 of Rs. 11,075/- from the firm of Kamta
 Prasad Raghunath Prasad in which the
 assessee was a partner, was claimed. The
 Income-tax Officer did not go into the
 details but ignored the figure in the ab-
 sence of information from the Income-
 tax Officer assessing the aforesaid firm.
 Before the Appellate Assistant Commis-
 sioner it was submitted that the actual
 share of loss was Rs. 13,232/- and it in-
 cluded a sum of Rs. 8,669/- representing
 loss suffered in speculative dealings in
 silver paid through the firm Kamta Pra-
 sad Raghunath Prasad. The Appellate
 Assistant Commissioner, after examining

the details of the loss, directed the In-
 come-tax Officer to exclude a profit of
 Rs. 1415/- from the speculative trans-
 actions and to carry forward the net
 loss of Rs. 7,254/- for setting it off against
 the income of the assessee from specula-
 tive dealings in subsequent years. Be-
 fore the appellate tribunal there was no
 dispute about these figures. What was
 contended was that the loss of Rs. 7,254/-
 should be set off against profit from
 other business. The tribunal rejected
 this contention following the decision in
Keshavlal Premchand v. Commissioner of Income-tax, Bombay, 1957-31 ITR 7
 = (AIR 1957 Bom 20). Thereafter the
 assessee moved the tribunal for making
 a reference to the High Court. The High
 Court did not accept the view in *Keshavlal Premchand's 1957-31 ITR 7* = (AIR 1957 Bom 20) which has been followed in several other decisions by other High Courts.

3. Now certain provisions of the Act
 may be noticed before the case law is
 discussed. Section 6 gives the heads of
 income chargeable to income-tax which
 are six in number. Section 7 deals with
 the first head "salaries"; Section 8 with
 second head "interest on securities"; Sec-
 tion 9 with "income from property" and
 S. 10 provides for liability to tax under
 the head "profits and gains of business,
 profession or vocation" which is the
 fourth head given in S. 6. It is unneces-
 sary to go to the 5th and 6th heads. Sec-
 tion 24 provides that where any assessee
 sustains a loss of profits or gains in any
 year under any of the heads mentioned
 in Section 6, he shall be entitled to have
 the amount of the loss set off against his
 income, profits or gains under any other
 head in that year. In the year with
 which we are concerned in the present
 case there was a proviso which was, at
 that time, the second proviso but it be-
 came the first proviso after the enact-
 ment of the Taxation Laws (Extension to
 Jammu and Kashmir) Act 1954. This
 proviso, at the material time, stood as
 follows:

"Provided further that in computing
 the profits and gains chargeable under
 the head 'Profits and gains of business,
 profession or vocation', any loss sustain-
 ed in speculative transactions which are
 in the nature of a business shall not be
 taken into account except to the extent of
 the amount of profits and gains, if any, in any other business consisting of
 speculative transactions".

In Keshavlal Premchand's case, 1957-81 ITR 7 = (AIR 1957 Bom 20) the assessee had suffered a loss in speculative business carried on by him in the year of account. His contention was that he was entitled to take this loss into account in arriving at the profits and gains of his business (of non-speculative nature). Mr. Palkhiwala, who argued the case before the Bombay Court, put forward the view that S. 24 (1) read with proviso referred only to a case where the assessee was claiming the right to set off the loss which he had suffered under one head against a profit which he had earned in another head. The section therefore had no application when the assessee wanted to adjust or set off a loss against a profit under the same head. It was urged by him that the assessee in claiming to set off his speculative loss against his business profits under the same head was not claiming the benefit of any right conferred by S. 24 (1) and therefore the proviso had no application. The argument was elaborated further by referring to the true nature and function of a proviso which was to except or take out a particular portion from the field dealt with by the section. Chagla C. J., who delivered the judgment of the Bombay Bench, had no difficulty in coming to the conclusion that on the language of the proviso itself and on the scheme of the Act the legislature in enacting the so-called proviso was enacting a substantive provision dealing with the mode of computing the profits and gains chargeable under the head "profits and gains of business, profession or vocation" and that the legislature had provided that when profits and gains were computed the loss sustained in a speculative transaction must not be taken into account except to the extent of the amount of profits and gains, if any, in any other business consisting of speculative transactions. The learned Chief Justice further referred to the mischief which was aimed at by the legislature in enacting the proviso. In recent times business-men were known to buy speculative losses in order to reduce their profits and the legislature wanted to put an end to that mischief which could only be done by preventing the assessee from reducing his profits by speculative losses. The Bombay decision was followed by the Madhya Pradesh High Court in Commissioner of Income-tax Nagpur and Bhandara v. Ram Gopal Kanhaiya Lal, 1960-88 ITR 193 =

(AIR 1960 Madh Pra 106) as also by the Division Bench of the Punjab High Court in Manohar Lal Munshi Lal v. Commissioner of Income-tax, New Delhi, 1962-44 ITR 618 = (AIR 1960 Punj 520). The matter ultimately went to a Full Bench of the Punjab High Court in Commissioner of Income-tax v. Ram Swarup, 1962-45 ITR 248 = (AIR 1962 Punj 318) (FB) in which after reviewing the entire case law and examining the various aspects relevant to the question the view expressed by Chagla C. J. in the Bombay case was accepted as correct. Similarly in Jummar Lal Surajkaran v. Commissioner of Income-tax, Andhra Pradesh, 1963-47 ITR 809 (A. P.); Hanuman Investment Co. v. Commissioner of Income-tax, West Bengal, Calcutta, 1963-48 ITR 915 (Cal) and Joseph John v. Commissioner of Income-tax, Kerala, (1964) 51 ITR 322 (Ker) the considerations which prevailed in Keshavlal Premchand's case were accepted as correct.

4. It would appear that so far as this court is concerned the matter now stands concluded by the following observations in Commissioner of Income-tax, Gujarat v. Kantilal Nathu Chand, 1967-63 ITR 318 at p. 321 = (AIR 1967 SC 632 at pp. 634-635).

"Section 24 is, thus, a provision laying down the manner of computation of total income. The principal clause of section 24 (1) lays down that, if there be a loss of profits or gains in any year under any of the heads mentioned in Section 6, that loss has to be set off against the income, profits or gains of the assessee under any other head in that year. If this provision had stood by itself without any provisos, the result would have been that all losses incurred by an assessee under any of the heads mentioned in Section 6 would be adjusted against profits under all other heads, and then the total income of the assessee would be worked out on that basis. The first proviso to this sub-section, however, lays down an exception to this general rule contained in the principal clause. The exception relates to income from business sustained in speculative transactions and places the limitation that losses sustained in speculative transactions are not to be taken into account in computing the profits and gains chargeable under the head "Profits and gains of business, profession or vocation", except to the extent that they will be set off against profits

and gains in any other business which itself consists of speculative transactions. The effect of the proviso is that if there are profits in speculative business, those profits are added to income under the other heads mentioned in Section 6 for purposes of computing the total income of the assessee in order to determine the tax under Section 23 of the Act. On the other hand, losses in speculative business are not to be taken into account when computing the total income, except to the extent to which they can be set off against profits from other speculative business. The first proviso, thus, clearly limits the applicability of the principal clause of Section 24 (1); and, when applied, it governs the manner in which the total income of the assessee is to be computed. In the case before us, the Income-tax Officer was clearly right in the assessment years 1958-59 and 1959-60 in not setting off the losses in the speculative business against the income earned in those years either from property or from ready business in kappas".

The learned counsel for the assessee sought to press the reasons which prevailed with the learned Judges of the High Court and has sought to characterise the above observation as obiter. It is neither necessary to deal with the reasoning of the High Court nor can that reasoning stand in view of what has been laid down in Kantilal Nathu Chand's case, 1967-68 ITR 318 = (AIR 1967 SC 632) by this court which cannot be regarded as obiter because it has been clearly stated that the question of the applicability of the proviso with which we are concerned arise directly in that case in respect of the assessment years 1958-59 and 1959-60. The concluding portion of the passage extracted leaves no room for doubt in this matter.

5. Moreover we are of the opinion that where the language is quite clear and no other view is possible it is futile to go into the question whether the proviso to S. 24 (1) operates as substantive provision or only by way of an exception to S. 24 (1). The proviso says in unmistakable and unequivocal terms that any losses sustained in speculative transactions which are in the nature of a business shall not be taken into account except to the extent of the amount of profits or gains in any other business consisting of speculative transactions. This has to be read with Explanation (1) according to which where the specula-

tive transactions carried on are of such a nature as to constitute a business the business shall be deemed to be distinct and separate from any other business.

6. In the above view of the matter the answer to the questions referred in both the appeals will be in the negative, namely, against the assessee and in favour of the Department. The appeals are accordingly allowed with costs. There will be one hearing fee.

SSC/D.V.C.

Appeals allowed.

AIR 1969 SUPREME COURT 212

(V 56 C 40)

R. S. BACHAWAT AND A. N. GROVER,
JJ.

Sham Sunder, Petitioner v. Union of India and others, Respondents.
Writ Petn. No. 31 of 1967, D/- 15-7-1968.

(A) Civil Services — Railway Establishment Code, R. 157 — Cancellation or amendment of approved panels of selected candidates — General direction by Railway-Board, Dated 4-8-1953 that panels once approved should not be cancelled or amended without reference to authority next above the one that approved the panel — General Manager, Northern Railway who had approved a particular panel of selected candidates has power to amend the panel subsequently with the approval of Railway Board who was the authority next above him — AIR 1966 SC 1197, Rel. on.

(Para 5)

(B) Constitution of India, Art. 16 (1) — Equality of opportunity in matters of employment — Means equality as between members of the same class of employees and not equality between members of separate, independent classes — AIR 1960 SC 384, Rel. on.

(Para 8)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1197 (V 53) =
(1966) 3 SCR 61, Srivastava v.
N. E. Railway
(1960) AIR 1960 SC 384 (V 47) =
(1960) 2 SCR 311, All India
Station Masters' and Assistant
Station Masters' Association v.
General Manager Central Railways

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M/s. Basudev Prasad and M. I. Khawaja, Advocates, for Petitioner; Mr. Niren De, Solicitor-General of India and Dr. V. A. Seyid Muhammad, Senior Advocate, (M/s. R. N. Sachthey and S. P. Nayar, Advocates, with them), for Respondents.

The following Judgment of the Court was delivered by

BACHAWAT J.: The petitioner is employed on the Northern Railway as

an enquiry and reservation clerk in the grade of Rs. 150—240. In January 1965 several posts of enquiry-cum-reservation clerks were upgraded, 11 posts being raised to the grade of Rs. 370—475, 18 posts to the grade of Rs. 250—380 and 26 posts in the grade of Rs. 205—280. As a result of the upgrading the revised cadre of enquiry-cum-reservation clerks on the Northern Railway consisted of the following non-gazetted posts:—

Category	No. of posts	Scale of pay	Classification
Enquiry-cum-Reservation Clerk	202	150—240 (AS)	Selection
Assit. Reservation Supervisor	32	205—280 (AS)	Non-selection
Reservation Supervisor	28	250—380 (AS)	Selection
Chief Reservation Inspector	11	370—475 (AS)	Selection

2. The promotion of non-gazetted railway servants is governed by Chapter II of the Indian Railway Establishment Manual and the rules made by the Railway Board from time to time under R. 157 of the Railway Establishment Code. Promotion to selection posts has to be made from a panel of selected employees prepared by a selection board and approved by the competent authority. For making the selection, eligible staff up to four times the number of anticipated vacancies are called for written and viva voce tests under R. 9 (d) of Chapter II. By letter No. E (NG) 62 PM 1/91/ dated July 10, 1964 the Railway Board directed that

"the number of persons to be placed on a panel should be equal to the existing and anticipated vacancies, plus 25 per cent thereof for unforeseen vacancies. Anticipated vacancies connote only those which are likely to arise due to normal wastage during the currency of the panel. The currency of the panel for non-gazetted selection posts should be two years from the date of the approval of the same by the competent authority or till exhausted whichever is earlier."

3. On January 22, 1965 under orders of the General Manager, Northern Railway, 152 enquiry-cum-reservation clerks were asked to appear in tests for selection to the posts of reservation supervisors in the grade of Rs. 250—380. The petitioner who ranked 113 in order of seniority was allowed to appear in the tests. As a result of the oral and written tests a panel of 38 persons was drawn up on July 7, 1965 and was published in

the Railway Gazette on August 1, 1965. The petitioner was one of the selected candidates and his name was shown as No. 33 in the panel. A note at the foot of the panel intimated to the staff concerned that "the mere fact that their names are on the panel will not confer upon them any right for permanent absorption as a reservation supervisor." In calling 152 persons for the selection, the General Manager, Northern Railway proceeded upon the footing that 38 persons had to be placed on the panel and 4 times 38, that is to say 152 persons should be asked to appear in the tests. According to him there were 18 immediate vacancies in the posts of reservation supervisors due to upgrading, 1 anticipated vacancy due to retirement and 11 anticipated vacancies on account of promotion due to upgrading of 11 posts in the next higher grade of chief reservation inspector. The figure 38 is the total of 18 plus 1 plus 11 plus 25 per cent thereof. The view that anticipated vacancies included 11 vacancies on account of promotion due to the upgrading of 11 posts in the next higher grade was supported by the prevailing practice in the Northern and other Railways.

4. The Railway Board received several complaints and representations regarding the constitution of the panel. By an order dated September 16, 1965 (Annexure H) the Railway Board decided that the panel of 38 persons was irregularly drawn up and that there should be a panel of 24 persons only for promotion to the grade of Rs. 250—380 to cover 18 upgraded vacancies, 1 vacancy on ac-

count of retirement and 5 vacancies representing 25 per cent for contingencies and the field of selection should be restricted to $24 \times 4 = 96$ and not 152 persons. Accordingly the panel already published should be operated only in respect of the first 24 persons and that the names of the remaining 14 persons should be deleted forthwith. The Board directed that action should be taken to form a panel for filling up 11 upgraded posts in the grade of Rs. 370—475 and thereafter a further selection should be held for filling up the resultant vacancies in the grade of Rs. 250—380. By an order dated November 3, 1965 (Annexure K) the General Manager, Northern Railway implemented the decision and directed that the panel formed on July 7, 1965 was to be operated upto the first 24 persons only and that the names of the remaining 14 persons including the petitioner should be treated as deleted from the panel. By another order dated October 4, 1966 (Annexure N) the General Manager, Northern Railway decided to hold a selection for filling up the resultant vacancies in the grade of Rs. 250—380. Having regard to the number of resultant vacancies, the petitioner is not eligible for being called for selection under Annexure "N". In this writ petition the petitioner alleges that the orders under Annexures H, K and N have violated his fundamental rights under Articles 14 and 16 of the Constitution, and he asks for the issue of appropriate writs restraining the respondents from enforcing those orders and directing them to make promotions to posts in the grade of Rs. 250—380 in accordance with the panel published in the Gazette on August 1, 1965.

5. Counsel for the petitioner contend-
ed that the Railway Board or the General Manager had no power to amend the panel published on August 1, 1965. We are unable to accept this contention. The point was not taken in the petition. When the contention was raised at the hearing of the petition, the learned Solicitor-General drew our attention to the letter of the Railway Board No. E/52/PM 2-34 dated August 4, 1953. On the subject of cancellation or amendment of approved panels the Railway Board directed by this letter "that the panels once approved should not be cancelled or amended without reference to the authority next above the one that approved the panel". There is no contro-

versy that the Railway Board had power to issue this general direction under R. 157 of the Railway Establishment Code. In the present case the General Manager Northern Railway was the authority approving the panel. The Railway Board was the authority next above him. Under the general direction issued by the Board in its letter dated August 4, 1953, the General Manager was competent to amend the panel with the approval of the Railway Board. In Srivastava v. N. E. Railway, (1966) 3 SCR 61 at pp. 64, 65 = (AIR 1966 SC 1197 at pp. 1199-1200) the Court held that an amendment of an approved panel in accordance with a similar rule was in order.

6. The point in controversy was whether there were 11 more anticipated vacancies in the grade of Rs. 205—380 on account of the upgrading of 11 posts in the next higher grade of Rs. 375—480. Now the selection for the 11 new posts in the grade of Rs. 375—480 had to be made from 56 eligible members of the staff comprising 23 clerks in the grade of Rs. 205—380 and 33 clerks in lower grades. The Railway Board held that until the selection was made, it could not be anticipated that 11 clerks in the grade of Rs. 205—380 would be promoted and that there would be 11 consequential vacancies in that grade due to promotions to the higher grade. Acting upon this view the Railway Board decided that the anticipated vacancies in the grade of Rs. 205—380 due to normal wastage would be 19 and not 30 and that the panel should be amended accordingly and should be operated in respect of the first 24 persons only. We are unable to say that the decision is perverse or that it should be quashed and set aside.

7. All the 24 enquiry-cum-reservation clerks retained in the panel were senior to the petitioner. The junior most of them ranked 77 in order of seniority. All of them would have been selected and included in the panel, even if 96 persons were originally called for selection. There is no force in the contention that the retention of the first 24 persons in the panel without holding a fresh selection is discriminatory or is violative of Articles 14 and 16.

8. For purposes of promotion, all the enquiry-cum-reservation clerks on the Northern Railway form one separate unit. Between members of this class

there is no discrimination and no denial of equal opportunity in the matter of promotion. It is said that panels of class III selection posts of station masters in the grade of Rs. 370—475 on the Northern Railway and all class III selection posts on other Railways have been drawn up on the footing that anticipated vacancies in the selection grade include vacancies on promotions due to upgrading of posts in the next higher grade and that the Railway Board has not issued any direction for the amendment of these panels. Assuming this allegation to be true, the other panels might require revision and the matter deserves the attention of the Railway Board. But the other panels relate to separate classes of employees and have no bearing on the question of equal opportunity in the matter of promotion of enquiry-cum-reservation clerks on the Northern Railway. Equality of opportunity in matters of employment under Art. 16 (1) means equality as between members of the same class of employees and not equality between members of separate, independent classes [see All India Station Masters' and Assistant Station Masters' Association v. General Manager Central Railways, (1960) 2 SCR 311 at p. 319 = (AIR 1960 SC 384 at pp. 387-388)].

9. In the result, the petition is dismissed. There will be no order as to costs.

KSB

Petition dismissed.

**AIR 1969 SUPREME COURT 215
(V 56 C 41)**

(From Orissa: 34 Cut LT 666)

J. C. SHAH, V. RAMASWAMI,
V. BHARGAVA, G. K. MITTER AND
C. A. VAIDIALINGAM, JJ.

P. V. Jagannath Rao and others, Appellants v. State of Orissa and others, Respondents.

1. The State of Bihar; 2. Biju Patnaik, Interveners.

Civil Appeals Nos. 1148-1150 of 1968,
D/- 30-4-1968.

(A) Commissions of Inquiry Act (1952), Section 3 — Object of enquiry to take appropriate legislative and administrative measures to maintain purity and integrity of political administration — It is valid exercise of power.

Where the purpose of the enquiry as stated in the preamble to the notification appointing a Commission of Inquiry stated that "the matters aforesaid regarding the aforesaid persons should be enquired into through a Commission of Inquiry so that facts may be found which alone will facilitate rectification and prevention of recurrence of such lapses and securing the ends of justice and establishing a moral public order in future", in other words, where the object of the enquiry to be made by the Commission appointed under Section 3 of the Act was to take appropriate legislative or administrative measures to maintain the purity and integrity of political administration in the State, the appointment of the Commission of Inquiry was in valid exercise of the statutory power by the State Government under Section 3 of the Act. AIR 1958 SC 538, Distinguished; (1968) 34 Cut LT 666, Affirmed.

(Para 6)

(B) Commissions of Inquiry Act (1952), Section 3 — Appointment of Commission not due merely to political rivalry but impelled by desire to set up and maintain High standard of moral conduct in political administration — Appointment of Commission is not illegal or ultra vires and mala fide.

If a statutory authority exercises its power for a purpose not authorised by the law the action of the statutory authority is ultra vires and without jurisdiction. In other words, it is a mala fide exercise of power in the eye of law, i. e., an exercise of power by a statutory authority for a purpose other than that which the Legislature intended. But the question arises as to what is the legal position if an administrative authority acts both for an authorised purpose and for an unauthorised purpose. In such a case, where there is a mixture of authorised and unauthorised purpose the proper test to be applied is as to what is the dominant purpose for which the administrative power is exercised. To put it differently, if the administrative authority pursues two or more purposes of which one is authorised and the other unauthorised, the legality of the administrative act should be determined by reference to the dominant purpose. (1929) 1 KB 619 and (1907) 96 LT 762 and (1951) 2 KB 284, Ref. (Para 8)

The existence of political rivalry between the ruling party and the leaders of the ex-ruling party into whose doings the

enquiry commission is constituted to enquire, is not in itself sufficient to hold that the appointment of the Commission of Inquiry is illegal. When after the perusal of the affidavits of the parties, it is clear that the appointment of the Commission of Inquiry was not due merely to the existence of political rivalry of the parties but was impelled by the desire to set up and maintain high standards of moral conduct in the political administration of the State, and that the latter was main object of the appointment of the Commission and not "the character assassination" of the leaders of the ex-ruling party, the appointment of a Commission is not ultra vires or mala fides. (1968) 34 Cut LT 666, Affirmed. (Para 7)

(C) Contempt of Courts Act (1952), Section 1 — Appointment of Commission of Inquiry under Commissions of Inquiry Act, during pendency of civil litigation, when amounts to contempt of Court — Enquiry cannot be said to be judicial — Commission cannot commit contempt, being Statutory Commission — Commissions of Inquiry Act (1952), Section 3.

One of the items regarding one of persons into whose conduct the Commission was appointed to inquire, in the notification appointing a Commission of Inquiry, was the subject matter of a civil litigation pending in appeal before the High Court. In the civil litigation none of the parties had adduced any evidence. The person had not appeared as a witness and had not presented himself for cross-examination. The suit was decided by lower Court purely on basis of burden of proof. There was no factual enquiry into the allegations. It was contended that the appointment of Commission of Inquiry during the pendency of the appeal in the suit constituted contempt of Court.

Held that it did not amount to contempt of Court. It was not also possible to accept the argument that the inquiry was in relation to the very matters which were the subject matter of the civil suit and of the pending appeal. (Para 11)

The inquiry cannot be looked upon as a judicial inquiry and the order ultimately passed cannot be enforced *proprio vigore*. The inquiry and the investigation by the Commission do not therefore amount to usurpation of the function of the courts of law. The scope of the trial by the Courts of law and

the Commission of Inquiry is altogether different. In any case, it cannot be said that the Commission of Inquiry would be liable for contempt of Court if it proceeded to enquire into matters referred to it by the Government Notification. In appointing a Commission of Inquiry under Section 3 of the Act the State Government is exercising a statutory power and in making the inquiry contemplated by the notification, the Commission is performing its statutory duty. It is therefore not possible to accept the argument that the setting up of the Commission of Inquiry by the State Government or the continuance of the inquiry by the Commission so constituted would be tantamount to contempt of Court. To constitute contempt of court, there must be involved some "act done or writing published calculated to bring a court or a judge of the Court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts". Therefore the issue of the notification under Section 3 of the Act or the conduct of the Inquiry by State did not amount to contempt of Court. (Para 11)

Cases Referred:	Chronological Paras	
(1958) AIR 1958 SC 538 (V 45) = 1959 SCR 279, Shri Ram Krishna Dalmia v. S. R. Tendolkar	6, 11	
(1951) 1951 AC 482 = 1951-1 TLR 829, R. Perera v. The King	11	
(1951) 1951-2 KB 284 = 1951-1 All ER 982, Earl Fitzwilliam's Wentworth Estates Co., Ltd. v. Minister of Town and Country Planning	7	
(1942) 1942 AC 435 = 1942-1 All ER 142, Crofter Hand Woven Harris Tweed Co. v. Veitch	8	
(1929) 1929-1 KB 619 = 45 TLR 345, The King v. Minister of Health	7	
(1907) 96 LT 762 = 71 JP 265, Rex. v. Brighton Corporation; Ex parte, Shoosmith	7	
(1900) 1900-2 QB 36 = 69 LJQB 502, Reg. v. Gray	11	

Mr. A. K. Sen, Senior Advocate (M/s. Rajendra Mohanty, K. R. Chaudhury and K. Rajendra Choudhury, Advocates, with him), for Appellants; Mr. C. K. Daphary Attorney-General for India and Mr. Ashok Das, Advocate-General for the State of Orissa (M/s. Santosh Chatterjee, B. B. Ratho and R. N. Sachthey, Advocates, with them), for Respondents (Nos. 1, 2

and 4); Mr. Lal Narain Singh, Advocate-General for the State of Bihar (Mr. R. K. Garg, Advocate with him), for Intervener No. 1; Mr. B. Sen, Senior Advocate (M/s. M. K. Banerjee, S. K. Dholakia, Advocates, and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Intervener (No. 2).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals were heard on April 15 and April 16, 1968 and at the close of the hearing we ordered that the appeals should be dismissed with costs and indicated that our reasons would be pronounced later. Accordingly our present judgment gives our reasons for the order which had already been passed.

2. These appeals are brought against the common judgment of the Orissa High Court dated February 22, 1968 in O.J.C. Nos. 396, 408 and 418 of 1967. By these applications the petitioners therein prayed for an appropriate direction or order under Article 226 of the Constitution for quashing and setting aside notification No. 813-EC, dated October 26, 1967, issued by the Government of Orissa in exercise of the powers conferred on it by Section 3 of the Commissions of Inquiry Act (LX of 1952) and for other reliefs. The Schedule to the Notification gives the names of 15 persons against whom inquiry is to be made. The petitioners in the three O.J.C.s. have respectively been referred to in Items 6, 2 and 12 of the Schedule. In O. J. C. 418, Shri Harekrushna Mahtab, Shri Nabakrushna Choudhury, Shri Pabitra Mohan Pradhan, Shri Santanu Kumar Das and Shri Surendranath Patnaik were originally impleaded as opposite parties Nos. 5 to 9. Shri Biju Patnaik filed an application in this case to be impleaded as an opposite party. As the other parties had no objection he was also impleaded as opposite party No. 10. Rules were issued and except opposite parties Nos. 3 and 6 the other opposite parties showed cause. By its judgment dated February 22, 1968 the High Court dismissed the applications, holding that the notification of the State Government dated October 26, 1967 appointing the Commission of Inquiry was legal and valid. Against this judgment the petitioners in all the three O. J. Cs. have preferred the present appeals by certificate of the Orissa High Court.

3. Shri Harekrushna Mahtab was the Chief Minister of Orissa from 1947 to 1949. Shri Nabakrushna Choudhury was the Chief Minister from 1950 to 1956. In the 1957 General Election to the Orissa Legislative Assembly (hereinafter referred to as the 'Assembly'), out of 140 seats the Congress Party got only 56 seats. Shri Harekrushna Mahtab formed the Ministry with the support of other members but he had to resign in 1959 due to withdrawal of support by some of the groups in the Assembly. In May, 1959, he formed a coalition Ministry with the help of Ganatantra Parishad of which Shri R. N. Singh Deo was the leader. Shri Singh Deo became the Finance Minister and the Deputy Leader in the Coalition Government. During the coalition Ministry there developed acute difference of opinion in the Orissa Congress Legislative party over the conduct and programme of the coalition Ministry. The Congress Legislative party was divided into two groups, one under the leadership of Shri Harekrushna Mahtab and the other under the leadership of Shri Biju Patnaik. Shri Harekrushna Mahtab had to resign in February, 1961 as he lost the support of the majority of the Congress Legislative party. The Assembly was dissolved and there was President's rule for sometime. During the President's rule, a mid-term election was held in May 1961. The Congress Party succeeded in capturing 80 seats out of 140 under the leadership of Shri Biju Patnaik. At that time the Ganatantra Parishad had joined the Swatantra Party of India. The dissident group of members under the leadership of Shri Harekrushna Mahtab defected from the Congress Party and formed a separate political party under the name of "Jana Congress". The case of the appellants is that from 1961 till the end of 1966 this group had its secret alliance with the Swatantra Party and went on creating obstruction from within to the smooth administration by the Congress Party which had a superior numerical strength. Shri Biju Patnaik was the Chief Minister, Shri Biren Mitra was Deputy Chief Minister. There was a firm called "Orissa Agents" in the name of Mrs. Mitra which made supplies to some of the departments of the Orissa Government. A campaign was carried on by Shri Mahtab and Shri Pabitra Mohan Pradhan attacking the honesty of Shri Biren Mitra. There was a debate in the Assembly in which a direct attack

was made on the honesty and integrity of Shri Mitra and there was a demand for appointment of a Commission of Inquiry. The Government of Orissa did not agree to the appointment of a Commission of Inquiry but Shri Biju Patnaik referred the matter to Shri Singh Deo, leader of the Opposition and Chairman of the Public Accounts Committee. Shri Singh Deo initially accepted the responsibility, but later on expressed his unwillingness. The Orissa Government had a special audit of the allegations and sent the report to the Public Accounts Committee in the year 1964. While the matter was pending with the Public Accounts Committee Shri Biju Patnaik resigned the Chief Ministership of Orissa on October 1, 1963. He, however, continued to be the Chairman of the State Planning Board till January 29, 1965 when Shri Biren Mitra was the Chief Minister. Shri Mitra dropped out Shri Pabitra Mohan Pradhan from the cabinet. During the tenure of the office of Shri Mitra as the Chief Minister of Orissa some members of the Opposition in the Assembly, which included all the members of the Swatantra Party, filed a memorandum before the President of India alleging misappropriation, misconduct and fraud against Shri Patnaik, Shri Mitra and certain other Ministers and requested the President of India to appoint a Commission of Inquiry to inquire into these allegations. The President referred the Memorandum to his Council of Ministers. It is said the Central Government did not favour the appointment of a Commission of Inquiry but decided to have the allegations enquired into by the Central Bureau of Intelligence (hereinafter referred to as the C. B. I.). After receiving the preliminary report of the C. B. I. the Central Government rejected the demand for appointment of a Commission of Inquiry. A statement was made in Parliament that certain improprieties were committed but the examination did not reveal any misconduct, misappropriation or fraud or abuse of power for personal gain. As a result of the statement in the Parliament Shri Biren Mitra who was then the Chief Minister submitted his resignation and Shri Sadasiv Tripathy was elected as the leader of the Congress Legislative Party and carried on administration as the Chief Minister of Orissa till the last General Election. Soon after the formation of the present Ministry, the Gover-

nor of the State announced in his address to the Legislature the decision to set up a Commission of Inquiry to enquire into the charges of corruption and improprieties alleged to have been committed by the Ministers who were in office from 1961 to 1967. The present Commission was appointed in pursuance of the policy laid down in the address of the Governor. The main ground of attack on behalf of the appellants was that the notification was illegal because the Government exercised the statutory power mala fide and for collateral purpose and that the object of appointing the Commission of Inquiry was to get rid of Shri Biju Patnaik and Shri Biren Mitra and to drive them out of the political life of Orissa. The High Court held that the allegation of the appellants was not made out and upheld the legal validity of the notification dated October 26, 1967 issued by the Orissa Government.

4. Sub-section (1) of Section 3 of the Commissions of Inquiry Act, 1952 (No. LX of 1952), hereinafter referred to as the 'Act', provides as follows:-

"3. Appointment of Commission.—(1) The appropriate Government may, if it is of opinion that it is necessary so to do, and shall, if a resolution in this behalf is passed by the House of the People or, as the case may be, the Legislative Assembly of the State, by notification in the Official Gazette, appoint a Commission of Inquiry for the purpose of making an inquiry into any definite matter of public importance and performing such functions and within such time as may be specified in the notification, and the Commission so appointed shall make the inquiry and perform the functions accordingly:

* * * * *

Section 4 vests in the Commission the powers of a civil court while trying a suit under the Code of Civil Procedure and reads as follows:-

"4. Powers of Commission.—The Commission shall have the powers of a civil court, while trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;

- (d) requisitioning any public record or copy thereof from any court or office;
- (e) issuing commissions for the examination of witnesses or documents;
- (f) any other matter which may be prescribed."

Section 5 empowers the appropriate Government, by a notification in the Official Gazette to confer on the Commission additional powers as provided in all or any of the sub-sections (2), (3), (4) and (5) of that section. Section 6 states:

"6. Statements made by persons to the Commission.—No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

Provided that the statement—

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject matter of the inquiry."

By Section 8 the Commission is empowered to regulate its own procedure including the time and place of its sittings and may act notwithstanding the temporary absence of any member or the existence of any vacancy among its members.

5. The notification of the Orissa Government dated October 26, 1967 is to the following effect:—

“HOME DEPARTMENT NOTIFICATION

The 26th October, 1967.

No. 813-EC.—Whereas pursuant to the mid-term general election of the State Legislative Assembly in 1961, Councils of Ministers headed by Shri Biju Patnaik, Shri Biren Mitra and Shri Sadashiva Tripathy were formed in the State during different times during the period from the 23rd June 1961 till the 8th March 1967 and Shri Biju Patnaik after laying down his office as Chief Minister, declared himself to be the Chairman, Planning Board and continued to function as Chairman, Planning Board during the period from the 4th October, 1963 to the 29th January 1965, during the Chief Ministership of Shri Biren Mitra;

And whereas during the tenure of office of the aforesaid persons as Chief Ministers there were various allegations against the conduct of the aforesaid persons and some of the Ministers and Deputy Mini-

sters of the State of Orissa, as specified in the Schedule hereto, by politicians, the general public and others, and the allegations apart from being put forward from public platforms by private persons and otherwise, have been the subject-matter of active agitation all through in the State Legislature and in the Parliament and some of such allegations were of such a nature that an enquiry was conducted thereon by the Central Bureau of Investigation and the Central Cabinet also held deliberations over the same:

And whereas on an active and careful consideration of all such allegations by the Government of Orissa, it appears to them:—

That during the aforesaid period, i. e., from the 23rd June 1961 to the 8th March 1967, the said person as named in the schedule:

(1) committed various acts of misconduct, misappropriation, fraud, negligence, favouritism, nepotism, illegalities, irregularities, improprieties and abuse of their power in the matters of administration of the State;

(2) abused their official positions for securing pecuniary and other benefits for themselves, members of their families, their relations, their friends, their party-men (Congressmen) and others in whom they were interested, from out of the funds of the State exchequer and otherwise to the detriment of the interests of the State;

(3) committed breach of trust and acts of impropriety with respect to the properties and assets of the State with a view to further the interests of their party organisation, i. e., the Congress;

(4) entered into contracts and other monetary transactions for the supply of machinery, tools, equipments and execution of works, themselves, or permitted their family members, relations, friends, party-men and others to enter into such contracts and transactions with the Government of Orissa, with different Departments of the Government of Orissa, with Corporations, Local Bodies, Statutory Bodies and with other Bodies with which Government of Orissa have or had interest, control or concern in utter disregard of the interest of the State in breach of the trust imposed on them by virtue of their Constitutional positions;

(5) resorted to misuse of power, interfered in the processes of elections and administration of Local Bodies not only to help their friends, favourites and party-

men but also at times for their own personal benefits;

(6) acquired directly properties of the State either for themselves or for the benefit of the members of their families or relations or others in whom they were interested;

(7) advanced money and loans by way of favouritism out of the State exchequer in favour of themselves, members of their families, their relations and other persons in whom they were interested;

(8) permitted wastage, misuse, misutilisation and misappropriation of the funds of the State in several ways to the detriment of the interests of the State in utter disregard of the canons of financial propriety and established rules and procedure from which a presumption of personal gains for themselves or for persons as aforesaid directly or indirectly arises;

(9) caused wastage, misuse, misutilisation, misappropriation, illegal or irregular use of the funds of the State through contracts or other monetary transactions entered into by the Government without following the rules of law or the established procedure;

(10) by way of favouritism and nepotism caused maladministration in matters of public services, namely, in the matter of appointments, transfers, promotions and dealing with corrupt officers;

(11) interfered with the administration of law and tried to pervert the course of justice by helping offenders to escape law;

(12) caused to the State Government huge financial loss which has given rise to a great economic crisis, serious retardation in the progress of trade, industry and commerce, agricultural output, serious problems of unemployment and has also vitiated the moral and general character of the people;

(13) acted in several cases against constitutional proprieties, public policies and proper social and political conduct;

(14) amassed wealth themselves, through members of their family, relations and other persons or permitted the members of their family, relations and other persons to amass wealth and their assets during the aforesaid period have increased disproportionate to the known sources of their income, by abuse of their constitutional positions.

Under such circumstances the people in general and the Government have expressed a desire that the matters aforesaid regarding the aforesaid persons

should be enquired into through a Commission of Inquiry so that facts may be found which alone will facilitate rectification and prevention of recurrence of such lapses and securing the ends of justice and establishing a moral public order in future.

Under such circumstances, the Government of the State of Orissa are of the opinion that it is necessary to appoint a Commission of Inquiry for the purpose of making a full inquiry into the aforesaid matters which are of definite public importance.

Now, therefore, the State Government in exercise of the powers conferred by section 3 of the Commissions of Inquiry Act, 1952 (Act 60 of 1952), hereby appoint a Commission of Inquiry consisting of Shri Justice H. R. Khanna of the Delhi High Court to inquire into and report on and in respect of—

Whether the persons mentioned in the schedule, during the aforesaid period;

(1) committed various acts of malfeasance, misfeasance, misappropriation, fraud, negligence, favouritism, nepotism, illegalities, irregularities, improprieties and abuse of their power in matters of administration of the State in different cases?

(2) abused their official positions for securing pecuniary and other benefits for themselves, the members of their families, their relations, their friends and their partymen (Congressmen) and others in whom they were interested, from out of the funds of the State exchequer and otherwise to the detriment of the interests of the State?

(3) committed breach of trust and acts of impropriety with respect to the properties and assets of the State with a view to further the interests of their party organisation, i.e., the Congress?

(4) entered into contracts and other momentary (monetary?) transactions for the supply of machinery, stores, equipment and execution of works or permitted their family members, relations, friends and others in whom they were interested, with the Government of Orissa in utter disregard of the law, rules and administrative procedure relating thereto and in breach of the confidence reposed on them, by virtue of their constitutional positions?

(5) resorted to misuse of power, interfered in the process of election and administration of local bodies not only to help their friends, favourites and party-

men, but also at times for their own personal benefit?

(6) acquired directly properties of the State either for themselves or for the benefit of members of their families, relations or other persons in whom and organisations in which they were interested?

(7) advanced money and loans in favour of themselves, members of their families, their relations and other persons in whom they were interested, out of the State Exchequer?

(8) permitted wastage, misuse and expenditure in various ways to the detriment of the interests of the State without following the established rules of procedure from which the presumption of personal gains for themselves directly or indirectly would arise?

(9) by way of favouritism and nepotism have caused maladministration in matters of public services, namely, appointments, transfers, promotions and dealing with corrupt officers?

(10) interfered in the administration of law and tried to pervert the course of justice by helping offenders to escape law?

(11) by their aforesaid conduct have put the State Government to huge financial loss which has resulted in a financial crisis for the State?

(12) by their aforesaid conduct have hampered the entire industrial development in the State?

(13) by their aforesaid conduct have given rise to serious problems of unemployment?

(14) by their aforesaid conduct have spread corruption in the Government machinery and have polluted the general public morale in the State and have also brought about a general demoralisation of the political, social, economic and moral aspects of the Society?

(15) by their aforesaid conduct have put the State to financial loss which has developed into a great economic crisis and has resulted in rapid retardation of the progress of trade, industry and commerce, a deplorable fall in the agricultural output, spread of corruption in all wings of administration and a general breakdown in the morale and character of the people of the State?

The Commission of Inquiry may also perform such other functions as are necessary or incidental to the inquiry.

The Commission shall inquire into the detailed particulars pertaining to the aforesaid matters along with such other incidental and ancillary matters thereto that shall be placed before them by the State Government.

The Commission shall inquire into the financial implications of the aforesaid matters.

The Commission shall make its report to the State Government on or before 30th April, 1968.

And whereas the State Government are of opinion that having regard to the nature of the inquiry to be made and other circumstances of the case, all the provisions of sub-section (2), sub-sec. (3), sub-section (4), sub-section (5) and sub-section (6) of Section 5 of the Commissions of Inquiry Act, 1952 shall be made applicable to the said Commission, the State Government hereby directs that all the said provisions shall apply to the said Commission.

The Commission shall have its headquarters at Bhubaneshwar and may also visit such places as may be necessary in furtherance of the inquiry.

By order of the Governor
B. B. Rath,
Additional Secretary to Govt.

SCHEDULE

		From	To
1. Shri Biju Patnaik	Chief Minister	23-6-1961	1-10-1963
	Chairman State Planning Bd.	4-10-1963	29-1-1965
2. " Biren Mitra	Minister	23-6-1961	1-10-1963
	Chief Minister	2-10-1963	20-2-1965
3. " S. Tripathy	Minister	23-6-1961	20-2-1965
	Chief Minister	21-2-1965	8-3-1967
4. " Nilmoni Routray	Minister	23-6-1961	25-2-1967
5. " Satyapriva Mohanty	Minister	2-10-1963	24-2-1967
6. " P. V. Jagannath Rao	Minister	23-6-1961	8-3-1967
7. " H. B. Singh Mardaraj	Minister	23-6-1961	20-2-1965
8. " R. P. Mishra	Minister	21-2-1965	25-2-1967
9. " Brundaban Nayak Deputy	Minister	29-7-1962	1-10-1963
	Minister	2-10-1963	28-6-1965

10. Shri T. Sanganna	Dy. Minister	29-7-1962	1-10-1963
	Minister	2-10-1963	27-2-1967
11. " Prahallad Mallik	Dy. Minister	29-7-1962	28-2-1967
12. " S. K. Sahu	Dy. Minister	29-7-1962	28-2-1967
13. " Anup Singh Deo	Dy. Minister	21-2-1963	8-2-1967
14. " Chittaranjan Naik	Dy. Minister	21-2-1963	28-2-1967
15. " Chandramohan Singh	Dy. Minister	29-7-1962	24-2-1967

B. B. RATH,
Additional Secy. to
Government."

6. On behalf of the appellants Mr. Asoke Sen put forward the argument that the appointment of the Commission is not valid as the notification does not state what is the purpose for which the enquiry was to be made. To put it differently, the argument of the appellants was that the notification is not related to any future Government action or legislative policy and hence the notification was bad. The contention of Mr. Asoke Sen was that an inquiry for mere collection of facts unrelated to any future course of Government action or legislative policy does not fall within the purview of Section 3 of the Act and it is not a valid exercise of statutory power to appoint such a Commission. We are unable to accept the argument put forward on behalf of the appellants as correct. The purpose of the enquiry is stated in the preamble to the notification which states that "the matters aforesaid regarding the aforesaid persons should be enquired into through a Commission of Inquiry so that facts may be found which alone will facilitate rectification and prevention of recurrence of such lapses and securing the ends of justice and establishing a moral public order in future". In other words, the object of the enquiry to be made by the Commission appointed under Section 3 of the Act was to take appropriate legislative or administrative measures to maintain the purity and integrity of political administration in the State. In our opinion the appointment of the Commission of Inquiry in the present case was in valid exercise of the statutory power by the State Government under Section 3 of the Act. Mr. Asoke Sen referred in this connection to the decision of this Court in *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*, 1959 SCR 279 = (AIR 1958 SC 538) in which the appellant challenged the validity of the notification of the Central Government dated December 11, 1958 appointing a Com-

mission of Inquiry to inquire into and report in respect of certain companies mentioned in the Schedule attached to the notification and in respect of the nature and extent of the control and interest which certain persons named in the notification exercised over these companies. It was held by this Court in agreement with the Bombay High Court, that the notification was legal and valid except as to the last part of Cl. 10 thereof which empowered the Commission to recommend the action which should be taken as and by way of securing redress or punishment or to act as a preventive in future cases. Clause 10 of the notification in that case stated:

"Any irregularities, frauds or breaches of trust or action in disregard of honest commercial practices or contravention of any law (except contraventions in respect of which criminal proceedings are pending in a Court of Law) in respect of the companies and firms whose affairs are investigated by the Commission which may come to the knowledge of the Commission and the action which in the opinion of the Commission should be taken as and by way of securing redress or punishment or to act as a preventive in future cases."

The portion of Clause 10 of the notification which was held to be ultra vires by this Court was the portion beginning with the words "and the action" and ending with the words "in future cases". It was argued on behalf of the appellant in that case that while the Commission may find facts on which the Government may take action, legislative or executive the Commission cannot be asked to suggest any measure, legislative or executive, to be taken by the appropriate Government. The argument was rejected by this Court. In this connection, S. R. Das, C. J. speaking for the Court observed at p. 294 of the Report SCR = (at pp. 546-547 of AIR) as follows:—

"We are unable to accept the proposition so widely enunciated. An inquiry necessarily involves investigation into facts and necessitates the collection of material facts from the evidence adduced before or brought to the notice of the person or body conducting the inquiry and the recording of its findings on those facts in its report cannot but be regarded as ancillary to the inquiry itself, for the inquiry becomes useless unless the findings of the inquiring body are made available to the Government which set up the inquiry. It is, in our judgment, equally ancillary that the person or body conducting the inquiry should express its own view on the facts found by it for the consideration of the appropriate Government in order to enable it to take such measure as it may think fit to do. The whole purpose of setting up of a Commission of Inquiry consisting of experts will be frustrated and the elaborate process of inquiry will be deprived of its utility if the opinion and the advice of the expert body as to the measures the situation disclosed calls for cannot be placed before the Government for consideration notwithstanding that doing so cannot be to the prejudice of anybody because it has no force of its own. In our view the recommendations of a Commission of Inquiry are of great importance to the Government in order to enable it to make up its mind as to what legislative or administrative measures should be adopted to eradicate the evil found or to implement the beneficial objects it has in view. From this point of view, there can be no objection even to the Commission of Inquiry recommending the imposition of some form of punishment which will, in its opinion, be sufficiently deterrent to delinquents in future. But seeing that the Commission of Inquiry has no judicial powers and its report will purely be recommendatory and not effective proprio vigore and the statement made by any person before the Commission of Inquiry is, under section 6 of the Act, wholly inadmissible in evidence in any future proceedings, civil or criminal, there can be no point in the Commission of Inquiry making recommendations for taking any action as and by way of securing redress or punishment which, in agreement with the High Court, we think, refers, in the context, to wrongs already done or committed, for redress or punishment for such wrongs, if any, has to be imposed by a

court of law properly constituted exercising its own discretion on the facts and circumstances of the case and without being in any way influenced by the view of any person or body, howsoever august or high powered it may be. Having regard to all these considerations it appears to us that only that portion of the last part of Clause (10) which calls upon the Commission of Inquiry to make recommendations about the action to be taken 'as and by way of securing redress or punishment', cannot be said to be at all necessary for or ancillary to the purposes of the Commission. In our view the words in the latter part of the section, namely, 'as and by way of securing redress or punishment', clearly go outside the scope of the Act."

In our opinion, the ratio of this case has no application in the present case, because there is nothing corresponding to the impugned part of Clause 10, in the notification of the Orissa Government dated October 26, 1967. On the contrary, we have already pointed out that the object to set up the Commission of Inquiry in the present case was to take appropriate legislative or administrative measures for maintaining high standards of public conduct and purity of political administration in the State. It follows therefore that the notification of the Orissa Government falls within the ambit of Section 3 of the Act and must be held to be legally valid and *intra vires*.

7. We pass on to consider the next question arising in these appeals, namely whether the power was exercised by the State Government for a purpose alien to the statute. It was contended by Mr. Asoke Sen that there was a bitter political rivalry between the appellants on the one hand and Shri Pabitra Mohan Pradhan, Shri Harekrushna Mahtab, Shri Singh Deo and the other persons who are at present in charge of the Orissa administration. Reference was made by Mr. Asoke Sen to the political history of the State of Orissa from 1947 up to the General Elections, 1967 and in particular to the rivalry between Shri Biju Patnaik and Shri Singh Deo who was the leader of Opposition in the previous Government and also to the internal rivalry between the two political groups in the Congress Legislative Party, one led by Shri Harekrushna Mahtab and the other led by Shri Biju Patnaik and Shri Biren Mitra. It was urged that the Commission was set up by the present

Orissa Government not in the public interest but for a collateral purpose, namely, for getting rid of Shri Biju Patnaik and Shri Biren Mitra and driving them out of the political life of Orissa. Mr. Asoke Sen said that the object of the enquiry was character assassination of Shri Patnaik and Shri Biren Mitra and so the Commission was set up for a collateral purpose and the notification must be struck down as illegal and ultra vires. It is not possible, in our opinion, to accept this argument as correct. It is admitted that there is political rivalry in Orissa between the appellants and the present Chief Minister of Orissa Shri R. N. Singh Deo and also as between the appellants and the group of Congress dissidents led by Shri Harekrushna Mahtab, Shri Nabakrushna Choudhury, Shri Pabitra Mohan Pradhan, Shri Santanu Kumar Das and Shri Surendranath Patnaik. But we do not think that the existence of political rivalry is in itself sufficient to hold that the appointment of the Commission of Inquiry is illegal. Having perused the affidavits of the appellants and also those filed by the respondents in this case we are of opinion that the appointment of the Commission of Inquiry was not due merely to the existence of political rivalry of the parties but was impelled by the desire to set up and maintain high standards of moral conduct in the political administration of the State. As we have already pointed out, the object of appointing the Commission is stated in the notification itself as "the rectification and prevention of recurrence of such lapses and securing the ends of justice and establishing a moral public order in future". In the affidavit of Shri Pabitra Mohan Pradhan it is stated that the appointment of the Commission of Inquiry was one of the items of the common programme on which the Jana Congress and the Swatantra Party contested the General Elections of 1967. As a result of the popular mandate the Swatantra Party and the Jana Congress coalition took charge of the reins of Government and in accordance with the solemn promise made by those parties to the people of Orissa the Government decided to appoint a Commission of Inquiry in order to investigate the widespread corruption practised by the persons named in the Schedule to the impugned notification. The decision to appoint a Commission was also announced in the first address of the Governor to the Orissa

Legislative Assembly after the 1967 General Elections. In paragraph 17 of the affidavit, Shri Pabitra Mohan Pradhan has further said that the object of the Jana Congress and the Swatantra Party was "to set up a clean administration, so that the State's resources should not go into the pockets of the corrupt group led by Shri Biju Patnaik and Shri Biren Mitra but should be used for giving a better life to the people of the State". In para 6 of the affidavit Shri Pabitra Mohan Pradhan further states: "I have always believed and still believe that politics is not for the purpose of serving the selfish ends and to satisfy the greed of any politician or any person or any group of persons. Politics is for the service of the people and involves sacrificing one's life and comforts for raising the living standard of the overwhelming poverty-stricken people of our State and our country so that they may enjoy a good life and hold up their heads with pride." In para 5 he has denied that there was any intention on his part to carry on character assassination of Shri Biju Patnaik, Shri Biren Mitra and their group. It is true that the appointment of the Commission of Inquiry may have been made partly on account of the political rivalry between the parties but having perused the affidavits filed by the appellants and the respondents in this case, we are satisfied that the main object of the appointment of the Commission of Inquiry was not to satisfy the political rivalry of the politicians at present in power in Orissa but to promote measures for maintaining purity and integrity of the administration in future in the Orissa State. We are accordingly of the opinion that Mr. Asoke Sen is unable to make good his argument that the impugned notification is a mala fide exercise of the statutory power and it should be struck down as illegal.

8. It is well settled that if a statutory authority exercises its power for a purpose not authorised by the law the action of the statutory authority is ultra vires and without jurisdiction. In other words, it is a mala fide exercise of power in the eye of law, i.e., an exercise of power by a statutory authority for a purpose other than that which the Legislature intended [See *The King v. Minister of Health, 1929-1 KB 619*]. But the question arises as to what is the legal position if an administrative authority acts both for an authorised purpose and

for an unauthorised purpose. In such a case where there is a mixture of authorised and unauthorised purpose, what should be the test to be applied to determine the legal validity of the administrative act? The proper test to be applied in such a case is as to what is the dominant purpose for which the administrative power is exercised. To put it differently, if the administrative authority pursues two or more purposes of which one is authorised and the other unauthorised, the legality of the administrative act should be determined by reference to the dominant purpose. This principle was applied in *Rex v. Brighton Corporation; ex parte Shoosmith*, (1907) 96 LT 762. A Borough Corporation expended a large sum of money upon altering and paving a road, which was thereby permanently improved, but they decided to do the work at the particular time when it was done in order to induce the Automobile Club to hold motor trials and motor races upon it. The Court of Appeal (reversing the decision of the Divisional Court), refused to intervene, and it was observed by Fletcher-Moulton, L. J. at page 764 as follows:—

"It cannot be denied that the physical act of changing the surface of a road when the corporation thought fit and proper so to do was within their statutory powers and there is no case proved by the evidence which shows either that they wastefully used the public money or that they did so with improper motives. The case would be quite different if one came to the conclusion that under the guise of improvement of a road, certain moneys had been used really for diminishing the expenses of the Automobile Club or anything of that sort and that there had been a turning aside of public moneys to illicit purposes".

The principle was applied by Denning, L. J. in *Earl Fitzwilliam's Wentworth Estate Co. Ltd. v. Minister of Town and Country Planning*, 1951-2 KB 284. It was a case concerning the validity of a compulsory purchase made by the Central Land Board, and confirmed by the Minister, under the provisions of the Town and Country Planning Act, 1947, in respect of a plot of land, ripe for development, which the owner was not prepared to sell at the existing use value. The landowner applied to have the order quashed, as not having been made for any purpose connected with the Board's function under the Act, but for the pur-

pose of enforcing the Board's policy of sales at existing use values. The majority (consisting of Somerwell and Singleton, L. J.) held that, though the main purpose of the Board may well have been to induce landowners in general and the company, in particular, to adopt one of the methods of sale favoured by the Board, it was nevertheless in connection with their function as the authority operating the development charge scheme, and at any rate, "the case was not one in which it could be said that powers were exercised for a purpose different from those specified in the statute". Denning, L. J. disagreed with the majority and held that the dominant purpose of the Board was not to assist in their proper function of collecting the development charge, but to enforce their policy of sales at existing use value only. The dominant purpose being unlawful, the order was invalid, and could not be cured by saying that there was also some other purpose which was lawful. The Board and the Minister had misunderstood the extent of their compulsory powers and their affidavits showed that they had overlooked that their ultimate purpose in exercising their powers should be connected with the performance of the Board's functions under the Act. At page 307 of the Report Denning L. J. observed as follows:—

"What is the legal position when the board have more than one purpose in mind? In the ordinary way, of course, the courts do not have regard to the 'purpose' or 'motive' or 'reason' of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. But sometimes the validity of an act does depend on the purpose with which it is done—as in the case of a conspiracy—and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind which was lawful: see what Lord Simon, Lord Maugham and Lord Wright said in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, (1942 AC 435, 445, 452-3, 469, 475).

So also the validity of government action often depends on the purpose with which it is done. There, too, the same

principle applies. If Parliament grants a power to a government department to be used for an authorized purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinate to some other purpose which is not authorised by law, then the department exceeds its powers and the action is invalid."

9. Applying the test to the present case, we are of opinion that the dominant purpose of setting up the Commission of Inquiry was to promote measures for maintaining purity and integrity of the administration in the political life of the State and not "the character assassination" of Shri Biju Patnaik and Shri Biren Mitra and their group.

10. It follows therefore that the impugned notification of the Orissa Government dated October 26, 1967 is legally valid.

11. We proceed to consider the next argument put forward on behalf of the appellants, namely, that the appointment of the Commission of Inquiry was illegal because it constituted contempt of Court. It was pointed out that items with regard to Shri Biren Mitra referred to in the impugned notification were the subject-matter of civil litigation and there was a First Appeal pending in the High Court. It appears that all the items of charges regarding Shri Biren Mitra were included in the Memorandum submitted by Shri Nisamoni Khuntia, Secretary, Sanjukta Socialist Party to the President of India. The memorandum was published in the Daily newspaper "The Eastern Times" on its front page on August 2, 1964 with bold headlines "Money amassed through corruption". Shri Narendra Chandra Pradhan was the Printer and Publisher of that paper. Shri Biren Mitra filed two suits — O. S. Nos. 266 and 267 of 1964 against the Prajantra Prachar Samiti (Defendant No. 1), Shri Janaki Ballav Patnaik (Defendant No. 2), Shri Narendra Chandra Pradhan (Defendant No. 3) and Shri Nisamoni Khuntia (Defendant No. 4). It was alleged that there was collusion between defendants 1 to 4 and other political opponents of Shri Biren Mitra. Defendants 1 to 3 filed a common Written Statement saying that the assertions in the memorandum were true. The 4th defendant filed a separate written state-

ment to the same effect. The suits were heard by the Subordinate Judge, Cuttack. He held that the publication was on the face of it defamatory and libellous. No evidence was given on either side regarding the truth of the imputations in the publications. Holding that the burden of proof rested on the defendants the Subordinate Judge decreed the suit for damages for Rs. 200. It was contended by Mr. Asoke Sen that the decision of the Subordinate Judge was pending in the First Appeal in the High Court and so no Commission of Inquiry could be appointed with regard to the same matters. In our opinion, there is no substance in this argument. It should be noticed, in the first place, that none of the parties in the civil suit has adduced any evidence. Shri Biren Mitra did not choose to appear as a witness and present himself for cross-examination. The suits were decided purely on the basis of burden of proof. We do not wish to express any view as to whether these two suits were decided rightly or wrongly, but the fact remains that there was no factual enquiry into the allegations. It is also not possible to accept the argument that the present inquiry is in relation to the very matters which were the subject-matter of the civil suits and of the first appeal. It was pointed out by this Court in 1959 SCR 279 = (AIR 1958) SC 538 that the inquiry cannot be looked upon as a judicial inquiry and the order ultimately passed cannot be enforced *proprio vigore*. The inquiry and the investigation by the Commission do not therefore amount to usurpation of the function of the courts of law. The scope of the trial by the Courts of law and the Commission of Inquiry is altogether different. In any case, it cannot be said that the Commission of Inquiry would be liable for contempt of Court if it proceeded to enquire into matters referred to it by the Government Notification. In appointing a Commission of Inquiry under S. 3 of the Act the Orissa Government is exercising a statutory power and in making the inquiry contemplated by the notification, the Commission is performing its statutory duty. We have already held that in the appointment of the Commission of Inquiry the Government was acting bona fide. It is therefore not possible to accept the argument of the appellants that the setting up of the Commission of Inquiry by the State Government or the continuance of the

inquiry by the Commission so constituted would be tantamount to contempt of Court. To constitute contempt of court, there must be involved some "act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority" or something "calculated to obstruct or interfere with the due course of justice or the lawful process of the courts", see Reg v. Gray, (1900) 2 QB 36; Arthur Reginald Perera v. The King, 1951 AC 482 at p. 488. The respondents in this case have done nothing to obstruct or interfere with the lawful powers of the Court by acting bona fide and discharging statutory functions under the Commissions of Inquiry Act. We therefore see no justification for holding that the issue of the notification under S. 3 of the Act or the conduct of the Inquiry by respondents amount to contempt of Court. We accordingly reject the argument of Mr. Asoke Sen on this aspect of the case.

12. It is for these reasons that we have dismissed these Civil Appeals, by our order dated April 16, 1968. One set of hearing fee.

RGD Appeals dismissed.

AIR 1969 SUPREME COURT 227

(V 56 C 42)

(From: Rajasthan)*

R. S. BACHAWAT AND K. S. HEGDE,
JJ.

Amalgamated Electricity Co. (Belgaum) Ltd., Appellant v. Municipal Committee, Ajmer, Respondent.

Civil Appeal No. 706 of 1965, D/- 25-7-1968.

(A) Municipalities — Ajmer Merwara Municipalities Regulation (1925), S. 233 — Civil P. C. (1908), S. 80 — Applicability — Suit against public Officer in respect of 'act' done in an official capacity — 'Act' includes illegal omissions — Omission must entail penal consequence for public officer — Non-discharge of official duty by official concerned must amount to illegal omission — Suit against Municipal Committee claiming amount as surcharge due under Notification issued under S. 3 (2) of Bombay Electricity (Surcharge) Act — Notice under S. 233 of Regulation is

*First Appeal No. 67 of 1956, D/- 22-9-1964 — Raj.).

not necessary — F. A. No. 67 of 1956 D/- 22-9-1964 (Raj) Reversed — Bombay Electricity (Surcharge) Act (19 of 1946), S. 3 (2) — Words and Phrases — "Act" includes illegal omissions — General Clauses Act (1897), S. 3 (2).

Before S. 80 of the Civil P. C. can be relied on in any suit against a public Officer, it must be shown that it is a suit in respect of an 'act' purporting to be done by him in his official capacity. In view of the provisions of the General Clauses Act, the expression 'act' also includes illegal omissions. Therefore if the suit does not relate to any 'act' or 'illegal omission' purporting to be done by a public officer in his official capacity, S. 80 will not have any application. Similar is the position under S. 233 of the Ajmer Merwara Municipalities Regulation. (Para 7)

Every omission is not an illegal omission. Before an omission can be considered as an illegal omission it must be shown that the official concerned had omitted to discharge some official duty imposed on him in public interest. The omission in question must have a positive content in it. In other words the non-discharge of that duty must amount to an illegality. Failure on the part of the Municipality to discharge its liabilities under the provisions of the Regulation will not ordinarily become illegal omissions. Such omission does not entail any penal consequence for the public official responsible for it.

(Para 9)

Where, therefore, an electricity company filed suit against Ajmer Municipal Committee claiming certain amount as surcharge due under notification issued by Chief Commissioner of Ajmer under S. 3 (2) of Bombay Electricity (Surcharge) Act, no notice under S. 233 of the Ajmer Merwara Municipalities Regulation was necessary before instituting the suit. AIR 1927 PC 176, Distinguished; AIR 1934 PC 96, Applied; AIR 1938 Cal 191, Ref.; F. A. No. 67 of 1956 D/- 22-9-1964 (Raj), Reversed.

(Para 12)

(B) Bombay Electricity (Surcharge) Act (as extended to Ajmer Merwara under Ajmer Merwara (Extension of Laws) Act, 1947) (19 of 1946), Ss. 3, 4, 6 — Relative scope — Intention of Legislature to be gathered from language of statutory provision — S. 6 does not in any manner control Ss. 3 and 4 — Levy of surcharge on price of electrical energy supplied for street lighting — Notification issued by

Chief Commissioner is not without authority of law — F. A. No. 67 of 1956, D/- 22-9-1964 (Raj), Reversed — (Civil P. C. (1908), Pre — Interpretation of Statutes — Intention of Legislature)

The provisions of Sections 3 and 4 clearly empower the Chief Commissioner to levy surcharge on the bills for the supply of electricity for street lighting. Section 4 empowers the licensee to collect from the consumer the surcharge levied. Municipal councils are not excluded from the operation of Ss. 3 and 4 of the Bombay Act, as extended to Ajmer Merwara. Similarly electrical energy supplied on the basis of a contract is not excluded from the operation of S. 3. S. 6 does not in any manner control Ss. 3 and 4. The intention of a legislature or its delegate has to be gathered from the language of the statutory provisions and not from what it failed to say. Ss. 3 and 4 are self-contained provisions. For taking action on the basis of those sections no assistance is needed from S. 6. Therefore notification issued by the Chief Commissioner levying surcharge on the price of the electrical energy supplied for street lighting is not without the authority of law. F. A. No. 67 of 1956, D/- 22-9-1964 (Raj), Reversed. (Para 14)

(C) Electricity Act (1910), S. 3 (f), Sch. CL (12) — Bombay Electricity (Surcharge) Act, (as extended to Ajmer Merwara by Ajmer Merwara Extension of Laws Act, 1947) (19 of 1946), Ss. 3, 4 — Competency of Legislature to provide for surcharge — No conflict in Cl. 12 of Schedule in former Act and Ss. 3 and 4 of latter Act — Notification issued by Chief Commissioner of Ajmer levying surcharge is not ultra vires the provisions of Electricity Act — F. A. No. 67 of 1956 D/- 22-9-1964 (Raj), Reversed — (Constitution of India, Arts. 246, 254 Sch. 7 List III Entry 38)

Electricity is a concurrent subject both under the Constitution as well as under the Government of India Act, 1935. Therefore, the Bombay legislature had competency to provide for the levy of surcharge so long as the relevant provision did not conflict with any provision in the Central Act. (Para 15)

There is no conflict between Cl. 12 of the Schedule in the Electricity Act and Ss. 3 and 4 of the Bombay Act. Clause 12 prescribes a procedure for settling the price of electricity supplied by the

licensee for street lighting. It merely lays down the machinery for settling the price if there is dispute between the contracting parties. That clause does not fix the price to be paid or even the maximum price payable. That clause does not take away the power from the State legislature to impose additional burden on the consumer. Under that clause the licensee cannot dictate his terms to the authority responsible for street lighting. Clause 12 imposes no fetters on the powers of the provincial legislatures in the matter of enhancing the price of the electricity supplied by the licensee for street lighting. Hence, notification issued by Chief Commissioner of Ajmer levying surcharge under Sections 3 and 4 of Bombay Electricity (Surcharge) Act is not ultra vires the provisions of Electricity Act. F. A. No. 67 of 1956, D/- 22-9-1964 (Raj), Reversed. (Para 16)

(D) Constitution of India, Art. 133 (1) (a) — Appeal under — Supreme Court does not examine contentions which have not been examined by appellate court. (Para 19)

Cases Referred: Chronological Paras (1938) AIR 1938 Cal 191 (V 25) = 65 Cal LJ 561, Debendra Nath Roy v. Official Receiver (1934) AIR 1934 PC 96 (V 21) = 61 Ind App 171, Revati Mohan Das v. Jatindra Mohan Chosh (1927) AIR 1927 PC 176 (V 14) = 54 Ind App 338, Bhagchand Dagdusa Gujarathi v. Secy. of State

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Mr. Purshottam Trikandas, Senior Advocate (Mr. I. N. Shroff, Advocate with him), for Appellant; Mr. B. D. Sharma, Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: This is plaintiff's appeal. The Amalgamated Electricity Co. Ltd. is the plaintiff in the suit from which this appeal arises. It sued the Municipal Committee, Ajmer, through its Chairman in suit No. 21 of 1951 in the court of Sub-Judge, first class, Ajmer. In that suit it claimed a sum of Rs. 93,520-2-1 as surcharge due under certain notifications issued by the Chief Commissioner of Ajmer. Out of the said sum, a sum of Rs. 28,837-12-5 was claimed as being due as Surcharge on the bills issued by it in respect of the electricity supplied by it to the defendant for street lighting. A sum of Rs. 58,143-12-2 was claimed as

Surcharge on its bills in respect of the electricity utilised for pumping water in pursuance of one of its contracts with the defendant. The balance amount was claimed as interest on the amounts claimed. That suit was resisted by the defendant on various grounds. The trial court substantially allowed the plaintiff's claim and decreed the suit in a sum of Rs. 44,461-11-9 with interest and proportionate costs. The High Court of Rajasthan accepting the appeal (No. 67 of 1956) of the defendant dismissed the plaintiff's suit. After obtaining a certificate under Article 183 (1) (a) of the Constitution, the plaintiff has filed this appeal.

2. The High Court of Rajasthan dismissed the plaintiff's suit on two grounds namely, (1) that before filing the suit, no notice as required by Section 233 of the Ajmer Merwara Municipalities Regulation, 1925 has been given, and (2) the notification of the Commissioner imposing the impugned Surcharge is either beyond the scope of the provisions of Bombay Electricity Surcharge Act, 1946 (Bombay Act 19 of 1946) (to be hereinafter referred to as the Bombay Act) as extended to Ajmer by the Central Government in pursuance of the powers conferred on it under the Ajmer Merwara (Extension of Laws) Act, 1947 or in the alternative the provisions of the Bombay Act are ultra vires Clause 12 of the schedule to the Indian Electricity Act, 1910 (to be hereinafter referred to as the Electricity Act).

3. In view of the above findings the other pleas taken by the defendant were not examined. We have to see whether the decision of the High Court is in accordance with law.

4. The material facts of the case are as follows:

A company known as Trustees Corporation (I) Ltd. took out a license from the Chief Commissioner of Ajmer on 19th January, 1928 under the provisions of the Electricity Act authorising it to generate and supply electrical energy within the municipal limits of Ajmer and such extensions beyond those limits as may be permitted by the Chief Commissioner from time to time in accordance with the conditions mentioned in the license (Exh. 1). Sometime later the said company transferred all its rights and liabilities to Ajmer Electric Supply Co. Ltd. The Ajmer Electric Supply Co. Ltd. was

later amalgamated with the plaintiff's company as per the scheme of transfer approved by the Bombay High Court. The Ajmer Electric Supply Co. Ltd. had entered into an agreement (Exh. 20) on 31st March, 1932 with the Municipal Committee, Ajmer for supplying electricity for street lighting and maintaining the street lighting equipments. By another agreement (Exh. 21) dated 15th March, 1939, it undertook to pump water from the wells belonging to Municipal Committee at Bhaonta.

5. On September 3, 1948, the Government of India in exercise of the powers conferred on it by Section 2 of Ajmer Merwara (Extension of Laws) Act, 1947, extended the Bombay Act to the province of Ajmer Merwara subject to certain modifications. That notification among other modifications omitted the words "or in any contract for energy or for maintenance of street lighting equipment" found in Section 6 of the Bombay Act. The other modifications made are not relevant for our present purpose. After the extension of the Bombay Act to Ajmer Merwara, the Ajmer Electric Supply Co. Ltd., applied under S.3 of the Bombay Act to the Chief Commissioner for imposing Surcharge as provided in that section to meet its increased cost. On September 19, 1948, the Chief Commissioner directed that the Bombay Act as modified shall apply to two undertakings including Ajmer Electric Supply Co. Ltd., Ajmer. There was another notification on September 19, 1948 but that is not relevant for our present purpose. On March 29, 1949, the Chief Commissioner issued the notification herein set out below in substitution of the notification issued by him on September 19, 1948.

"CHIEF COMMISSIONER'S OFFICE, AJMER."

No. 6/5/48-LSG. Dated Ajmer, the
29th March, 1949.

To be substituted for the notification bearing the same number and date.
Orders by the Chief Commissioner,

Ajmer Merwara.

NOTIFICATION

No. F/8-4-II(CO)-II Dated Ajmer,
the 19th September, 1948.

In exercise of the powers conferred by sub-section (2) of Section 3 of the Bombay Electricity (Surcharge) Act, 1946 (XIX of 1946) as extended to the Ajmer

Merwara by the Government of India, Ministry of Home Affairs Notification No. 8/9/48-Judicial, dated the 3rd September, 1948, and in accordance with the recommendations made by the Electricity Advisory Board constituted by him under Section 35 of the Indian Electricity Act, 1910, the Chief Commissioner, is pleased to fix for a period of two years from the date of this Notification, the following rates of surcharge on the

Ajmer Electric Supply
Co. Ltd., Ajmer and
Beawar Electric Supply
Co. Ltd., Beawar.

charges for energy leviable by the Ajmer and Beawar Electric Supply Companies:

(1) For supplies made under standard tariffs:

(i) Ajmer Electric Supply Co. Ltd., Ajmer 20 per cent.

(ii) Beawar Electric Supply Co. Ltd., Beawar 15 per cent.

(2) For supplies made under special contracts, other than those made with Municipal Committee for street lighting.

0.007 of an anna per unit (Kw. hour) per rupee increase in the price of oil beyond the basic price of Rs. 90 per ton.

(3) For supplies for Municipal Street Lighting made under special contracts

Ajmer Electricity Co.
Ltd., Ajmer and Beawar
Electric Supply
Co. Ltd., Beawar.

0.128 of an anna per month per each rupee advance in price of fuel oil beyond the basic price of Rs. 90 per ton for each 60 wattage lamp and prorate for lower and higher wattage lamps.

The surcharge is leviable on the actual energy consumed and not on the standing charges of motors and meters.

By order

(Sd.) A. N. Lal
Secretary to the Chief
Commissioner,
Ajmer Merwara."

On the basis of that notification the Ajmer Electric Supply Co. Ltd. called upon the defendant by means of a lawyers' notice dated 16th August, 1951 to pay the surcharge detailed therein. As the defendant did not comply with the demand made, the plaintiff after the amalgamation mentioned earlier instituted the present suit.

6. It is not necessary to deal with the various pleas taken by the defendant in resisting the plaintiff's suit. Some of those pleas have been given up; some have not been considered by the High Court. The plaintiff's suit has been dismissed by the High Court solely on the grounds mentioned above. If the plaintiff succeeds in satisfying this court that the view taken by the High Court is wrong then the matter will have to go back to the High Court for decision on questions left undecided.

7. We shall first take up the question of notice under Section 233 of Ajmer Merwara Municipalities Regulation. The contention of the defendant is that

the notice issued is invalid inasmuch as the same was issued on behalf of the Ajmer Electric Supply Co. Ltd. after that company was amalgamated with the plaintiff. The next ground of attack is that the said notice is invalid because it does not set out the name and the place of abode of the intending plaintiff. These contentions have commended themselves to the learned Judges of the High Court. Section 233 of the Ajmer Merwara Municipality Regulation prescribes:

"Section 233: Suits against Committee or its officers.—No suit shall be instituted against a Committee, or against any member, officer or servant of a Committee, in respect of any act purporting to be done in its or his official capacity, until the expiration of one month next after notice in writing has been, in the case of a Committee, delivered or left at its office, and in the case of an officer or servant, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the in-

tending plaintiff; and unless the plaint contains a statement that such notice has been so delivered or left:

Provided that nothing in this section shall apply to any suit instituted under S. 54 of the Specific Relief Act, 1877 (I of 1877)."

So far as suits against public officials are concerned this section is an exact reproduction of Section 80, Civil Procedure Code. But Section 80, Civil Procedure Code has two parts namely:

- (1) Suits against Governments, and
- (2) Suits against public officers in respect of acts purporting to be done by those public officers in their official capacity.

So far as suits against Governments are concerned, they cannot be validly instituted without giving a notice as required by Section 80, Civil Procedure Code. But when we come to suits against public Officers, Section 80, Civil Procedure Code applies only to suits in respect of any 'act' purporting to be done by a public officer and that in his official capacity. Hence before Section 80 can be relied on in any suit against a public officer, it must be shown that it is a suit in respect of an 'act' purporting to be done by him in his official capacity. In view of the provisions of the General Clauses Act, the expression 'act' also includes illegal omissions. Therefore if the suit does not relate to any 'act' or 'illegal omission' purporting to be done by a public officer in his official capacity, Section 80 will not have any application. Similar is the position under Section 233 of the Ajmer Merwara Municipalities Regulation.

8. The stand taken by the plaintiff is that in the instant case no notice under Section 233 of Ajmer Merwara Municipalities Regulation was necessary, alternatively it was urged that if such a notice is necessary, the notice issued complies with the requirements of law. If the first alternative is accepted there is no need to go into the question as to the validity of the notice issued.

9. In the suit, the plaintiff does not complain of any act done by the defendant nor does it say that the defendant was guilty of any illegal omission. The plaintiff's case is as mentioned earlier that in view of the notification issued by the Chief Commissioner on March 29, 1949 [Exh. 13 (B)], it was entitled to re-

cover from the defendant the amount claimed. The stand taken by the defendant is that the levy of surcharge is invalid. Whether the contention is sustainable or not there is no doubt that it is bona fide contention. That contention had commended itself to the High Court. Every omission is not an illegal omission. Before an omission can be considered as an illegal omission it must be shown that the official concerned had omitted to discharge some official duty imposed on him in public interest. The omission in question must have a positive content in it. In other words the non-discharge of that duty must amount to an illegality. We are told that under the provisions of the Ajmer Merwara Municipalities Regulation, it is the duty of the Municipal Council to discharge all its liabilities. In that connection reference was made to certain provisions of the said regulation. But the failure on the part of the Municipality to discharge its liabilities will not ordinarily become illegal omissions. The municipality or its members or office-bearers cannot be punished for their failure to pay the amount due to the plaintiff. To put it differently the omission complained does not entail any penal consequence for the public official responsible for it. If every omission is considered as an illegal omission and therefore an 'act' either within the meaning of Section 80, Civil Procedure Code or Section 233 of the Ajmer Merwara Municipalities Regulation then the distinction between the first part of S. 80, Civil Procedure Code and its second part disappears. If that is so, it follows that in every suit against a public officer relating to his public duty, the issuance of a notice is a condition precedent. That in our opinion would be re-writing the section.

10. It is true that in Bhagchand Dagdusa Gujarathi v. Secretary of State, 54 Ind App 338 = (AIR 1927 PC 176), the Privy Council laid down that Section 80 should be strictly complied with and is applicable to all forms of action and all kinds of reliefs claimed against the Government. But here in this case we are not concerned with a claim against the Government. Therefore that decision has no application to the facts of the present case. The case which is relevant for our present purpose is Revati Mohan Das v. Jatindra Mohan Ghosh, 61 Ind App 171 = (AIR 1934 PC 96). Therein a manager of an estate appointed under

Section 95 of the Bengal Tenancy Act, 1885 executed a mortgage in favour of the predecessor of the plaintiff therein after obtaining the sanction of the local court. The successor of that manager failed to discharge the mortgage debt. Consequently the plaintiff brought a suit against him for obtaining a mortgage decree. That suit was resisted on the ground that the plaintiff had failed to give the notice prescribed by Section 80, Civil Procedure Code before instituting the suit. That plea succeeded in the High Court. The Judicial Committee of the Privy Council reversed the decree of the High Court holding that the failure on the part of the respondent to discharge the mortgage cannot be considered as an 'act' within the meaning of Section 80, Civil Procedure Code. In the course of the Judgment Sir George Lownes speaking for the Board observed thus:

"On the alternative contention their Lordships are unable to hold that non-payment by respondent 1 is an "act purporting to be done by" the manager "in his official capacity". Under the general definitions contained in S. 3, General Clauses Act, 1897 an "act" might include an illegal omission 'but there clearly was no illegal omission in the present case.' It is also difficult to see how mere omission to pay either interest or principal could be an act purporting to be done by the manager in his official capacity."

(emphasis (here into ' ') supplied).

11. At this stage we would like to emphasise the observations of their Lordships "but clearly there was no illegal omission in the present case". This observation shows that a mere omission to discharge the debt without anything more is not an illegal omission. It is true that in that case, the court proceeded further and observed:

The mortgage imposed no personal liability upon the manager, but merely provided that if payment was not made the mortgagor would be entitled to realise his dues by sale through the Court, and this was all that the appellant sought by his suit. The manager for the time being no doubt had an option to pay in order to save the sale, but failure to exercise an option is not in any sense a breach of duty. The appellant made no claim against respondent 1 personally. He was there only as representing the estate of which the sale was sought. In

their Lordships' opinion, such a suit is not within the ambit of Section 80 and no notice of suit was required."

12. It is possible to read this passage as merely setting out the facts of that particular case and the equitable considerations arising therefrom and not as the ratio of the decision. Even if we consider that passage as one of the reasons given in support of the decision, the strength of the earlier ratio is not weakened. The interpretation placed by us on that decision is the same as that placed by the Calcutta High Court in Debendra Nath Roy v. Official Receiver, AIR 1938 Cal 191. Mr. Sharma reads to us several decisions of the various High Courts wherein it has been laid down that a suit brought in respect of breach of contract by a public official is an 'act' within the meaning of Section 80, Civil Procedure Code. Similarly illegal omissions have been held to be 'acts' under that section. In some of the decisions it was held that the second part of Section 80, Civil Procedure Code applies only to actions on torts committed by public officials, in the discharge of their public functions. There is conflict of judicial opinion on that point. For our present purpose it is not necessary to resolve that conflict. Suffice it to say that in the present case, the plaintiff does not complain of any 'act' or even an illegal omission on the part of the defendant. Hence we agree with Mr. Purshottam Tricundas that no notice under Section 233 of the Ajmer Merwara Municipalities Regulation was necessary before instituting the suit. In that view it is not necessary to consider whether the notice relied on by the plaintiff meets the requirements of the law.

13. This takes us to the validity of the notification issued by the Chief Commissioner of Ajmer on March 29, 1949 levying certain surcharges on the consumers of electricity supplied by the plaintiff. Section 6 of the Bombay Act as it originally stood read:

"The provisions of the Act shall apply notwithstanding anything in any other law or any license or sanction granted under the Principal Act or in any contract for energy or maintaining street light equipments."

The notification extending this Act to Ajmer Merwara modified that section and the modified section reads:

"The provisions of the Act shall apply notwithstanding anything in any other

law or any license or sanction granted under the Principal Act."

The words 'Principal Act' refer to the Electricity Act. On the basis of this modification it is urged on behalf of the respondent that the Chief Commissioner was not competent to levy the impugned surcharge. From the fact that certain words were omitted in Section 6, we are asked to assume that the Government of India intended that no surcharge should be levied on the bills issued to the defendant for the supply of electrical energy for street lighting and in respect of energy utilised for pumping water. We do not know why the words in question were omitted from Section 6. But to our mind the omission of those words does not in any manner affect the provisions contained in Sections 3 and 4 of the Bombay Act. Now we shall set out Sections 3 and 4 of the Bombay Act. They read:

"Section 3.—(1) Any licensee or sanction-holder may apply to the Provincial Government in the prescribed form for fixing a rate of surcharge on the charges for energy or street lighting equipment leviable by him under the terms of his licence, sanction or contract, as the case may be. Such application shall be accompanied by such calculations as may be prescribed.

(2) On receipt of an application under sub-section (1), the Provincial Government may, if it considers that a surcharge is desirable in the case of such licensee or sanction-holder, by order notified in the Official Gazette, fix the rate of surcharge.

(3) The rate of surcharge fixed under sub-section (2) shall not exceed:

(a) 33½ per centum in the case of undertakings where diesel oil is used for the generation of energy.

(b) 20 per centum in the case of undertakings where steam is used for the generation of energy.

(4) In the order fixing the rate of surcharge under sub-section (2), the Provincial Government may specify such conditions as it may think fit to be observed by the licensee or sanction-holder.

(5) Without prejudice to the generality of the power contained in sub-section (4), the Provincial Government may require the execution of an undertaking in the prescribed form by the licensee or sanction-holder that his profits in excess of the prescribed limits shall be transfer-

red to a Rates Stabilization Reserve for prescribed purposes.

(6) The Provincial Government may at any time enhance or reduce by a like order the rate fixed under sub-s. (2).

Section 4.—Licensee and sanction-holder not to supply energy at charge other than charge surcharged.—Upon the rate of surcharge being fixed by the Provincial Government from time to time in accordance with this Act, it shall not be lawful for the licensee or sanction-holder concerned except with the previous sanction of the Provincial Government to charge at other than charges surcharged at the rate for the time being so fixed:

Provided that no surcharge or any subsequent revision thereof shall affect charges leviable for any period not covered by the relevant order of the Provincial Government."

14. The provisions contained therein clearly empower the Chief Commissioner to levy surcharge on the bills for the supply of electricity for street lighting. Section 4 empowers the licensee to collect from the consumer the surcharge levied. Municipal Councils are not excluded from the operation of Ss. 3 and 4 of the Bombay Act as extended to Ajmer-Merwar. Similarly electrical energy supplied on the basis of a contract is not excluded from the operation of Sec. 3. That much is clear from the language of that section. We see no reason to read into that section an exception in the case of Municipal Councils or electricity supplied for street lighting under a contract. Section 6 does not in any manner cut down the operation of Sections 3 and 4. In our opinion that section as it stood originally or as modified has no impact on Sections 3 and 4. Charges for the supply of energy for street lighting are ordinarily payable by the Municipal Councils. Generally speaking it is the Municipal Councils that provide street lighting. Possibly Section 6 was included in the Bombay Act as a matter of abundant caution. It is not denied that the Bombay Legislature had competence to enact that Act. We shall presently examine the contention that that Act is ultra vires the provisions of Electricity Act and therefore the provisions of that Act should not be given effect to. But for the present we are assuming that that Act is valid and pro-

ceed to examine the impact of Section 6 on Sections 3 and 4. We think that Section 6 does not in any manner control Sections 3 and 4. The intention of a legislature or its delegate has to be gathered from the language of the statutory provisions and not from what it failed to say. If because of modification of Section 6, the provisions contained in Sections 3 and 4 could not be applied in the case of supply of electrical energy for street lighting under a contract then it could have been said that the notification issued by the Chief Commissioner was without the authority of law. But that cannot be said in this case. The provisions in Sections 3 and 4 are self-contained provisions. For taking action on the basis of those sections no assistance is needed from Section 6. Therefore we think the High Court was wrong in opining that the notification issued by the Chief Commissioner levying surcharge on the price of the electrical energy supplied for street lighting was without the authority of law.

15. We shall now examine the contention that the notification issued by the Chief Commissioner on March 29, 1949 is ultra vires the provisions of the Electricity Act. On this aspect the argument on behalf of the respondent proceeded thus: Section 3 (f) of that Act provides "that the provisions contained in the Schedule shall be deemed to be incorporated with and to form part of, every license granted under this Act, save in so far as they are expressly added to, varied or excepted by the license, and shall subject to any such additions, variations or exceptions which the State Government is hereby empowered to make, apply to the undertaking authorised by the license:

(Proviso is not relevant for our present purpose).

Clause 12 of the Schedule as it stood at the relevant time read:

"XII. Charge for supply for public lamps.—The price to be charged by the licensee and to be paid to him for energy supplied for the public lamps, and the mode in which those charges are to be ascertained shall be settled by agreement between the licensee and the (State Government) or the local authority, as the case may be, and, where any difference or dispute arises, the matter shall be determined by arbitration." The argument proceeded.

Electricity Act which is a Central legislation lays down that the price to be charged by the licensee and to be paid to him for the electrical energy supplied for street lighting shall be settled either by agreement between the licensee and the State Government or the local authority as the case may be or, and, where any difference or dispute arises the matter should be determined by arbitration; the price so fixed cannot be altered in any manner; levying surcharge is but one mode of enhancing the price to be paid; such a course is violative of Cl. 12 of the Schedule in the Electricity Act; hence it must be held that the Chief Commissioner had no power to levy any surcharge which would interfere with the mandate of Clause 12. It was not said before us nor before the High Court that the Bombay legislature had no competence to enact the Act. Electricity is a concurrent subject both under the Constitution as well as under the Government of India Act, 1935. Therefore quite clearly the Bombay legislature had competence to provide for the levy of surcharge so long as the relevant provision did not conflict with any provision in the Central Act. Hence the question is whether Sections 3 and 4 are in conflict with Clause 12 of the Schedule of the Electricity Act? If the two can coexist then there is no question of conflict between the two.

16. We see no conflict between Cl. 12 of the Schedule in the Electricity Act and Sections 3 and 4 of the Bombay Act. Clause 12 prescribes a procedure for settling the price of electricity supplied by the licensee for street lighting. It merely lays down the machinery for settling the price if there is dispute between the contracting parties. That clause does not fix the price to be paid or even the maximum price payable. We fail to see how that clause takes away the power from the State Legislature to impose additional burden on the consumer. All that clause means is that the licensee cannot dictate his terms to the authority responsible for street lighting. We are unable to agree with the learned Judges of the High Court that incorporating Clause 12 of the Schedule, the Central Legislature intended that under no circumstance the liability of the consumer can be increased beyond what is agreed during the continuance of the contract. In our opinion, it imposes no fetters on the powers of the provincial legislatures

in the matter of enhancing the price of the electricity supplied by the licensee for street lighting.

17. For the reasons mentioned above we are unable to agree with the High Court that either the suit is bad because of want of a valid notice under Sec. 233 of the Ajmer Merwar Municipalities Regulation or that the notification imposing surcharge is invalid for any reason.

18. Under the notification imposing surcharge the plaintiff is not entitled to get any additional sum as regards the pumping of water. Under that notification to the extent it is applicable to this case surcharge is levied only on the price of electrical energy supplied under a contract for street lighting and not in respect of the price of the electrical energy used for pumping water. Under Ex. 21 the plaintiff entered into an agreement to pump water for a fixed consideration. For so doing it may have to utilise the electricity produced by it but that does not amount to supplying electricity to the Municipal Council much less supplying electricity for street lighting. From Clause 8 of that agreement it is seen that the parties to that agreement contemplated the pumping of water by using Oil Engines though ordinarily it was expected that it will be done by electrical energy. It is true that Cl. 20 of the agreement provides that the Municipal Council shall have first claim over other consumers for the supply of energy for pumping such quantity of water as may be required from the wells at Bhaonta. In construing the true nature of the contract entered into between the parties, the contract has to be read as a whole and if so read it is clear that what the plaintiff undertook was to pump water from the wells in question and not to supply any electrical energy. Hence we are in agreement with the learned Judges of the High Court that the plaintiff's case in this regard should fail.

19. Mr. Sharma urged that the High Court had not thought it necessary to decide certain contentions advanced on behalf of the defendant in view of its conclusions set out earlier. He told us that the defendant had pleaded that the plaintiff failed to prove the quantum of surcharge payable by the defendant. It also contended that the notification under which the surcharge is levied cannot have retrospective operation and that no surcharge was leviable under that notifi-

cation on the charges in respect of maintaining street lighting equipments. According to the learned Counsel for the plaintiff there is no merit in any one of these contentions. As mentioned earlier the High Court has not gone into these contentions. It is for that court to examine those contentions. This court does not ordinarily examine contentions which have not been examined by the appellate court. It is best that these questions should be gone into by the High Court.

20. In the result we allow this appeal, set aside the judgment of the High Court and demand the case back to the High Court for deciding the issues that remain to be decided. The costs of this appeal shall be costs in the cause.

SSG/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 235
(V 56 C 43)

(From Allahabad)°

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

M/s. G. E. C. (P) Ltd., Naini, Allahabad, Appellant v. The Labour Court, Allahabad and others, Respondents.

Civil Appeal No. 958 of 1966, D/- 5-8-1968.

Industrial Disputes Act (1947), Ss. 23, 24, Sch. II, Items 1 and 3 — Dismissal of workmen for participating in illegal strike — Order based on warning given in respect of previous strike in disregard of settlement — Dismissal held mala fide and vindictive — U. P. Industrial Disputes Act (1947), Section 6-S (4).

Normally the imposition of a punishment for misconduct, under the Standing Orders, is a managerial function which cannot be interfered with by the Labour Court. But where even after there was an agreement that the management would not be take disciplinary action in respect of a strike, the management issued a warning for this strike after the workmen had taken part in the subsequent illegal strike and passed an order of dismissal of workmen taking into account the warning, the order of dismissal could not be said to be bona fide. The issue of warning in respect of

° (Adjudication Case No. 78 of 1965, D/- 16-9-1965—All. Labour Court.)

first strike long after the second strike was with a view to create a ground for punishment and dismissal in the subsequent proceedings, relating to the second strike, and as such, the action of the management was not bona fide.

(Para 17)

Mr. H. R. Gokhale, Senior Advocate (Mr. O. P. Malhotra, Advocate and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Appellant; M/s. R. Vasudev Pillai and Subodh Markandeya, Advocates, for Respondents (Nos. 2 (a) to 2 (k)).

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: In this appeal, by special leave, the question, that arises for consideration, is as to whether the award of the Labour Court, Allahabad, dated September 16, 1965, directing the reinstatement of six workmen, referred to in the order of reference is justified.

2. The facts leading up to the award may be referred to. There was a strike, in the establishment of the appellant company, from March 18, 1964. There was a meeting of the District Industrial Relations Advisory Committee, on March 29, 1964, presided over by the District Magistrate of the area. Representatives of the management and the workmen, attended the said meeting. The proceedings of the meeting show that the Advisory Committee decided to appeal to the appellant not to take any action against the workers, on the ground that they had gone on strike, from March 18, 1964. There was an appeal to the District Magistrate, Allahabad, to release, as a gesture of goodwill, the arrested employees of the company, who were not involved in violence. The Union, representing the workers of the appellant, in turn decided to call off the strike and directed the workmen to resume work with effect from the morning of March 30, 1964. There is no controversy that the strike was called off, and certain workers, who had been arrested in connection with the strike were also released from jail, on March 29, 1964 itself. This strike will be referred to, as the first strike in the course of this judgment.

3. On March 20, 1964, the respondent Union had given to the appellant another notice, stating that the workmen of the appellant company would be going on a token strike, for one day, after four-

teen days of the receipt of the notice, in sympathy with the workers of the Swadeshi Cotton Mills, Naini. The exact date, on which the strike was to take place, was not given in the notice, as required under sub-section (4) of Sec. 68 of the U. P. Industrial Disputes Act, 1947 (hereinafter referred to as the Act). On April 9, 1964, the respondent Union again intimated to the management about the workmen's intention to go on strike on April 10, 1964, and offered to work on a Sunday, so that there would be no loss of production; but the management intimated the Union that the factory would work on April 10, 1964. A token strike actually took place, on April 10, 1964. This strike will be termed as the second strike, in these proceedings.

4. In respect of the first strike, the Management had, on March 28, 1964, charge-sheeted, for going on an illegal strike, some of the workmen, including the workmen, whose dismissal had been set aside by the present award. A joint reply was sent, by the concerned workmen, on April 9, 1964, to the management, drawing their attention to the decision of the District Industrial Relations Advisory Committee, dated March 29, 1964, and the settlement, arrived at therein, between the management and the Union. The workmen also requested the management, not to disobey the decision of the Committee. The appellant sent a communication, on April 10, 1964, to the workmen, stating that they had not made any commitment, at the meeting on March 29, 1964, that the management would not proceed with the taking of disciplinary action, against an employee, who committed a misconduct according to the Standing Orders of the Company. The workmen were again directed to furnish, within 24 hours, their reply, if any, to the charge-sheet, dated March 28, 1964.

5. On May 8, 1964, the Acting Works Manager, of the appellant company, passed orders, warning the concerned workmen, for having misconducted themselves, as stated in the charge-sheet dated March 28, 1964. It is further stated, in this order, that after hearing the explanation, furnished by the workmen, the management holds the workmen guilty of misconduct, for which they could have been dismissed; but the management has taken a lenient view and, hoping that the misconduct will not

be repeated, administers an earnest warning.

6. In respect of the second strike, which took place on April 10, 1964, the management charge-sheeted, on April 16, 1964, thirteen workmen, for going on illegal strike, which is a misconduct, under sub-clause (2) of Clause 21, of the Certified Standing Orders of the company, and as the strike was in violation of sub-section (4) of Section 6-S of the Act. There was a further charge that the workmen, concerned, had intimidated and prevented other willing workers from going to work. The workmen were directed to offer their explanation, as to why disciplinary action need not be taken for their conduct.

7. On April 17, 1964, the thirteen workmen, jointly sent a reply saying that the strike, on April 10, 1964, was legal, and due notice had been given, under the provisions of the Act. They also denied having intimidated, or restrained, any willing worker from going to work. They further stated that they had not committed any misconduct. The management proceeded to conduct an inquiry, against the thirteen workmen, and Sri K. D. Gupta, an officer of the company, was entrusted with the conduct of the said inquiry. Shri Gupta accordingly conducted an enquiry on April 20, 1964, and sent his report to the Acting Works Manager, on April 24, 1964. After referring to the conduct of the inquiry proceedings, Shri Gupta has stated that the thirteen workmen are guilty of participation in an illegal strike, on April 10, 1964, and, as participation in an illegal strike, is a misconduct, under Cl. 21 (2) of the Certified Standing Orders of the Company, the workmen concerned are guilty of misconduct; but, regarding the charge of intimidation and incitement, the inquiry officer found that the said charge was not established.

8. On May 22, 1964, the Acting Works Manager of the appellant accepted the report of Shri Gupta and passed orders, administering a warning, to seven out of the thirteen, workmen; but, regarding the remaining six workmen, the Works Manager, after taking into account the warning that had been administered to them, on May 8, 1964, for going on an illegal strike (referring to the first strike), passed orders dismissing them from service.

9. The Union raised a dispute, regarding the dismissal of the six workmen

and accordingly the said dispute was referred to the Labour Court, Allahabad, for adjudication.

10. The case of the workmen was that the strike, on April 10, 1964, was legal, and that the domestic inquiry, conducted by Shri Gupta, was neither bona fide, nor fair. They also contended that in view of the settlement, arrived at on March 29, 1964, in respect of the first strike, the management had no right to take any action, by way of warning the workmen, as it purported to do, on May 8, 1964. Taking the said warning into account, for the purpose of imposing the punishment of dismissal, amounted to a vindictive conduct, on the part of the management, and, therefore, the order of dismissal was illegal.

11. The management, on the other hand, contended that the strike, that took place on April 10, 1964, was illegal, as it was not in accordance with the provisions of the Act and participation, in such illegal strike, was a misconduct, under Cl. 21 (2) of the Standing Orders of the Company and, such misconduct could be punished by dismissal, under Cl. 22. According to the management, the inquiry proceedings, conducted by Shri Gupta, were quite fair, and bona fide, and the workmen were given full opportunity to participate in the inquiry proceedings. They also pleaded that the management was entitled, to impose punishment for misconduct, by taking into account the previous conduct of the workmen concerned; and, in this case, the warning, recorded against them on May 18, 1964, was legitimately and properly taken into account, inasmuch as the management had not agreed to withdraw the proceedings, against the workmen.

12. The Labour Court has upheld the plea of the management, that the second strike, on April 10, 1964, being contrary to sub-s. (4) of S. 6-S, was illegal under S. 6-T of the Act; but it has further held that, notwithstanding the infirmity in the notice, issued by the workmen regarding the second strike, all the managements in the area, including the appellant, were fully aware of the fact of the intended token strike on April 10, 1964. The Labour Court has further held that the inquiry proceedings, conducted by Shri Gupta, were bona fide and fair, and they suffered from no infirmity, whatsoever. The Labour Court further holds that, though normally imposing of a

punishment, for misconduct, under the Standing Orders, is a managerial function, in this case, the appellant was not justified in taking into account the warning, recorded on May 8, 1964, in respect of the first strike. It is the further view, of the Labour Court, that the continuance of disciplinary proceedings, and recording of warning, on May 8, 1964, by the appellant, against the six concerned workmen, in respect of the first strike, was with a view to create a ground for punishment and dismissal, in the subsequent proceedings, relating to the second strike, and, as such, the action of the management was not bona fide. The Labour Court, in this connection, refers to the proceedings of the District Industrial Relations Advisory Committee, that took place on March 29, 1964, in the presence of the representatives of the appellant, and the Union, and the Labour Court is of the view that a settlement had been arrived at, by which the management has agreed, not to take any disciplinary action, against the workers, in connection with the first strike. Ultimately, the Labour Court holds that the punishment of dismissal, inflicted on the six workmen, by the appellant, on May 22, 1964, is unconscionable and unjustified, and not recorded in a bona fide manner. In consequences, the order of dismissal, passed against the six concerned workmen, named in the annexure to the order of reference, was set aside and the workmen were directed to be reinstated with 50 per cent back wages.

13. We have fairly elaborately referred to the various circumstances, leading to the passing of the order of dismissal, by the management, in order to appreciate the contentions, urged on behalf of the management, that the Labour Court had committed a serious illegality, in interfering with an order, passed by the management, for misconduct, as provided under the standing orders of the company.

14. Mr. H. R. Gokhale, learned counsel, for the appellant, raised two contentions before us: (i) that the finding of the Labour Court, that at the meeting of the District Industrial Relations Committee, held on March 29, 1964, the appellant agreed not to take disciplinary action, against its workmen, in respect of the first strike, is erroneous; and (ii) that having held that the second strike was illegal, as being contrary to sub-s. (4) of S. 8-S of the Act, the Labour Court has

committed an error in interfering with the act of the management, when it imposed a punishment, for misconduct, under the standing orders of the company.

15. Mr. R. Vasudeva Pillai, learned counsel for the Union, has supported, in full, the award of the Labour Court.

16. We are not impressed with either of the contentions, of the learned counsel for the appellant. We have already referred to the proceedings, of the District Industrial Relations Committee, of March 29, 1964. No doubt, a day prior to that, the appellant had issued notices to the workmen, asking them to show cause as to why disciplinary action should not be taken against them, for going on strike from March 18, 1964. There was a joint reply, given by the workmen, on April 9, 1964, to the effect that, at the meeting held on March 29, 1964, the management had agreed, not to take any disciplinary action, against the workmen, and that, it was on that basis that the strike itself was called off, and the workmen, arrested, were also released by the Government. There was no doubt an attempt, by the management, in their reply of April 10, 1964, to make it appear that they had not committed themselves, at the meeting of March 29, 1964, as mentioned by the workmen. But it is rather surprising that, when the President of the Union, WWI, gave evidence to the effect that there was a settlement, on March 29, 1964, whereby the management had agreed not to take any disciplinary action, against the workmen, there was absolutely no cross-examination, by the appellant, of that witness. There is no dispute that Mr. Wright represented the management, at the said meeting, and no suggestion even has been made to WWI that the evidence, given by him, is not correct. No doubt, the appellant, in their letter of April 10, 1964, had taken the stand that the company had not committed itself, not to take any action against the workmen, in respect of the first strike. The inquiry report of Shri Gupta, in respect of the second strike, was already in the hands of the management, on April 24, 1964. It is really after the receipt of this report, that the Acting Works Manager of the appellant-company recorded warnings, as against the concerned workmen, on May 8, 1964, in respect of the first strike. This warning has been taken into account, by the Works Manager, when he

passed the order of dismissal, in respect of the second strike, on May 23, 1964. Having due regard to these circumstances, the finding of the Labour Court, that the continuance of the disciplinary proceedings, and recording of punishments of warnings, as against the six concerned workmen, on May 8, 1964, in respect of the first strike, by the management, was to create a ground for punishment and dismissal, in respect of the second strike, is perfectly justified. The further finding of the Labour Court, that the action of the management, in recording warnings in respect of the first strike, is not only not bona fide, but also against the settlement, arrived at, on March 29, 1964, is also correct. The first contention, on behalf of the management, therefore, fails.

17. There is the finding of the Labour Court, that the second strike, on April 10, 1964, is illegal. Going on illegal strike, is certainly 'misconduct', under sub-cl. (2) of Cl. 21, of the Standing Orders of the company. Under Cl. 22 of the Standing Orders, the punishment for misconduct is dismissal, or, in the alternative suspension, for a period not exceeding four days. If the management had, without any regard to what happened, in respect of the first strike, imposed punishment under Cl. 22, in respect of an illegal strike, which is 'misconduct' under Cl. 21 (2) of the Standing Orders, after a fair inquiry, the punishment, meted out being a managerial function, would not be normally interfered with. But, in this case, even the order of dismissal clearly shows that the management has taken into account the previous conduct of the workmen, in having gone on the first strike, and the punishment of warning, administered on May 8, 1964. It is because of this past conduct, it is further stated in the order, that the six workmen were being dismissed from service. The finding of the Labour Court is that the management was not entitled to take into account the warning, given on May 8, 1964, in respect of the first strike, in view of the settlement, on March 29, 1964. In view of the fact that the warning has been taken into account, by the management, which it is not entitled to, the punishment of dismissal has been rightly considered, by the Labour Court, to be not bona fide, and vindictive. In fact, the Labour Court is also of the view that the punishment is unconscionable, and unjustified. It is on these grounds,

that the Labour Court has interfered with the order of dismissal, passed by the management. The second contention, of learned counsel for the appellant, also fails, as we are in agreement with the reasons, given by the Labour Court, on this aspect of the matter.

18. The result is that this appeal fails, and is dismissed. There will be no order as to costs.

BNP/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 239

(V 56 C 44)*

(From: Gujarat)*

R. S. BACHAWAT AND K. S. HEGDE,
JJ.

The Gujarat Electricity Board, Appellant v. Shantilal R. Desai, Respondent
Civil Appeal No. 2525 of 1966, D/-
6-8-1968.

(A) Electricity Act (1910) (prior to its amendment in 1959) S. 7 (1), (2) and (4)
— Purchase of undertaking — Exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps — Spl. Civil Appln. No. 94 of 1962, D/- 31-10-1963 (Guj), Reversed.

Under the provisions of S. 7, there is no requirement that after a notice under S. 7 (4) is issued the authority must again exercise its option to purchase on the expiration of the period of licence. It is no doubt true that the right to purchase the undertaking accrues only at the expiration of the period of licence but for exercising that right, the authority must make its election within the period prescribed in S. 7 (4) and issue a notice as required by that sub-section. Spl. Civil Appln. No. 94 of 1962, D/- 31-10-1963 (Guj), Reversed. (Para 10)

Sub-s. (4) of S. 7 is complementary to sub-ss. (1) and (2) of that Section and therefore they must be read together. On an analysis of these provisions it is seen that before a licensee can be compelled to sell his undertaking, the authority entitled to purchase must elect to purchase the same by exercise of the option given to it under the licence read with S. 7 of the Act followed by a notice as required by S. 7 (4) of the Act. In

*(Spl. Civil Appln. No. 94 of 1962, D/-
31-10-1963 — Guj.).

S. 7 the expression "option of purchasing an undertaking" merely means the right of purchasing the undertaking. The word 'option' is used because two courses are open to the concerned authority namely, either to purchase the undertaking or renew the licence. Once the authority elects to purchase then the notice prescribed in sub-s. (4) should be given before the period mentioned therein. It is not correct to say that the section contemplates two stages namely (1) to elect to purchase the undertaking at least two years before the expiration of the licence and (2) exercise the option to purchase at the end of the licence period. The exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps. By the very act of electing to purchase the authority exercises its option to purchase. Sub-ss. (1), (2), and (4) of S. 7 are plain and unambiguous. They do not lend themselves to any subtleties.

(Para 9)

(B) Electricity Act (1910) (prior to its amendment in 1959), S. 7 — Electricity (Supply) Act (1948), S. 71 (prior to its repeal in 1959) — Right and option of State Government or local authority to purchase undertaking — State Electricity Board, if can exercise such right.

By the combined operation of S. 7 of the Act of 1910 and S. 71 of the Act of 1948, the State Electricity Board has acquired the right to purchase the undertaking. AIR 1960 SC 284, Rel. on. Spl. Civil Appln. No. 94 of 1962, D/- 31-10-1963 (Guj.), Affirmed. (Para 14)

It is true that before S. 71 can be held to be attracted to a case it must be shown that the right or option to purchase the undertaking of the licensee vested in the State Government or a local authority under the provisions of Electricity Act. It is also true that from the provisions of the Electricity Act read with the rules made thereunder it is manifest that the condition as to the option of purchase either by the local authority or by the Government is the result of an agreement between the applicant who had applied for licence and the Government who granted the licence. But that does not mean that the right to purchase the undertaking does not vest in the concerned authority by virtue of S. 7. That right may accrue either because it is directly conferred by S. 7 or because it is obtained as a result of a contract compelled by that Section. In either case

it is a right obtained by the authority by virtue of S. 7. There is no dispute that the licence granted must conform to the requirements of S. 7. AIR 1963 SC 464, Explained. (Para 13)

(C) General Clauses Act (1897), S. 6 — Issue of notice to purchase undertaking of licensee by State Electricity Board prior to amendment of S. 7 of Electricity Act 1910 and repeal of S. 71 of Electricity (Supply) Act 1948 — Expiry of licence period after the amendment and repeal of those provisions — S. 6 comes to the aid of Board and it could purchase the undertaking when new law has not either expressly or impliedly, taken away right acquired earlier.

(Paras 13 and 16)

(D) Constitution of India, Art. 133 — New plea — Plea not raised before High Court taken before Supreme Court — Supreme Court, while remitting the case back to High Court for deciding the issues that were left open by the High Court directing High Court to consider the new plea.

(Paras 17 and 18)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 464 (V 50) = 1962 (3) Supp SCR 496, Fazilka Electric Supply Co. Ltd. v. Commr. of Income-tax, Delhi 12, 13 (1960) AIR 1960 SC 284 (V 47) = 1960-2 SCR 289, Okara Electric Supply Ltd. v. State of Punjab 14

Mr. C. K. Daphtary, Attorney-General for India, (Mr. I. N. Shroff, Advocate, with him), for Appellant; Mr. H. R. Gokhale, Senior Advocate, (M/s. S. B. Vakil and Janendralal, Advocates and B. R. Agarwala, Advocate of M/s. Gagrat and Co., with him), for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: The only question that falls for decision in this appeal is whether on the basis of the notice issued by the Bombay State Electricity Board on January 8, 1959 under S. 7 of the Indian Electricity Act, 1910 (to be hereinafter referred to as the Act) prior to its amendment in 1959, the appellant can compulsorily purchase from the respondent his concern 'The Bilimora Electric Power Supply Co.'. In his application before the High Court under Art. 226 of the Constitution the respondent challenged the vires of S. 7 of the Act. But that contention remains to be examined. The High Court has chosen to allow the petition solely on the ground that as the re-

quirements of S. 7 have not been complied with, the appellant cannot compel the respondent to sell the undertaking. If we come to the conclusion that that conclusion is unsustainable then the matter will have to go back to the High Court for deciding the constitutionality of S. 7.

2. The respondent was given a licence on February 11, 1932, under the provisions of the Baroda Electricity Act Samvat 1983 for supplying electricity within the area mentioned in the licence. Clause 27 of that licence provided that the option of purchase given by S. 9 of the Baroda Electricity Act shall be exercisable first on the expiration of thirty years computed from the commencement of the licence and thereafter on the expiration of every subsequent period of ten years during the subsistence of the licence. The manner in which the undertaking should be valued is laid down in that Act. On the merger of the former Baroda State with the Province of Bombay, the Act as well as the Electricity (Supply) Act, 1948 (Act 54 of 1948) were made applicable to the territories of the former State of Baroda, and the corresponding Baroda Acts were repealed with the saving clause that the licences issued under the repealed Act shall continue to remain in force as if issued under the Act, until the expiration of the period of those licences. In exercise of the powers conferred by S. 5 of the Electricity Supply Act 1948 the Government of Bombay constituted the Bombay State Electricity Board on January 31, 1945. On January 8, 1959 that Board issued to the respondent a notice under S. 7 of the Act. That notice is important for our present purpose. Hence we shall quote the relevant portion thereof. It runs thus:

"In exercise of the powers conferred on the Bombay State Electricity Board by virtue of S. 71 of the Electricity (Supply) Act, 1948 read with S. 7 of the Indian Electricity Act, 1910, you are hereby notified that the Bombay State Electricity Board has decided to exercise and shall exercise the option of purchasing your undertaking on the expiry on 10-2-1962 of the licence granted to you The receipt of this notice may please be acknowledged."

3. As a result of the Bombay Reorganization Act, 1960, the present Gujarat State came into existence. In exercise of the powers conferred by S. 5 of

the Electricity (Supply) Act, 1948 read with sub-s. (4) of S. 68 of the Bombay Reorganization Act, 1960 the appellant Corporation was constituted by the Government of Gujarat by means of a notification dated May 1, 1960. The Central Government by the notification No. EL-II-1(22)/60 dated the 17th June, 1960 made in exercise of the powers conferred by Cl. (a) of sub-s. (4) of S. 68 of the Bombay Reorganization Act, 1960 directed that the appellant Corporation shall "with effect from 1st May 1960" take over from the Bombay State Electricity Board all its undertakings, assets, rights and liabilities in the area comprised in the State of Gujarat. The said notification was amended in some respect by notification of the Government of India dated October 3, 1960 providing therein that the amendment thereby made in the notification dated June 17, 1960 shall be deemed always to have been made. On the basis of the aforementioned notifications, the appellant is claiming the right to compulsorily purchase the undertaking.

4. The respondent is contesting the right of the appellant to compulsorily purchase his undertaking. With a view to forestall the appellant from taking action against him, the respondent filed an application under Art. 226 of the Constitution in the High Court of Gujarat seeking directions to the appellant to forbear from compelling him to sell or deliver his undertaking, refrain the appellant from ceasing to supply electricity to him for the purpose of his said undertaking and also refrain the appellant from preventing him from supplying electric energy in the area mentioned in his licence. Some other incidental reliefs were also sought.

5. The High Court came to the conclusion that though the notice issued by the appellant on January 8, 1959 is a valid notice under S. 7 (4) of the Act but that by itself is not sufficient to compel the respondent to sell his undertaking to the appellant; before the respondent can be compelled to sell his undertaking to the appellant it was necessary for the appellant to exercise its option to purchase the undertaking on the expiration of the period of licence. As the appellant had failed to exercise that option on the expiration of the period of licence it cannot compel the respondent to sell his undertaking. On the basis of these findings the High Court has substantially

granted the relief prayed for by the respondent. The appellant challenged the correctness of this conclusion. On the other hand the respondent is supporting the judgment of the High Court not only on the ground accepted by the High Court but also on some of the other grounds advanced on his behalf before the High Court but rejected by that Court.

6. We shall first take up the question whether the High Court was right in holding that the appellant had to take two independent steps viz. (1) an election to purchase the undertaking followed up by a notice to the respondent in pursuance of that election within the period mentioned in S. 7 (4) of the Act and (2) exercise its option to purchase on the expiration of the period of licence and communicate the same to the respondent.

7. Before addressing ourselves to that question it is necessary to mention that the High Court's finding that the rights of the Shriman Sarkar (Baroda Government) to purchase the undertaking under S. 9 of the Baroda Electricity Act had devolved on the State Government was not challenged before us. Therefore it is not necessary for us to trace how the rights of the Baroda Government came to devolve on the then State of Bombay. But the respondent did contest the appellant's claim to exercise that right. That question we shall separately consider. For the present we shall proceed on the basis that the appellant is entitled to exercise the right of purchase conferred on the Baroda Government under the licence read with S. 9 of the Baroda Electricity Act. We may also state at this stage that the conclusion of the High Court that the licence issued under S. 9 of the Baroda Electricity Act should be considered as a licence issued under S. 7 of the Act was also not challenged before us.

8. Now we shall proceed to consider the true scope of S. 7 of the Act. For our present purpose only sub-ss. (1), (2) and (4) of S. 7 of the Act are relevant. They read as follows:

"Section 7 (1). Where a licence has been granted to any person not being a local authority, and the whole of the area of supply is included in the area for which a single local authority is constituted, the local authority shall, on the expiration of such period, not exceeding

fifty years and of every such subsequent period not exceeding twenty years, as shall be specified in this behalf in the license, have the option of purchasing the undertaking, and, if the local authority, with the previous sanction of the State Government, elects to purchase, the licensee shall sell the undertaking to the local authority on payment of the value of all lands, buildings, works, materials and plant of the licensee suitable to, and used by him for, the purposes of the undertaking, other than a generating station declared by the license not to form part of the undertaking for the purpose of purchase, such value to be, in case of difference or dispute, determined by arbitration:
• • • • •

(4) Not less than two years' notice in writing of any election to purchase under this section shall be served upon the licensee by the local authority or the State Government as the case may be."

9. In our opinion sub-s. (4) of S. 4 is complementary to sub-ss. (1) and (2) of that Section and therefore they must be read together. On an analysis of these provisions it is seen that before a licensee can be compelled to sell his undertaking, the authority entitled to purchase must elect to purchase the same by exercise of the option given to it under the licence read with S. 7 of the Act followed by a notice as required by S. 7 (4) of the Act. In S. 7 the expression "option of purchasing an undertaking" merely means the right of purchasing the undertaking. The word 'option' is used because two courses are open to the concerned authority namely, either to purchase the undertaking or renew the licence. Once the authority elects to purchase then the notice prescribed in sub-s. (4) should be given before the period mentioned therein. We are not able to agree with the High Court that the Section contemplates two stages namely (1) to elect to purchase the undertaking at least two years before the expiration of the licence and (2) exercise the option to purchase at the end of the licence period. The exercise of option to purchase as well as electing to purchase is one integral process and not two independent steps. By the very act of electing to purchase the authority exercises its option to purchase. In our opinion sub-ss. (1), (2) and (4) of S. 7 are plain and unambiguous. They do not lend themselves to any subtleties.

10. In construing a provision, all its relevant parts should be considered together and their true effect ascertained. One can easily find out the reasons behind the procedure prescribed in S. 7. In view of the terms of the licence read with S. 7 (1) and (2) the concerned authority has two courses open before it. It can either decide to purchase the undertaking or renew the licence on the expiration of the period for which the licence is granted. The licensee must know in good time what course the authority is going to adopt so that he may so arrange his affairs as to cause least inconvenience to himself. Hence though the power to exercise the option to purchase arises on the expiration of the period of licence as per the terms of the licence, S. 7 lays down that if the authority wants to purchase the undertaking it must elect to do so at least two years before the expiration of the licence and communicate the same to the licensee. Once the concerned authority exercises its option and communicates the same to the licensee, the same is binding on the authority as well as the licensee. Otherwise there is bound to be considerable inconvenience both to the licensee and to the public. We are not able to find any good reason for reading into S. 7 a requirement that after a notice under S. 7 (4) is issued the authority must again exercise its option to purchase on the expiration of the period of licence. It is no doubt true that the right to purchase the undertaking accrues only at the expiration of the period of licence but for exercising that right, the authority must make its election within the period prescribed in S. 7 (4) and issue a notice as required by that sub-section. The requirements of S. 7 were fully complied with by the notice issued by the Bombay State Electricity Board on January 8, 1959.

11. We shall now take up the other contention advanced by Mr. H. R. Gokhale, learned Counsel for the respondent in support of the decision under appeal.

12. One of his contentions was that whether the State Government was competent to purchase the undertaking or not, neither the Bombay Electricity Board nor the appellant was competent to exercise that right. His argument on this question proceeds thus: Section 7 (1) prior to its amendment in 1959 empowered the local authority or the State Government to make the purchase con-

templated under that Section; the Electricity Board is not within the contemplation of that Section; the finding of the High Court that the provisions contained in sub-s. (1), (2) and (4) of S. 7 of the Act read with S. 71 of the Electricity (Supply) Act 1948, confers on the appellant such a power is not correct because the right or option to purchase the undertaking was conferred on the State Government or the appropriate local authority under the licence and not under the provisions of the Act; in other words the said right is merely a contractual right and not a right flowing from the provisions contained in S. 7 of the Act as held by this Court in Fazilka Electric Supply Co., Ltd. v. Commr. of Income-tax, Delhi, 1962 (3) Supp SCR 496 = (AIR 1963 SC 464) and therefore the appellant cannot take any assistance from S. 71 of the Electricity (Supply) Act, 1948. This contention did not commend itself to the High Court. We shall now proceed to examine how far the same is correct.

13. Section 71 of the Electricity (Supply) Act, 1948 provides:

"Rights and options to purchase under Act 9 of 1910 to vest in Board.—Where under the provisions of the Indian Electricity Act 1910 (9 of 1910), any right or option to purchase the undertaking of a licensee vests in the State Government or a local authority such right or option shall be deemed to be transferred to the Board, and shall be exercisable by the Board in accordance with the provisions of the said Act applicable to the exercise of such right or option by the State Government or a local authority, as the case may be."

Board is defined in S. 2 (2) of that Act as meaning State Electricity Board constituted under S. 5 thereof. It is true that before S. 71 can be held to be attracted to a case it must be shown that the right or option to purchase the undertaking of the licensee vested in the State Government or a local authority under the provisions of the Act. It is also true that this Court had held in Fazilka Electric Supply Company's case, 1962 (3) Supp SCR 496 = (AIR 1963 SC 464) that from the provisions of the Act read with the rules made thereunder it is manifest that the condition as to the option of purchase either by the local authority or by the Government is the result of an agreement between the applicant who

had applied for licence and the Government who granted the licence. In that case this Court was considering whether the sale concerned in that case fell within the scope of S. 10 (2), (7) of the Indian Income Tax Act or whether it can be held to be compulsory acquisition as contended by the assessee. A sale compelled by law may also be a 'sale' under the Sale of Goods Act. But that does not mean that the right to purchase the undertaking does not vest in the concerned authority by virtue of S. 7. That right may accrue either because it is directly conferred by S. 7 or because it is obtained as a result of a contract compelled by that Section. In either case it is a right obtained by the authority by virtue of S. 7. There is no dispute that the licence granted must conform to the requirements of S. 7.

14. In Okara Electric Supply Ltd. v. State of Punjab, 1960-2 SCR 239 = (AIR 1960 SC 284) this Court observed that Ss. 5, 6 and 7 show that in the case of a licensee, specific provisions have been made for the acquisition of the undertaking in cases of revocation or cancellation of licenses. For the aforementioned reasons we hold that appellant had acquired the right to purchase the undertaking by the combined operation of S. 7 of the Act and S. 71 of the Electricity (Supply) Act, 1948.

15. It was next contended on behalf of the respondent that by the time the licence period expired, S. 7 of the Act had been amended and S. 71 of the Electric (Supply) Act, 1948 repealed, no provision was made to preserve the rights already acquired under those provisions, hence the appellant is not entitled to purchase the undertaking. It is not the case of the respondent that either expressly or by necessary implication, the new law had taken away the right acquired earlier. That being so S. 6 of the General Clauses Act comes to the aid of the appellant. That Section provides that where that Act or any Central Act or Regulation made after the commencement of that Act repeals an enactment hitherto made or hereafter to be made then unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. It also saves the previous operation of any enactment so repealed or anything duly done or suffered thereunder.

16. The right to purchase the respondent's undertaking came to vest firstly in the Bombay State Electricity Board subsequently in the appellant in view of the various notifications referred to earlier. That right has to be worked on the basis of law as it stood on the date the notice under S. 7 (4) of the Act was given.

17. In this Court a new contention was taken on behalf of the respondent namely that in any case, the appellant's right to purchase is conditional on the payment of the price as provided in S. 7 and hence the appellant cannot demand possession of the undertaking without paying the price after the same is determined according to law. This contention had not been taken before the High Court. The High Court may go into this question while deciding the writ petition.

18. For the reasons mentioned earlier we allow this appeal, set aside the order of the High Court and remit the case back to High Court for deciding the issues that were left open. Costs of this appeal shall be costs in the cause.

CWM/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 244 (V 56 C 45)

(From Patna: 1968 Pat LJR 384)

J. M. SHELAT AND K. S. HECDE, JJ.
Hiralal Agrawal etc., Appellants v.
Rampadarath Singh and others, etc., Respondents.

Civil Appeals Nos. 1244 to 1246 of 1968, D/- 15-7-1968.

(A) Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Section 16 — Object and scheme of section indicated.

The object of Section 16 is twofold: (i) to ensure that no one holds land in excess of the ceiling area and (ii) to confer on a co-sharer or a raiyat of the adjoining area the right of reconveyance from the transferee. To subserve this object sub-section (2) lays down certain restrictions: (a) that there can be no registration of a deed of transfer without a declaration by the transferee that the total area which would be held by him including the area under transfer does not exceed the ceiling area; (b) prohibition against registering a document if

such a declaration shows that the transfer would have the effect of exceeding the ceiling area; and (c) that no such transfer would be complete without the deed of transfer being registered. The object of sub-section (3) is to secure consolidation by giving the right of re-conveyance to a co-sharer or a raiyat of an adjoining area so that the land in question can be used in the most advantageous manner and also to prevent fragmentation of the land. (Para 6)

(B) Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), Rules 18 and 19 and Forms L. C. 12 and 13 — Object of, indicated.

From the contents of Rules 18 and 19 and Forms L. C. 12 and 13, it is clear that the object of these rules is firstly, to enable the registering authority to see that the transferee does not by the transfer acquire land in excess of the ceiling area and, secondly to enable the Collector to know that a transfer of the land has been made and that such transfer is completed by registration, the price paid for it and that the deposit made by the applicant is of a sum equivalent to the purchase price and 10 per cent. thereof. The purpose for requiring the applicant to file a copy of the challan and of the registered deed is to enable the Collector to ascertain therefrom the aforesaid facts and to proceed further on being satisfied about them. (Para 8)

(C) Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Section 16 — Right of reconveyance under Section 16 — Accrual of — It accrues only when registration of sale deed is completed as required by Sections 60 and 61, Registration Act and not before — Application under Section 16 presented to Collector prior to such date — Maintainability — (Registration Act (1908), Sections 47, 60 and 61). 1968 Pat LJR 384, Reversed.

This right of reconveyance does not accrue to an applicant under Section 16 of the Act unless there is a completed transfer. Under Section 16 (2) and (3), no transfer takes place unless the sale deed is registered. Registration is complete only when the certificate under Section 60, Registration Act is given and the endorsement and copying out the said certificate under Section 61 of the Registration Act are made. It follows therefore, that the right of reconveyance

accrues to the applicant only on the date of completion of registration of the transfer and an application under Section 16 presented to the Collector before such date would be premature (Obiter).

(Para 11)

In such a case, however it cannot be argued on the basis of Section 47, Registration Act that once registration is effected, the title under the sale deed relates back to the date of execution of the sale deed so as not to render the application presented prior to completion of registration as premature. AIR 1961 SC 1747 and AIR 1960 SC 1368 and AIR 1958 SC 838, Rel. on. (Para 11)

A sale deed dated 9-10-1964 in respect of certain land executed by P in favour of the respondent was presented for registration and the registration was complete on 30-11-1964. In the meanwhile the appellant who was a co-sharer obtained a certified copy of the sale deed from the registering authority and on 26-11-1964 he filed an application under S. 16 (3) of Bihar Act (12 of 1962) in the Collector's office annexing to his application the certified copy of the sale deed and a challan evidencing the requisite deposit as required by the proviso to Sec. 16 (3) (i) and Rule 19 of the Act and the Rules. Some one in the Collector's office received the application on November 28 1964 and made an endorsement thereon that it should be put up before the Collector on November 30, 1964. The said application having been placed before him on November 30, 1964, the Collector passed his interim order under S. 16 (3) (ii) directing the transferee to deliver possession of the land in question to the appellant. Admittedly, registration was also completed on that date.

Held that the application presented in the Collector's office on 26-11-1964 was not premature and the Collector had jurisdiction to pass the order on 30-11-64. A mere presentation of the application in the sense of the appellant having handed it over to some subordinate in the Collector's office cannot mean its having been entertained by the Collector on that date. The endorsement, on the contrary, showed that the Collector had not even seen it on that day, much less accepted it. The Collector took cognizance of it on November 30, 1964 only when it was placed before him and when on being satisfied that the conditions of Section 16 were satisfied he passed his order under sub-section (3) (ii) for hand-

ing over possession from the transferee to the appellant. 1968 Pat LJR 384, Reversed. (Para 12)

(D) Civil P. C. (1908), Pre. — Interpretation of Statutes — Statute whether directory or mandatory — Matters to be considered.

The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it used the word 'shall' is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. (1863) 32 LJQB 366 and (1917) 1 KB 1 and AIR 1965 SC 895, Rel. on. (Para 14)

(E) Tenancy Laws — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act (12 of 1962), Section 16 — Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules (1963), Rule 19 and Form L. C. 13 — Compliance of — Whether directory or mandatory — Effect of non-compliance — Jurisdiction of Collector to entertain application for reconveyance accompanied with certified copy of sale-deed presented for registration not affected if he is satisfied as to compliance of conditions precedent to making such application. 1968 Pat LJR 384, Reversed.

Whereas the deposit in the relevant treasury, the applicant being either a co-sharer or a raiyat of the adjoining land, his readiness and willingness to have the land in question reconveyed to him on the same terms and conditions as in the sale deed and the transfer of the land to the transferee are conditions precedent to his acquiring the right of reconveyance and to the Collector's jurisdiction to try such an application, the prescription as to annexing a copy of the registered deed is only directory and is laid down to furnish necessary information to the Collector to enable him to proceed with it. Annexing a certified copy of the sale deed where a copy of the registered deed is not yet available on account of the process of registration not having been completed would be sufficient compliance of the directory prescription so long as it furnishes information necessary for the Collector to proceed with the application.

Held on facts that the fact that the copy of the registered deed was not furnished along with the application was,

therefore, not fatal to the application nor did such omission deprive the Collector of his jurisdiction to entertain it nor did it vitiate the proceedings before him or the order thereon made by him. The Board of Revenue and the High Court were not right in dismissing the appellant's application. 1968 Pat LJR 384, Reversed. (Para 17)

Cases Referred:	Chronological Paras	
(1968) 1968 BLJR 33	= ILR 46	
Pat 1133, Raj Kishore Singh v. Bhubaneswari Singh		4
(1965) AIR 1965 SC 895 (V 52)	= 1965-1 SCR 970, Raza Buland Sugar Co. v. Municipal Board, Rampur	14
(1961) AIR 1961 SC 1747 (V 48)	= 1962-2 SCR 474, Ram Saran Lal v. Mst. Domini Kuer	11
(1960) AIR 1960 SC 1368 (V 47)	= 1961-1 SCR 248, Radhakishan Laxminarayan Toshniwal v. Shri- dhar Ramchandra	13
(1958) AIR 1958 SC 838 (V 45)	= 1959 SCR 878, Bishan Singh v. Khazan Singh	11, 13
(1917) 1917-1 KB 1	= 88 LJKB 292, King v. Lincolnshire Appeal Tribunal; Ex parte Stubbins	14
(1863) 32 LJQB 366	= 4 B and S 265, Bellamy v. Saull	14

Mr. S. T. Desai, Senior Advocate, (Mr. R. C. Prasad, Advocate, with him), for Appellants (In all the Appeals); Mr. M. K. Nambiar, Senior Advocate (M/s. D. P. Singh and Naginder Singh, Advocates with him), for Respondent No. 1 (In C. As. Nos. 1244 and 1248 of 1968), and Respondents Nos. 1 and 2 (In C. A. No. 1245 of 1968), Mr. K. M. K. Nair, Advocate, for Respondent No. 3 (In C. A. No. 1244 of 1968), Mr. E. C. Agrawala, Advocate, for Respondents Nos. 5 and 6 (In C. A. No. 1245 of 1968), Mr. M. Veerappa, Advocate, for Respondent No. 3 (In C. A. No. 1248 of 1968), Mr. U. P. Singh, Advocate, for Respondent No. 5 (In C. A. No. 1244 of 1968) and Respondent No. 4 (In C. As. Nos. 1245 and 1248 of 1968).

The following Judgment of the Court was delivered by

SHELAT, J.: These three appeals, by special leave, raise common questions and are, therefore, disposed of by a common judgment. The facts in Civil Appeal No. 1244 of 1968 being typical, we need set out them only so that the rival contentions of the parties on those questions may be properly appreciated.

2. By a deed of sale dated October 9, 1964, one Prembati Devi sold 2.62 acres of land to respondent 1 for Rupees 2,000. The said deed was thereafter presented to the Sub-Registrar for registration. On October 14, 1964, the appellant applied for a certified copy of the said sale deed and on its being furnished to him he filed an application dated November 26, 1964 under Section 16 (3) of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, XII of 1962 before the Collector. He annexed to his application the said copy of the sale deed and a copy of the challan evidencing his having deposited the sale price of Rs. 2,000 and an additional sum of 10 per cent thereof as required by the proviso to Section 16 (3) (i) and Rule 19 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules, 1963. On November 30, 1964, the Registrar completed registration by endorsing his certificate on the said sale deed under Section 60 (1) and copying out the endorsement and the certificate in the relevant register under Section 61 (1) of the Registration Act, 1908. The appellant had in his said application claimed to be entitled as a co-sharer to the right of re-conveyance of the said land under Section 16 (3) of the Act. On November 30, 1964, the Collector, on being satisfied that the application was proper, ordered possession to be given to the appellant under Section 16 (3) (ii) pending its disposal.

3. It is not in dispute that registration was completed on November 30, 1964, i. e., four days after the appellant had handed over his application and that though the certified copy furnished by him was not that of the registered deed, it was a correct copy of the sale deed presented for registration. On October 16, 1964, the Collector passed his order holding that the appellant was the co-sharer of the vendor and was entitled to the right of reconveyance. He, therefore, directed the transferee, respondent 1, to reconvey the said land in appellant's favour. No objection was taken before the Collector that the said application was not maintainable as registration was not completed when the appellant filed it or on the ground that only a certified copy of the sale deed and not of the registered deed had been annexed to it. This contention was raised for the first

time in appeal before the Commissioner who rejected it holding that in view of the admitted fact that registration was completed on November 30, 1964 the said proceedings before the Collector and his said order were not invalidated. The Commissioner consequently upheld the said order. In appeal before the Board of Revenue, the Board held that when the appellant presented his application on November 26, 1964, the transfer as contemplated by Section 16 was not completed and, therefore, its presentation by the appellant was not valid inasmuch as it was not in accordance with Rule 19 (2) of the said Rules. The reason given by the Board was that the rule required a copy of the registered deed and not a mere copy of the sale deed. On this ground the Board set aside the Collector's order and dismissed the appellant's application.

4. The appellant thereupon filed a writ petition in the High Court for a writ of certiorari for quashing the Board's said order. The High Court, relying on its previous decision in Rajkishore Singh v. Bhubneshwari Singh, 1968 BLJR 33, held that Section 16 (3) was a piece of beneficent legislation intended to prevent fragmentation of holdings and to facilitate consolidation with a view to utilisation of land in the most advantageous manner, and that to attain these objects when a transfer of land was made, a co-sharer of the transferor or a raiyat of the adjacent land was given the right to have the land reconveyed to him by the transferee through the Collector. The High Court, however, held that the said right depended on two conditions, viz., (a) the transferee was entitled to the full purchase price and an additional 10 per cent thereof as solatium and (b) the applicant made an application in the prescribed manner. The prescribed manner means the manner laid down by Rule 19 under which an application is to be made in Form L.C. 13 which requires the applicant to annex to his application a challan evidencing the deposit of the requisite amount in the relevant treasury, a copy of the registered sale deed and a statement to that effect in the application. The High Court observed that Section 16 (3) (ii) confers on the Collector the extra-ordinary power, without having to hold a preliminary enquiry, to dispossess the transferee and deliver to the applicant possession of the land in question pend-

ing the disposal of the application. It further observed that the exercise of this power was dependent on the condition that deposit has been made and that there has been a completed transfer, that is, a transfer evidenced by a copy of the registered deed of sale. Section 16 (2) (iii) provides that a transfer can only be made by a registered sale deed. The object of this clause and Rule 19 is that the Collector who is required to direct possession from the transferee to the applicant can satisfy himself that the land is transferred and that the deposit made is full and this he can do only if the application is accompanied by a copy of the registered deed. The High Court agreed that Section 16 was unlike the law of pre-emption under the Mahomedan law in that it gets rid of the procedural matters thereunder and provides not the right of substitution of the applicant in place of the transferee but a right of reconveyance of land in question. But it held that the right of reconveyance arises only on the transfer of the land to the transferee, that such transfer is completed only when the deed is registered and that though by reason of Section 47 of that Act the transfer takes effect from the date of execution once registration is completed, the transfer was not complete on November 28, 1964 when the Collector accepted the said application. Therefore, the right of reconveyance had not accrued to the appellant on that day, the transfer not having been yet completed and the Collector consequently had no jurisdiction to entertain the application. The High Court further held that the provisions of Rule 19 were mandatory and agreed with the Board that the appellant not having annexed a copy of the registered deed, his application was not only premature but was also not maintainable. These conclusions are challenged in these appeals.

5. Before we proceed further, it is necessary first to consider some of the relevant provisions of the Act and Rules. The long title of the Act shows that its object is inter alia to provide for fixation of ceiling area and acquisition of surplus land by the State Government. Chapter 2 deals with fixation of ceiling of land and Sections 4 and 5 therein lay down ceiling areas for different types of land and the rule that it shall not be lawful for any person to hold except, as provided under the Act, land in excess of

the ceiling area. Chapter 3 contains provisions connected with resumption of land by a raiyat from his sub-raiyat and Chapter 4 deals with acquisition of surplus land by the State Government. Chapter 5 which contains Section 16, deals with restrictions on future acquisition of land. Section 16 (1) lays down that no person shall acquire land which together with the land held by him exceeds in the aggregate the ceiling area. Clause (i) of sub-section (2) provides that no document of acquisition or possession of any land shall be registered unless the transferee declares before the registering authority the total area held by him. Clause (ii) prohibits registration of the document, if, from the said declaration it appears that the transaction is in contravention of sub-section (1), that is to say, the acquisition would make the total area held by the transferee in excess of the ceiling area. Clause (iii) provides that no transfer, exchange, lease, mortgage, bequest or gift can be made without the document therefor duly registered. Sub-section (3) (i) provides that if any transfer is made to a person other than a co-sharer or a raiyat of an adjoining land, such a co-sharer or a raiyat shall be entitled within three months from the date of the registration to apply before the Collector in the prescribed manner for transfer of the land to him on terms and conditions in the said deed provided that no such application shall be entertained by the Collector unless the purchase money together with 10 per cent thereof is deposited in the prescribed manner within the said period. Clause (ii) provides that on such deposit being made the co-sharer or the raiyat shall be entitled to be put in possession of the land even though his application is pending. Under Clause (iii) of sub-section (3), if the application is allowed, the Collector has to direct the transferee to convey the land in favour of the applicant by executing and registering a document of transfer.

6. The object of Section 16 is two-fold: (i) to ensure that no one holds land in excess of the ceiling area and (ii) to confer on a co-sharer or a raiyat of the adjoining area the right of reconveyance from the transferee. To subserve this object sub-section (2) lays down certain restrictions: (a) that there can be no registration of a deed of transfer without a declaration by the transferee that the total area which would be held by him

including the area under transfer does not exceed the ceiling area; (b) prohibition against registering a document if such a declaration shows that the transfer would have the effect of exceeding the ceiling area; and (c) that no such transfer would be complete without the deed of transfer being registered. The object of sub-s. (3) is to secure consolidation by giving the right of re-conveyance to a co-sharer or a raiyat of an adjoining area so that the land in question can be used in the most advantageous manner and also to prevent fragmentation of the land.

7. Rule 18 of the said Rules provides that the declaration to be made by a transferee under S. 16 (2) (i) before the registering authority shall be in Form L.C. 12. That form inter alia requires the transferee to declare that the land held by him and the land acquired by him under the document to be registered would not exceed the ceiling area. R. 19 deals with the application by a co-sharer or a raiyat of the adjoining land under S. 16 (3). It provides that such an application is to be made in form L.C. 18, and the applicant has to deposit the purchase money together with 10 per cent thereof in the treasury or sub-treasury of the district within which the land is situate. Cl. (2) of the rules provides that a copy of the challan showing the deposit together with a copy of the registered deed shall be filed with the application in which a statement to this effect shall also be made. Cl. (3) of the rule provides that a copy of the said application shall also be sent by the applicant to the transferor and the transferee by registered post with acknowledgment due. Cl. (4) provides that the Collector shall issue a notice to the transferor, the transferee and the applicant to appear before him at a date to be specified in the notice and after giving the parties a reasonable opportunity of showing cause and of being heard shall either allow the application or reject it. Form L.C. 18 requires the applicant (a) to state that the transfer of the land has been made through a document registered on the date to be specified therein, (b) to enclose a copy of the challan in token of the deposit of the purchase money plus 10 per cent solatium, and (c) to enclose a copy of the registered deed by which the land has been transferred.

8. From the contents of Rr. 18 and 19 and Forms L.C. 12 and 18, it is clear

that the object of these rules, firstly, is to enable the registering authority to see that the transferee does not by the transfer acquire land in excess of the ceiling area and, secondly, to enable the Collector to know that a transfer of the land has been made and that such transfer is completed by registration, the price paid for it and that the deposit made by the applicant is of a sum equivalent to the purchase price and 10 per cent thereof. It is manifest that the purpose for requiring the applicant to file a copy of the challan and of the registered deed is to enable the Collector to ascertain therefrom the aforesaid facts and to proceed further on being satisfied about them.

9. It is necessary at this stage to be clear about certain dates. The sale deed was executed by the transferor and the transferee on October 9, 1964. On November 14, 1964, the appellant obtained from the registering authority a certified copy of the sale deed tendered for registration. The appellant filed his application in the Collector's office on November 26, 1964. It is true that the Board of Revenue has stated at one place that the Collector "admitted" the application on November 28, 1964 and at another place that he "took cognizance of" it on that date. If by the words "admitted" and "took cognizance of" the Board meant that the Collector took cognizance of the application in its technical sense, the Board would appear to be factually incorrect. The record of the case shows that some one in the Collector's office received the application on November 28, 1964 and made an endorsement thereon that it should be put up before the Collector on November 30, 1964. As already stated, on the said application having been placed before him on November 30, 1964, the Collector passed his interim order under S. 16 (3) (ii) directing the transferee to deliver possession of the land in question to the appellant. Admittedly, registration was also completed on that date.

10. Two contentions were urged by counsel for the respondents. Proceeding on the basis that the appellant presented the application on November 26, 1964, Mr. Nambiar contended (1) that the application was premature as registration of the sale deed was not then completed and, therefore, there was not yet a completed transfer and (2) that, therefore, the Collector had no jurisdic-

tion to entertain such an application, his jurisdiction being dependent on a transfer having taken place. The argument was that under S. 16 (1) there can be no transfer to a person who together with the land already held by him acquires land by transfer which in the aggregate makes the area in excess of the ceiling area; that under S. 16 (2) no registering authority can register such a deed of sale and there can be no valid transfer unless the sale deed is registered. Therefore, as the said sale deed was not registered until November 30, 1964, there was no transfer till then, that no right of reconveyance accrued to the appellant and the Collector, therefore, could not entertain an application without such a right having already accrued to the applicant. The second contention was that the right conferred under S. 16 (3) being a statutory right and it being inconsistent with the right of a citizen to hold and dispose of his property it must be exercised in strict conformity with the terms and conditions laid down in the Act and the Rules, that the language of R. 19 is mandatory, that the power of the Collector under S. 16 (3) (ii) is extraordinary in the sense that without holding any preliminary enquiry he can direct the transferee to hand over possession of the land to the applicant. Therefore, he argued, the requirements of R. 19 must be held to be mandatory and that if they are not strictly complied with, the Collector would have no jurisdiction to entertain an application. Therefore, the appellant having failed to annex a copy of the registered deed of sale as required by R. 19 and Form L.C. 13 and having annexed only the certified copy of the unregistered deed of sale, his application was not in conformity with R. 19 and the Collector could not entertain it, much less act on it.

11. When the appellant lodged his application in the Collector's office he had already deposited the requisite amount in the treasury and had annexed thereto the copy of the challan. So that that condition under S. 16 was complied with. The application was also filed within the time prescribed by the section. Under S. 16 (2) and (3), however, no transfer takes place unless the sale deed is registered. Registration is complete only when the certificate under S. 60 is given and the endorsement and copying out the said certificate under S. 61 of the Registration Act are made.

But Mr. Desai argued that under S. 47 of that Act once registration is effected, the title under the sale deed relates back to the date of its execution and therefore though registration was completed on November 30, 1964, the transferee's title under the sale related back to the date of its execution, i.e., October 9, 1964. Assuming, therefore, that the application was presented on November 26, 1964, the transferee's title having related back to the date of the execution of the sale deed, the transfer must be deemed to be complete on that date and, therefore, it was not correct that the right of reconveyance had not accrued to the appellant on November 26, 1964 or that the Collector had no jurisdiction on that date to accept the said application. This contention, however, cannot be accepted in view of the decision in Ram Saran Lal v. Mst. Domini Kuer, 1962-2 SCR 474 = (AIR 1961 SC 1747) where this Court rejected an identical contention. Mr. Desai tried to distinguish that case on the ground that it was based on Mahomedan law which by custom applied to the parties there. But the decision is based not on any principle of Mahomedan law but on the effect of S. 47 of the Registration Act. The majority decision clearly laid down that the sale there was completed only when registration of the sale deed was completed as contemplated by S. 61 of the Registration Act and, therefore, the talab-i-mowasibat made before the date of completion of registration was premature and a suit based on such a demand of the right of pre-emption was premature and must, therefore, fail. Similarly, in Radhakishan L. Toshniwal v. Shridhar, 1961-1 SCR 248 = (AIR 1960 SC 1368) this Court laid down that where a statute providing for the right of pre-emption lays down that it accrues only when transfer of the property takes place and such transfer is not complete except through a registered deed, a suit filed before the sale deed is executed is premature as the right of pre-emption under the statute did not accrue till the transfer became effective through a registered deed. In Bishan Singh v. Khazan Singh, 1959 SCR 878 = (AIR 1958 SC 838) this Court laid down that in a suit for pre-emption the plaintiff must show that the right had accrued to him at the time when he exercised it.

12. But the question whether the right of reconveyance had accrued to the appellant or not on November 26,

1964 appears to be academic. As already stated, his application was placed for the first time before the Collector on November 30, 1964 when admittedly registration was completed and thereupon the transfer also had become complete. A mere presentation of the application in the sense of the appellant having handed it over to some subordinate in the Collector's office cannot mean its having been entertained by the Collector on that date. There is, therefore, no merit in the contention that the Collector had entertained the application either on the 26th when it was taken by the appellant to the Collector's office or on the 28th when some subordinate in the office made an endorsement on it that it should be placed before the Collector. The endorsement on the contrary shows that the Collector had not even seen it on that day, much less accepted it. The Collector took cognizance of it on November 30, 1964 only when it was placed before him and when on being satisfied that the conditions of S. 16 were satisfied he passed his order under sub-s. (3) (ii) for handing over possession from the transferee to the appellant. On these facts, Mr. Nambiar's first contention must fail.

13. The contention next was that the right of pre-emption being a weak right as held in 1959 SCR 878 = (AIR 1958 SC 838) and the outcome thereof being to disturb a valid transaction by virtue of such a right having been created by statute, there are no equities in favour of a pre-emptor as held in 1961-1 SCR 248 = (AIR 1960 SC 1368) and, therefore, the person coming to the court for exercise of such a right must show that he has duly complied with all the conditions laid down by the law giving him that right. Mr. Nambiar submitted that that being the position, the conditions laid down in R. 19 must be held to be mandatory and unless they are complied with an application for enforcing such a right must fail. The question is whether non-satisfaction of the condition that the application must be accompanied by a copy of the registered deed is fatal to the exercise of the right conferred under the Act.

14. Rule 19 does not lay down the consequence of non-compliance of its provisions. When a statute requires that something shall be done or done in a particular manner or form without expressly declaring what shall be the

consequence of non-compliance, the question often arises what intention is to be attributed by inference to the legislature, (see Maxwell on Interpretation of Statutes 11th edn. p. 362). It has been said that no rule can be laid down for determining whether the requirement is to be considered as a mere direction or instruction involving no invalid consequence for its disregard or as imperative with an implied nullification for disobedience beyond the rule that it depends on the scope and object of the enactment. A case nearest to the one before us is to be found in Bellamy v. Saull, (1863) 32 LJ QB 366. Section 34 of the Revenue (No. 2) Act, 1861 enacted that no copy of a bill of sale should be filed in any court unless the original was produced before the officer duly stamped. It was held that this provision did not invalidate the registration if the bill was not duly stamped when so produced for the object of the enactment was to protect the revenue and this was thought sufficiently attained if the deed was afterwards duly stamped without going to the extreme of holding the registration void. Similarly in King v. Lincolnshire Appeal Tribunal; Ex parte Stubbins, (1917) 1 KB 1. Regulation 19, Part 1 Section II of the Schedule to the Military Service (Regulations) Order, 1916 was held to be directory. The Military Service Act, 1916 provided that any person aggrieved by the decision of a local tribunal and a person generally or specially authorised by the army council to appeal from the decision of that tribunal may appeal against the decision of a local tribunal to the appeal tribunal of the area. The regulation provided that any such person may appeal against the decision of the local tribunal by delivering to that tribunal, in the prescribed form in duplicate, notice of appeal not later than three clear days after its decision, and the local tribunal shall thereupon send to the other party to the application the duplicate notice of appeal. The local tribunal granted the applicant exemption from military service. The military representative immediately announced in the presence and hearing of the applicant that he would appeal stating also his grounds of appeal. The copies in the prescribed form of the notice of appeal not being available, the military representative handed over to the clerk of the local tribunal a list of the names of persons in respect of whom he intended

to appeal including the applicant's name and some weeks before the appeal was heard the clerk discussed the matter with the applicant. The applicant raised an objection before the appeal tribunal that it had no jurisdiction to hear the appeal as the prescribed notice had not been given. The Appeal Court held that inasmuch as the applicant knew within the prescribed time that the appeal was pending, strict compliance by the military representative with the letter of regulation 19 by delivering to the local tribunal notice of appeal in the prescribed form in duplicate was not a condition precedent to the appeal tribunal having jurisdiction to hear and determine the appeal, that the provisions of regulation 19 as to procedure were directory only and not imperative and, therefore, non-compliance with them did not deprive the military representative of his right of appeal. The same rule of construction has also been laid down in *Raza Buland Sugar Co. v. Municipal Board, Rampur*, 1965-1 SCR 970 = (AIR 1965 SC 895). The appellant company there challenged the validity of water tax levied by the municipal board on the ground that the tax had not been imposed according to law inasmuch as the proposals and the draft rules had been published by the Board in an Urdu paper whereas according to S. 131 (3) read with S. 94 (3) of the U. P. Municipalities Act, 1916 they should have been published in a Hindi paper. The Court held that S. 131 (3) fell into two parts, the first providing that the proposal and draft rules for an intended tax should be published for inviting objections of the public and the second, laying down that such publication must be in the manner laid down in S. 94 (3). It held that considering the object of the provisions for publication, the first part was mandatory while the second was merely directory. What that part required was that the publication should be in Hindi in a local paper and if that was done there was sufficient compliance of S. 94 (3). The publication was made in Hindi in a local paper which had good circulation in Rampur; there was no regularly published local Hindi newspaper. There was in the circumstances substantial compliance with the provisions of S. 94 (3). At p. 975 (of SCR) = (at p. 899 of AIR) this Court observed that the question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it used

the word 'shall' is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor.

15. The object of R. 19 in prescribing that the application under S. 16 (3) must be accompanied by a copy of the registered deed is clearly to enable the Collector before he exercises his power thereunder to ascertain the purchase price, the terms and conditions of the sale, the readiness of the applicant to have the land in question reconveyed to him on the same terms and conditions as in the sale deed and the fact of the applicant having deposited the relevant amount in the treasury. The purpose of prescribing that a copy of the registered deed should accompany the application is that if such a copy is before the Collector there would be no scope for any controversy that the land is transferred to the purchaser, about its area and location, and the terms and conditions of the sale including the sale price. If this information is before the Collector and he is satisfied about it, does it still mean that it would be fatal to the application if the formality of annexing a copy of the registered deed is not complied with. Section 16 lays down that such an application must be made within three months from the date of the registration and if it is not done within that period, it would be time barred. Suppose for a while that an applicant does not know when registration under Ss. 60 and 61 of the Registration Act is completed and annexes to his application a certified copy of the sale deed furnished at his instance by the registering authority or where the registering authority is not able to furnish a copy of the registered deed of sale within time. Does it mean that an applicant is to be deprived of the right of reconveyance conferred by the statute? To hold that if the formality prescribed by R. 19 is not satisfied the application would be bad would be to nullify the object of the statute. That surely cannot be the intention of the draftsmen who framed R. 19 and Form L. C. 13.

16. Rule 19 (3) requires that a copy of the application shall be sent to the transferee and the transferor by registered post with acknowledgment due. Form L. C. 13 requires the applicant to state that the transfer is made by a regis-

tered deed on the date specified therein. If a copy of the application is delivered to the transferor or the transferee by hand delivery or by registered post but without acknowledgment due or if the applicant is not able to state the date of registration because he does not know it, does it mean that merely because Cl. (8) of R. 19 and the form use the word "shall" the omission to comply with the aforesaid requirements is fatal to the application? Surely these are directory instructions and if there is sufficient compliance thereof the application can be validly entertained by the Collector.

17. In our view, whereas the deposit in the relevant treasury, the applicant being either a co-sharer or a raiyat of the adjoining land, his readiness and willingness to have the land in question reconveyed to him on the same terms and conditions as in the sale deed and the transfer of the land to the transferee are conditions precedent to his acquiring the right of reconveyance and to the Collector's jurisdiction to try such an application, the prescription as to annexing a copy of the registered deed is only directory and is laid down to furnish necessary information to the Collector to enable him to proceed with it. Annexing a certified copy of the sale deed where a copy of the registered deed is not yet available on account of the process of registration not having been completed would, in our view, be sufficient compliance of the directory prescription so long as it furnishes information necessary for the Collector to proceed with the application. The fact that a copy of the registered deed was not furnished along with the application was, therefore, not fatal to the application nor did such omission deprive the Collector of his jurisdiction to entertain it nor did it vitiate the proceedings before him or the order thereon made by him. The Board of Revenue and the High Court were not right in dismissing the appellant's application. In the circumstances we allow the appeals, set aside the judgment and order of the High Court as also of the Board and restore the order passed by the Collector and confirmed by the Commissioner. The respondents will pay to the appellants the costs of these appeals as also their costs in the High Court. There will be only one hearing fee.

KSB

Appeals allowed.

AIR 1969 SUPREME COURT 253

(V 56 C 46)

(From: Patna)^aR. S. BACHAWAT AND K. S. HEGDE,
JJ.

Mst. Bibi Aisha and others, Appellants v. The Bihar Subai Sunni Majlis Awaqaf and others, Respondents.

Civil Appeal No. 323 of 1965, D/-
24-7-1968.

Evidence Act (1872), S. 65 (a) and (f) — Clause (a) is not controlled by clause (f) — When case falls under clause (a), any secondary evidence (a plain copy of the document) and not necessarily certified copy of document is admissible, though the case may also fall under clause (f). (1879) ILR 5 Cal 568, Approved. (Para 3)

Cases Referred: Chronological Paras (1879) ILR 5 Cal 568 = 5 Cal LR 381, A. Collision Between The Ava

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Mr. S. C. Agarwal, Advocate of M/s. Ramamurthi and Co. and M/s. K. M. K. Nair, Anil Kumar Gupta and S. P. Singh Advocates, for Appellants; Mr. Sarjoo Prasad, Senior Advocate (Mr. U. P. Singh, Advocate with him), for Respondent No. I.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The Bihar Subai Sunni Majlis-e-Awaqaf a body corporate established under the Bihar Waqfs Act, 1947 instituted a suit for setting aside a registered mokarrari lease deed dated November 18, 1949 executed by defendant No. 4 Sheikh Gholam Bari in favour of defendants 1 to 3 and for restoration of possession of the properties covered by the document, viz., the houses and shops being holdings Nos. 27 and 28 formerly known as holdings Nos. 22 and 23 in Ward No. 8 at Mohalla Muradpore P. S. Pirbahore in the city of Patna (Baakipur). The plaintiff's case is that the properties were dedicated by way of waqf by a waqfnama dated August 20, 1827 executed by Mst. Bibi Mannu Khanam Jan. The successive Mutawallis under this deed were Sheikh Azmatullah, Sheikh Ataullah, Sheikh Habibur Rahman, Bibi Zainunnissa and Sheikh Gholam Bari. The Trial Court decreed the suit and this decree was confirmed by the High Court.

^a(A. F. O. D. No. 500 of 1955, D/-
16-2-1961 — Pat.).

Both the courts concurrently found that Mst. Bibi Mannu Khanam Jan dedicated the properties by way of waqf by a deed dated August 20, 1827. The correctness of this finding is challenged in this appeal.

2. In Mohalla Muradpore in the city of Patna (Baakipur) there is an ancient mosque known as the mosque of Mst. Bibi Mannu Khanam Jan. It is not disputed now that Mst. Bibi Mannu Khanam Jan established this mosque. There are shops, rooms, katra and other structures to the east, west and the south of the mosque. To the east of the mosque are the disputed holdings Nos. 27 and 28. On September 25, 1948 Gholam Bari filed before the Waqf Board a return in Form No. 1 under Rules 6 and 11 of the Bihar Waqfs Act, 1948. In this return he stated that the properties were given in waqf to the mosque by Mst. Bibi Mannu Khanam Jan under the deed of waqf dated August 20, 1827. With this return he filed an English translation of the waqf deed. The translation was attested by him. P. W. 5 Mehdi Hasan, the Nazir of the Waqf Board proved that Gholam Bari also filed the original waqfnama together with its copy in Persian. The copy bore the following endorsement signed by Gholam Bari. "The copy corresponds to the original." The original waqfnama was returned to Gholam Bari and the copy was retained in the office of the Waqf Board. At the trial Gholam Bari did not produce the original deed. Accordingly the copy of the deed and its translation were exhibited.

3. The Trial Court and in the High Court Misra J. accepted the testimony of Mehdi Hasan and held that the copy of the original waqfnama was admissible in evidence. We agree with this finding. Tarkeshwaramath J. ruled that the copy was not admissible mainly on the ground that paragraph 7 of the plaint stated that the deed of waqf was in the plaintiff's custody. We agree with Misra J. that the averment in the plaint should be regarded as a general statement referring to the true copy which was left in the plaintiff's office. Under Section 65 (a) of the Evidence Act secondary evidence may be given of the existence, or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when after the notice mentioned in

Section 66, such person does not produce it. Where the case falls under S. 65 (a) any secondary evidence of the contents of the document is admissible. In the present case the conditions of S. 65 (a) were satisfied. The plain copy of the waqf was therefore admissible. On behalf of the appellant it was argued that Cl. (f) of S. 65 was applicable and that as the certified copy of the deed dated August 20, 1827 was permitted by the Evidence Act to be given in evidence a certified copy alone was admissible in evidence. There is no substance in this contention. If the case falls under clause (a) any secondary evidence of the document is admissible, though the case may also fall under clause (f). Clause (a) is not controlled by clause (f). In the case of *A Collision Between The Ava*, (1879) ILR 5 Cal 568 a question arose as to whether secondary evidence could be given of the contents of a certificate granted by the Board of Trade. The loss of the document attracted Cl. (c) of Section 65 and the failure to produce it after notice attracted Cl. (a). Clause (f) of Section 65 was also applicable. Wilson J. ruled that a certified copy need not be produced and any secondary evidence was admissible. We agree with this decision. Wilson J. said:

"By S. 65 in cases under Cls. (a) and (c) any secondary evidence is admissible; in cases under Cls. (e) and (f) only a certified copy. The present case falls under Cl. (a) or (c) and also under (f). In such a case which rule applies? I think the words, "In cases (a), (c) and (d) any secondary evidence is admissible," are too clear and too strong to be controlled by anything that follows, and that, therefore, in this case any secondary evidence might be received."

4. The existence of the deed of waqf dated August 20, 1827 is proved by numerous admissions made by Gholam Bari and his predecessors-in-title. The existence of the deed was admitted in a petition filed by Bibi Zaibunnisa before the District Judge, Patna on January 13, 1928, in the return filed before the plaintiff by Gholam Bari on September 25, 1948; in the petition dated February 15, 1949 and a statement dated March 21, 1949 filed by him before the President of the Bihar Subai Sunni Majlis-e-Awaqf. Other documents and admissions also clearly show that the disputed holdings are waqf properties.

5. The copy of the waqf deed shows that Bibi Mannu Khanam Jan appeared before the Darulquazaya Azimabad for admitting the execution and making a declaration and the Quazi signed the deed and put the seal of the Registry Office on 21st Rabiul Awal, 1233 A. H. The year 1233 is evidently a mistake for 1243. The deed was executed on 19th Muharram 1243 A. H. corresponding to 20th August 1827. No copy of this deed is now found in the records of the registration office. It appears that the document was presented for registration under Regulation XXXIX of 1793. Under that Regulation the Quazis were required to keep copies of all deeds and other papers which they might draw up or attest, to keep a list of such papers and to deliver the list and papers to their successors. The Regulation made no provision for the maintenance of a proper register book. The disputed waqf deed was registered in 1827. At this distance of time no copy of the deed is traceable in the registration office. But from other unimpeachable evidence, it is satisfactorily established that Mst. Bibi Mannu Khanam Jan executed the waqf deed dated August 20, 1827 and that the disputed holdings are waqf properties. In this view of the matter it is not disputed that the courts below rightly decreed the suit.

6. The appeal is dismissed with costs.
SSG/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 255
(V 56 C 47)

(From Madhya Pradesh: AIR 1964
Madh. Pra. 196)

R. S. BACHAWAT AND K. S. HEGDE,
JJ.

Chaturbhuj Pande and others, Appellants v. Collector, Raigarh, Respondent.
Civil Appeal No. 667 of 1965, D/-
23-7-1968.

(A) Land Acquisition Act (1894), Ss. 23
(1) and (2) and 3 (a) — Acquisition of land with orchards thereon — Value of trees, determination of — Value of trees does not fall under S. 23, secondly — Land includes trees standing thereon, which are component parts of land — Value of trees is ascertained only for determining the market value of land sought to be acquired — On the value of

Raigarh (Hegde J.)

land as determined the Court is bound to allow 15 per cent allowance provided by S. 23 (2). AIR 1964 Madh Pra 196, Reversed; (1907) ILR 30 Mad 151 and AIR 1920 All 101, Approved. (Para 8)

(B) Evidence Act (1872), S. 3 — Evidence — Land acquisition proceedings — Market value of land — Reference by appellate Court after conclusion of arguments to documents which are not part of record is not permissible — They should be admitted as fresh evidence and parties given opportunity to rebut them — Civil P. C. (1908), O. 20, R. 4, O. 41, R. 27. AIR 1954 Madh Pra 196, Reversed. (Para 5)

(C) Evidence Act (1872), S. 3 — Appreciation of evidence — Oral evidence — Civil cases — In assessing the value of the evidence Judges are bound to call in aid their experience of life and test the evidence on basis of probabilities — Evidence of only one party even when no evidence of rebuttal is led by opposite party need not necessarily be accepted. (Para 6)

(D) Evidence Act (1872), S. 167 — Civil P. C. (1908), S. 99 — Land Acquisition proceeding — Compensation awarded by Land Acquisition Officer substantially enhanced by High Court relying on inadmissible evidence — Evidence of claimant rejected by High Court — No appeal by Government against enhancement of compensation — If inadmissible evidence were not relied, the compensation allowed by Land Acquisition Officer would have remained — Claimant cannot therefore complain against High Court that it has taken into consideration inadmissible evidence. (Para 7)

(E) Civil P. C. (1908), S. 35 — Land Acquisition proceedings — Compensation awarded by Land Acquisition Officer though substantially enhanced by trial court and High Court—Parties directed to bear their own costs—Good reasons given — Claim by claimant highly exaggerated — Bulk of their evidence found unacceptable — Costs being essentially in the discretion of the courts, the Supreme Court declined to interfere with the order. (Para 10)

Cases	Referred:	Chronological	Paras
(1920)	AIR 1920 All 101 (V 7) =		
	ILR 42 All 555, Krishna Bai v.		
Secy. of State			9
(1907)	ILR 30 Mad 151 = 16 Mad		
	LJ 551, Sub. Collector of Godavari		
v. Seragam Subbaroyadu			9

Mr. S. T. Desai, Senior Advocate, (M/s. V. D. Mishra and A. G. Ratnaparkhi, Advocates, with him), for Appellants; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: In this appeal from the decision of the High Court of Madhya Pradesh in First Appeal No. 180 of 1959 on its file the principal question that arises for decision is as to the market value of the appellants' orchard acquired under the provisions of Land Acquisition Act 1894 (to be hereinafter referred to as the Act) in connection with the construction of Hirakud Dam in Orissa State.

2. Several lands in the Raigarh District of Madhya Pradesh were acquired by the Collector of Raigarh in pursuance of the request made by the Government of Orissa. Among the lands so acquired some of the appellants' lands were also included. For those lands the appellant claimed compensation in a sum of Rs. 7,95,770 under various heads but the Special Land Acquisition Officer under two different awards awarded to them a sum of Rs. 59,494/6/- . The appellants did not agree to the award made by the Special Land Acquisition Officer and at their instance the question of compensation was referred to the District Court of Raigarh under Section 18 of the Act. The Additional District Judge who tried the reference in question enhanced the compensation payable to the appellants to Rs. 3,29,480. In particular he valued the trees in the orchard acquired at Rupees 2,19,220. Aggrieved by the decision of the learned Additional District Judge, the Collector of Raigarh appealed to the High Court of Madhya Pradesh. In that appeal the appellants filed a memorandum of cross-objections praying for the enhancement of the compensation payable to them. The High Court substantially modified the decree of the learned Additional District Judge. It determined the compensation payable to the appellants at Rs. 1,47,751/7/- with interest as provided in the decree. Against that decision the appellants have brought this appeal after obtaining a certificate under Article 133 (1) (a) of the Constitution.

3. As mentioned earlier the principal question arising for decision is as regards the true compensation payable in respect of the orchard in question. In that orchard admittedly there were 160 Orange

trees, 41 Mosambi trees, 250 Gauva trees apart from other trees. The learned Additional District Judge valued each one of the Orange and Mosambi trees at Rs. 960 and Gauva tree at Rs. 240. There is no dispute as regards the number of trees in the orchard. In that orchard apart from the Orange, Mosambi and Gauva trees, there were some other trees but we need not concern ourselves about those trees as no dispute was raised before us either as to their number or value. The learned Additional District Judge computed the net income from each Orange tree at Rs. 100 and of Mosambi tree at Rs. 70 to Rs. 80 per year. He capitalised that income at 12 years' purchase and thus arrived at the compensation payable in respect of those trees. In so doing he heavily relied on the oral evidence adduced by the appellants. We may mention at this stage that there was absolutely no documentary evidence to support the claim of the appellants.

4. The evidence of the first appellant as well as that of the witnesses did not commend itself to the learned Judges of the High Court. They opined that the claim of the appellants was a highly exaggerated one and the evidence of the witnesses supporting that claim is unacceptable. Relying on certain official reports and the pamphlets published by certain individuals as to the yield from Orange, Mosambi and Gauva trees, average span of life of those trees and the market value of Orange, Mosambi and Gauva, the High Court re-assessed the compensation payable and came to the conclusion that the total value of the trees in the orchard in question could be reasonably fixed at Rs. 58,566.

5. Mr. S. T. Desai, learned Counsel for the appellants complained that the High Court was not right in looking into documents which were not a part of the records of the case particularly when his clients had not been given any opportunity to rebut the conclusions reached therein. It appears that these documents were looked into by the learned Judges after the conclusion of the arguments. If the High Court wanted to take into consideration any fresh evidence, it should have admitted the same in accordance with law. In that event, the appellants would have got opportunity to rebut that evidence. That having not been done, we do not think it was open to the High Court to rely on those

Act also relate to a similar matter, the case of Cheddu Singh, AIR 1964 All 179 (Supra) being in connection with the latter.

33. This case of the Calcutta High Court went up to the Supreme Court in Guru Govind Basu v. Sankari Prasad Ghosal, AIR 1964 SC 254. The facts, as it appears from the report, are as to whether an auditor appointed under Section 619 of the Indian Companies Act of a Government company by the Central Government on the advice of the Comptroller and Auditor General of India held an office of profit. Under Section 619 the Comptroller and Auditor General, shall have power to direct the manner in which the company's accounts shall be audited by the auditor appointed in pursuance of sub-section (2) and to give such auditor instruction in regard to any matters relating to the performance of his functions as such, to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf, and for the purposes of such audit to require information or additional information to be furnished to any person or persons so authorised on such matters, by such person or persons, and in such form, as the Comptroller and Auditor General may, by general or special order direct. The auditor is expected to submit a copy of his audit report to the Comptroller and Auditor General of India who shall have the right to comment upon, or supplement the audit report in such manner as he may think fit. It was pointed out on analysing these provisions that the appointment of an auditor in a Government company rests solely with the Central Government on the advice of the Comptroller and Auditor General of India. The law further provided that an auditor under these provisions may be removed from office before the expiry of his term only by the company in general meeting after obtaining the previous approval of the Central Government in that behalf. It was held that it was clear that the appointment of an auditor in a Government company rests solely with the Central Government and so also his removal from office. The Comptroller and Auditor General of India exercised control over the auditor of a Government company in respect of various matters including the manner in which the Company's accounts shall be audited. The Auditor General has also the right to give such auditor instructions in regard to any matter relating to the performance of his functions as such. The Auditor General may conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf. In other words, the Comptroller and Auditor General of India exercises full control

over the auditors of a Government company. The case was distinguished from that of Abdul Shakur, AIR 1958 SC 52 (Supra) by pointing out that the appellant in that case was the manager of a school run by a committee of management formed under the provisions of the Durgah Khwaja Saheb Act, 1955. He was appointed by the administrator of the Durgah and was paid Rs. 100 per month. It was pointed out that in that case appointment of the appellant was not made by the Government nor was he liable to be dismissed by the Government. The appointment was made by the administrator of a committee and he was liable to be dismissed by the same body and though the Committee of the Durgah Endowment was to be appointed by the Government of India, it was a body corporate with perpetual succession acting within the four corners of the Act. Merely because the Committee or the members of the Committee were removable by the Government of India or the Committee could make bye-laws prescribing the duties and powers of its employees could not convert the servants of the Committee into holders of office of profit under the Government of India. The appellant in that case was neither appointed by the Government of India nor was removable by the Government of India nor was he paid out of the revenues of India. The decision that ultimately emerged in that case has been correctly summarised in the head note as follows:—

"For holding an office of profit under the Government, one need not be in the service of Government and there need be no relationship of master and servant between them. The Constitution itself makes a distinction between the holder of an office of profit under the Government and the holder of a post or service under the Government. The Constitution has also made a distinction between the holder of an office of profit under the Government and the holder of an office of profit under a local or other authority subject to the control of Government. The decisive test for determining whether a person holds any office of profit under the Government is the test of appointment. It is not correct to say that the several factors which enter into the determination of this question — the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give direction in that behalf — must all co-exist and each must show subordination to Government and that if one of the elements is absent, the

test of a person holding an office under the Government, Central or State, is not satisfied. The circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor — not decisive of the question. Whether stress will be laid on one factor or the other will depend on the facts of each case. However, where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed, and the power to determine the question of remuneration are all present in a given case, then it must be held that the officer in question holds the office under the authority so empowered."

34. In this state of authority we have to see as to who is the appointing authority of respondent no. 1 as Adjutant. We have also to see as to who is the authority who can terminate the appointment. We have further to see whether it is that authority which determines the remuneration. We have also to look to the source from which the remuneration is paid, and also the authority vested with the power to control the manner in which the duties of the office are discharged and to give directions in that behalf.

35. It has already been described in detail how the appointment of an Adjutant is made, who make the appointment and who is in charge of discipline. We also know that the source from which the remuneration is paid is the public revenue and the authority who has power to control the manner in which all the duties are discharged is either the Government or an officer under the Government. Obviously, therefore, respondent no. 1 holds an office under the Government of the State of Uttar Pradesh. The question is whether it is an office of profit. The determining factor in such a case is as to whether he earned any profit or remuneration from the Government revenue. The quantum of remuneration is immaterial. Respondent no. 1 used to get an allowance of Rs. 50 per mensem for purposes of his duties. Can it be said to be a consolidated fee for the out-of-pocket expenses that he had to incur, as contemplated in Ravanna Subanna's case, AIR 1954 SC 653 (Supra) or is it by way of stipend paid to a scholarship holder or honorarium or allowance for attending training camp as contemplated in Panna Lal's case, 1964 All LJ 902 (supra)?

36. The learned counsel for respondent no. 1 strongly relied on the two cases, just referred to, to support his contention that the remuneration of Rs. 50 per mensem was only an honorarium, to meet his out-of-pocket expenses and at

the most was no better than a stipend paid to a scholarship holder. According to him, it was not a salary or remuneration as contemplated under the word "profit" used in the phrase "office of profit". We will see that the Government used the term remuneration in the shape of an honorarium in their earliest letter dated the 28th of February, 1963 (Exhibit A-4), but later on they reverted to the phrase "Instructor's allowance" and that is how the payment has been described in the various letters thereafter. The Government, however, again clarified the matter in their letter dated March 9, 1964 (Exhibit A-8) where they again say that the payment of this amount may be treated as an honorarium. It is how the Government regard the payment that used to be made to respondent no. 1 as an Adjutant. It is the nature of the payment or what has sometimes been described as the "pith and substance" that is to be looked into. A rose will smell as sweet, call it by whatever name. So it is not the name that is given by the Government to a certain payment. It is the nature of the payment that will determine as to whether the payment can be said to be a remuneration for the post. The payment is a periodical payment made from month to month. It is not made specifically for a certain period when the Adjutant attends to the parades. It is not also a payment which is made to him only during the course of his training. The payment, therefore, is neither a stipend nor an allowance by way of meeting out-of-pocket expenses. It is a consolidated sum paid every month. It is not stated that this payment is made for attending the parades only. The payment is attached to the office. The payment, no doubt, is a small amount, but that is not the question. It is a remuneration paid for the services. The services may have been offered at personal sacrifice in the national cause, but that did not take out the remuneration paid for the services from the category of its being "profit" which the office of an Adjutant brought to respondent no. 1. The three tests laid down in the case of Dr. Deorao Laxman Anande, AIR 1958 Bom 314 (supra) as to what authority has the power to make the appointment to the office, what authority can take disciplinary action and remove or dismiss the holder of the office and by whom and from what source is his remuneration paid are satisfied in this case. The authority in every case is the Government itself. I have, therefore, no hesitation in holding that at the relevant time respondent no. 1 held an office of profit under the Government of Uttar Pradesh.

37. The Constitution, however, gives power to the State Legislature to provide by law that a certain office shall,

even though it may be an office of profit, not disqualify its holder. In this connection attention has been drawn to two statutes of the Legislature of the State of Uttar Pradesh and it is urged that even if respondent no. 1 be held as holding an office of profit at the relevant time, he should not be held to be disqualified in view of the exemption provided under those statutes.

38. The two statutes are Act XIX of 1951 and Act XIII of 1952.

39. Under Section 3 of the former statutes an honorary officer for the purpose of any special duty shall not be disqualified and shall be deemed never to have been disqualified for being a member of the State Legislature constituted under Article 382 of the Constitution of India, provided that the holder of the office has been in receipt merely of compensatory allowance in accordance with any general or special order applicable thereto.

40. In order to come under this provision of law, three things are requisite. The officer must be an honorary officer, he must be an officer appointed for the purpose of a special duty and thirdly he must have been in receipt merely of compensatory allowance in accordance with any general or special order applicable thereto.

41. There is no doubt that respondent No. 1 was an officer. He is not an honorary officer. The word 'honorary' in accordance with the meaning of that word in Shorter Oxford English Dictionary means "giving services without emolument." As I have already held, the office of the Adjutant in the Home Guards is not honorary. It is not an office held for the purpose of special duty also.

42. The learned counsel pointed out that because the nature of the duty of Home Guards is special, the duties having already been described above, it is a case of a special duty. The Home Guards are auxiliary to the police and they are required to render assistance to the community in emergency, but generally they are to help in maintaining internal security. It cannot be said to be a special duty. If the word, "special" is used in such a wide meaning, then a Judge who performs judicial duty will be held to hold a special duty. Medical officers to the Government would also be holding special duties and so will the other officers of the Government, for the duties of each class are of a special type. A special duty in the context connotes a particular type of duty which is allotted to an officer. A person is appointed on special duty by Government when special type of work is to be done for the Government not on a permanent basis but as a result of some special cir-

cumstance. For instance, the Government may appoint an officer to examine into the text books prescribed for various examinations and a person so appointed will be an officer on special duty. His office will be terminated as soon as his work will finish. A person may be appointed to revise the manuals of any department. Such an officer also will be an officer on special duty. But the type of work which respondent no. 1 was expected to do as an Adjutant was not of a temporary nature or of a special nature arising out of some special requirement of the Government which requirement was not to last long. Respondent no. 1, therefore, could not have been said to have been holding the office of the Adjutant in the Home Guards by way of special duty.

43. Lastly, his is not a case in which he was merely paid compensatory allowance. His is a case in which he was paid a salary. He would not, therefore, be exempted under the provision of Act XIX of 1951.

44. Now let us look to the provisions of Act XIII of 1952. At the outset it may be pointed out that section 2 of this Act defines the term "Compensatory allowance", but strange though it may appear this term has nowhere been used in the provisions of the statute apart from the definition itself. In any case, it is clear that respondent no. 1 was not exempt from being disqualified from being chosen as or for being a member of the Uttar Pradesh State Legislature, for though he was holding an office which was not a whole time office, it was remunerated by salary if not by fees. In order to come under Section 3(2) of the Act for purposes of exemption, it should not only be an office which is not a whole-time one but also an office which is not remunerated by salary. The meaning of the word "salary" to be found in the Webster's New International Dictionary is "the recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services especially to holders of official, executive, or clerical positions; fixed compensation regularly paid, as by the year, quarter, month, or week." Thus the periodical payment that was made to respondent no. 1 was salary. Respondent no. 1, therefore, is not exempt even under this statute.

45. My finding on issue no. 1, therefore, is that respondent no. 1 is not an Adjutant under the U. P. Home Guards Adhiniyam. The question whether he holds an office of profit in that connection does not arise. He is, however, an Adjutant under the Government Scheme promulgated prior to the coming into force of the Adhiniyam and does hold an office of profit. He is not exempt under U. P.

Act XIX of 1951 and U. P. Act XIII of 1952 from the disqualification attached to the office under Article 191 of the Constitution.

46. Issue No. 2 — A copy of the order of appointment of respondent no. 1 (Exhibit 1) shows that he was selected and appointed as a Gaon Samaj Panel Lawyer for a period of three years under sub-rule (1)(c) of Rule 114 of the U. P. Zamindari Abolition and Land Reforms Rules, 1952, as from the 14th of September, 1965, which order was communicated to him under the signature of the Additional District Magistrate, Lucknow. The question is whether his being appointed to the post of a panel lawyer under the Government of Uttar Pradesh amounts to his holding an office of profit within the meaning of that term under Article 191 of the Constitution.

47. The appointment of such a lawyer is contemplated under Section 127-B of the Abolition Act which provides:—

"S. 127-B(1). The State Government may, on such terms and conditions and in such manner as may be prescribed, appoint in each district a panel of lawyers to conduct suits and other proceedings by or against the Gaon Sabhas in respect of their functions under this Act."

(2) A panel lawyer shall with respect to such Gaon Sabhas in the district, as may be prescribed, be their agent for the purpose of receiving processes issued by any court or any authority against them in respect of their functions under this Act and shall be deemed to be the recognised agent by whom appearances, acts and applications under this Act, or the United Provinces Land Revenue Act 1901 or any other law relating to land tenure may be made or done on behalf of such Gaon Sabhas."

48. Rule 114 of the U. P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as the Rules) in so far as it is relevant provides as follows:—

"114(1) For the conduct of suits, applications and other proceedings by or against the Gaon Sabha, the following shall be appointed to the panel of lawyers in each district for the Courts specified against each.

(a) ...
(b) ...

(c) A Mukhtar, a revenue agent or a lawyer to be selected for appointment by the Collector who is hereby empowered to make the appointment on behalf of the State Government — for Revenue Courts at Tahsil headquarters. He shall be the recognised agent of the Gaon Sabhas only for cases in Revenue Courts at Tahsil headquarters.

(d) ...

(2) The term of the tahsil panel lawyers shall not exceed three years but the appointing authority may remove any such lawyer before the expiry of his term.

(3) The District Officer shall maintain a confidential personal file of every panel lawyer and shall annually enter therein remarks on the lawyer's capacity, efficiency and integrity.

(4) The terms and duties of the panel lawyers and control of the Collector over them shall be governed by the instructions for the conduct of Gaon Sabha litigation issued in G. O. No. 2240-AZ/I-A-1165-1964, dated August 20, 1958, or such instructions as may be issued by the State Government from time to time."

49. A copy of the G. O. in question has been filed on the record as Exhibit 3. Paragraph 4 of the Instructions in that G. O. contemplates the appointment of a Mukhtar or revenue agent or vakil or pleader at each tahsil headquarters to represent the Gaon Samajas (now Gaon Sabhas) and do pairvi for them in tahsil and district courts. Paragraph 5 provides that the panel lawyers shall always be available to give free legal opinion and advice to the Land Management Committee, whose Chairman can directly consult them on points of law, particularly in all cases where Gaon Samajas (Gaon Sabhas) have been impleaded as defendants or where they propose to file a suit or an application under the Zamindari Abolition and Land Reforms Act or the Land Revenue Act. Under paragraph 7 of the Instructions panel lawyers cannot be engaged in criminal case or cases under the Panchayat Raj Act. They can appear only in those cases in which their engagement is approved by the Collector or the Sub-Divisional Officer. They would also defend the interest of the State in all cases in which the State is a party unless the Collector directs otherwise. They are under a disability to appear in any case against the Gaon Samaj (Gaon Sabha) barring exceptional cases in which they may be allowed to do so by the Collector. The Collector shall give such permission only when there is no conflict between the Gaon Samaj (Gaon Sabha) and the other party. Under paragraph 32 of the Instructions the Tahsil panel lawyers will submit to the Collector through the Sub-Divisional Officer, a bimonthly progress report in respect of the litigation work done by each of them in a certain pro forma prescribed under that instruction. This report is to be accompanied by a descriptive report which would show the nature of cases instituted or contested under each provision of law and the results generally obtained along with the comments of the lawyers concerned for generally improv-

ing the manner and method of conducting Gaon Samaj (Gaon Sabha) litigation. Paragraph 24 of the Instructions provides as to the presentation of the bills to the Collector by the penal Lawyers. Paragraph 25 provides that the Gaon Samaj Panel Lawyers are not required to file certificate of fee for getting their fee taxed and included in decrees and orders. Paragraph 26 provides for the fees payable to panel lawyers, mukhtars and revenue agents which will be in accordance with the valuation in Civil cases and in accordance with the rules laid down in Chapter VIII of the Revenue Court Manual in revenue cases subject to the condition that the minimum fee payable in any case shall not be less than Rs. 5. Paragraph 27 of the Instructions provides for the clerks of panel lawyers also being paid fee of rupee one per case or suit. Paragraph 28 provides for the supply of plain paper and other necessary stationery to the Panel Lawyers. Paragraph 31 provides for panel Lawyers to file vakalatnamas or power of attorney on behalf of the Gaon Samaj in each case. Such vakalatnamas shall be signed by the Chairman or the person authorised. Paragraph 12 provides that if a suit or a proceeding on behalf of the Land Management Committee is to be instituted in a Court at the district headquarters, the Sub-Divisional Officer shall submit all the papers for the orders of the Collector. The Collector shall then decide whether a suit or proceeding is to be instituted or not. He may in this connection consult the headquarters panel lawyer or the District Government Counsel, if he considers necessary. Under paragraph 13 if the suit or proceeding had been instituted in a court at the tahsil headquarters and the Government is not a party, the Sub-Divisional Officer shall take a decision as to whether the case is to be contested or not.

50. As to the source of remuneration, it is provided under Section 125-A of the Abolition Act that there shall be constituted for each district a Consolidated Gaon Fund to which shall be credited all contributions payable under sub-section (2) of that section. Sub-section (2) provides that every Gaon Panchayat in the district shall pay to the Collector annually such contribution not exceeding fifteen per cent of the total amount credited to the Gaon Fund, as may be fixed by the Collector in the manner prescribed. This consolidated fund shall be applied, among other things, to the payment of fees and allowances of the panel lawyers appointed under Section 127-B. The source of payment, therefore, is the Consolidation Gaon Fund.

51. The question to be decided is as to whether in view of the above rules

respondent no. 1 can be said to be holding an office of profit under the Government of Uttar Pradesh by virtue of his being a panel lawyer of the Gaon Sabhas (formerly Gaon Samajas) at the Tahsil Headquarters.

52. The contention on behalf of respondent no. 1 is that, in the first place, Respondent no. 1 does not hold an office at all. Apart from it, he does not hold an office of profit. In that connection his argument is that he is only one of the panel lawyers which means one of a list of lawyers and it is at the sweet will of the Collector whether he will be engaged in a case or not. He will only be available for professional engagement and as such he may in the end earn any remuneration or he may not earn any remuneration. In the circumstances, he cannot, according to the argument, be considered to be holding an office. The fees that he gets, he gets in a particular case in which he is employed. His, therefore, is only a professional engagement like the professional engagement of any lawyer for a client. He cannot in the circumstances be said to be the holder of any office much less an office of profit. Apart from it, it is also urged that even if he is held to be holding an office of profit, he is exempted from the disqualification in view of the provisions of Act XIX of 1951 and Act XIII of 1952, referred to in connection with issue no. 1.

53. It is very difficult to define the term 'office' with any exactitude. The Chief Election Commissioner, In the matter of Vindhya Pradesh Legislative Assembly Members, (1953) 4 Ele LR 422 tried to define the term "office", but though he started with the dictionary meaning of that term and the definitions contained in Burrow's Words and Phrases, Tomlin's Law Dictionary, Luce's Legislative Assemblies, he could not arrive at any definition.

54. We would get an idea as to what is an office from the observations made in the Supreme Court case, namely, Padam Sen v. State of Uttar Pradesh, AIR 1961 SC 218 at p. 220 where in paragraph (15) the following observations have been made:

"The word 'situation' according to Webster's New International Dictionary of the English Language, means: position or place of employment, place, office; as a situation in a store. The appropriate meaning for the purposes of this Explanation would be 'office'. 'Office' again, according to the same Dictionary, means a special duty, trust, charge or position, conferred by an exercise of governmental authority and for a public purpose; a position of trust or authority conferred by an act of governmental power; a right to exercise a public function or employment and receive the emoluments."

luments (if any) thereto belonging; as, an executive or judicial office . . . In a wider sense, any position or place in the employment of the Government, especially one of trust or authority. The Dictionary further notes the differences in the connotations of the various words office, post, appointment, situation and place and says: Office commonly suggests a position of (especially public) trust or authority; and situation emphasizes the idea of employment, especially in subordinate position, as, to seek a situation as governess, as private secretary."

55. The Rajasthan High Court tried to lay down certain criteria in AIR 1959 Raj 227 (supra) as to what the term "office" means. The criteria that they laid down were:

"(1) That the office should be independent of the person holding it, meaning thereby that the office must exist even if the person is not there.

(2) The office cannot be assignable or heritable.

(3) That there should be a relation of master and servant between the Government on the one hand and the person holding the office on the other, and

(4) that it must be for a specified period."

But these criteria have not been found to be satisfactory.

56. The Bombay High Court in AIR 1958 Bom 314 (supra) describes the negative aspect of the case that the word "office" does not necessarily imply that it must have an existence apart from the person who may hold it. Cases are known, in which, in order to make use of the special knowledge, talent, skill or experience of certain persons, posts are created which exist only so long as they hold them. It will be difficult to hold that such persons are not holders of offices. The first criterion, therefore, in Hoti Lal's case, AIR 1959 Raj 227 (supra) is not an essential criterion.

57. In the case of Ramappa v. Sangappa, AIR 1958 SC 937 the theory that the office cannot be assignable or heritable also has been exploded. That was a case of Patels and Shanbhogs who are appointed to their offices by the Government though the Government has no option in certain cases but to appoint an heir of the last holder; they hold their office by reason of such appointment only; they work under the control and supervision of the Government, their remuneration is paid by the Government out of Government funds and assets; they are removable by the Government, and there is no one else under whom their offices could be held. They were all held as holding offices of profit under the Government.

58. The theory of master and servant also receives a shock from the Supreme

Court case of Guru Govind Basu, AIR 1964 SC 254 (supra). It would thus appear that the criteria in Hoti Lal's case, AIR 1959 Raj 227 (supra) are not essential criteria for determining whether a person holds an office or not. It is, therefore, difficult to define the term "office", though the meaning of the word is well understood.

59. One of the grounds on which it is urged that the respondent no. 1 does not hold an office is that he is only a counsel appearing on behalf of Gaon Sabhas in the Tahsil concerned and that his is but a professional engagement like any other engagement by a client. The Lawyer does not hold an office for his client, though he performs a duty for him. This contention, though attractive, is without substance when we look into the details of the appointment. The rules do not provide, as the learned counsel would have me hold, that there are a number of lawyers for the Gaon Sabhas in the Tahsil Mohanlalganj, amongst whom he is one and if the Collector takes it into his head or it so occurs that no Gaon Sabha in the Tahsil is advised to fight any litigation that it may like to institute or it may like to defend, by the revenue authorities, i.e., the Sub-Divisional Officer or the Collector, he may not get any case at all during the year. The rules do not contemplate that there will be several panel lawyers in the same Tahsil Under Rule 114 of the Zamindari Abolition Rules the word "panel" is used for the whole list of lawyers that are appointed in the courts of various grades in the district. There is the District Government Counsel (Civil) for Civil Courts in the District headquarters. There is the District Government Counsel (Revenue) for Revenue Courts at the District headquarters and there is a mukhtar or a revenue agent or lawyer for courts at the tahsil headquarters. Thus so far as Tahsil headquarters are concerned, there is only one lawyer. Three sets of lawyers, namely, the District Government Counsel (Civil), the District Government Counsel (Revenue) and the lawyers at the Tahsil headquarters are known to constitute a panel. It is not that several lawyers are appointed at Tahsil headquarters and it is from out of those lawyers that the revenue authorities select one or the other to conduct the cases on behalf of Gaon Sabhas at the Tahsil headquarters. There is only one panel lawyer for each Tahsil headquarters. This is precisely what the appointment order (Exhibit 1) shows. Three lawyers have been appointed under that order, but they have been appointed for three different Tahsils and respondent no. 1 has been appointed for the Tahsil of Mohanlalganj. So it is not a case of an approved list of lawyers out

of whom one or the other may be appointed to conduct the litigations of the Gaon Sabhas at the Tahsil headquarters. This case is different from the case of a railway counsel who is one out of a panel of lawyers appointed to conduct the cases on behalf of the railway like the one contemplated in the case decided by the Election Tribunal at Allahabad in Govind Malaviya v. Murli Manohar, (1953) 8 Ele LR 84. In that case Murli Manohar, the returned candidate, who was a railway counsel, was described by the Assistant Traffic Superintendent as a retained railway counsel. He was just a pleader like any other pleader. In that case whenever the railway engaged him he was engaged through a separate vaka-latnama. He was at liberty to appear against the railway in cases in which he was not engaged by the railway. The Law Inspector stated in that case that Sri Murli Manohar was engaged only in difficult cases or cases of high valuation. He was not engaged in other cases. In the instant case respondent no. 1 is the only lawyer in the Tahsil of Mohanlalganj who conducts the cases on behalf of the Gaon Sabhas. It is not a case where it is the choice of the revenue authorities to engage him or not. It may be that the authorities may decide that they would not contest a case and so he would not be engaged. Under the rules, as already pointed out above, he is to be available for consultation in all cases. He is under the control of the district authorities inasmuch as he has to submit bimonthly progress report in respect of the litigation work (done) by him. He cannot appear against the Gaon Sabhas barring exceptional circumstances in which he may be allowed to do so by the Collector. Under Section 127-B(2) of the Abolition Act he shall be the agent for the Gaon Sabhas for the purposes of receiving processes issued by any court or authority against them and shall be deemed to be their recognised agent by whom appearances, acts and applications may be made or done on behalf of the Gaon Sabhas. It cannot, therefore, be said that he does not hold an "office." He holds an office under the State Government being under the control of the State Government or its officers. The office is an office of profit as it brings him remuneration in cases in which he is engaged. The source of payment, no doubt, is the Gaon Sabha Fund, but as has already been pointed out in connection with the discussion of issue no. 1, that is not the determining criterion. The appointing authority, as shown in the order of appointment is an officer of the State Government. The authority is vested with the power to terminate his appointment. The authority determines his remuneration as prescribed

under the rules. The source, no doubt, is the Gaon Sabha Fund, but the payment is controlled by the Collector. The Government determines the manner in which the duties of the office are discharged and also gives directions in that behalf. The office cannot but be an office of profit under the Government of Uttar Pradesh.

60. The question now arises as to whether in this case also respondent no. 1 is exempted from his disqualification under the two statutes, namely, Act XIX of 1951 and Act XIII of 1952. I need not enter into a detailed discussion as to what is an office of special duty. Obviously, this is not an office for the performance of any special duty, for this is a work which can be done by any other qualified lawyer provided he is appointed to the post. It is not a case where the office is honorary or only compensatory allowance is payable within the definition of that term under Section 2 of Act XIX of 1951. It is, no doubt, not a whole time office, but it is remunerated by fees though not by salary. The provisions of Act XIII of 1952 also are thus not helpful, to the respondent no. 1.

61. My finding on issue no. 2, therefore, is that respondent no. 1 does hold an office of profit within the meaning of that term under Article 191 of the Constitution on account of his being a panel lawyer of the Gaon Sabhas in the Tahsil of Mohanlalganj and he is not exempted under U. P. Act XIX of 1951 and U. P. Act XIII of 1952.

62. Third part of issue no. 5:— We now come to the third part of issue no. 5. For purposes of deciding that issue we shall presume that respondent no. 1 has failed to show the expenses incurred by him on the polling day in the return of expenses and also the expenses of a sum of Rs. 50 advanced by him to one Chamman. The question is whether this amounts to a corrupt practice under Section 123(6) of the Representation Act. This corrupt practice is described as follows:

"123(6). The incurring or authorising of expenditure in contravention of Section 77."

There is thus prohibition against incurring or authorising such expenditure as is prohibited under Section 77. Section 77, on the other hand, provides:

"77(1) Every candidate at an election shall, either by himself or by his election agent, keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive.

(2) The account shall contain such particulars, as may be prescribed.

(3) The total of the said expenditure shall not exceed such amount as may be prescribed."

63. We will see that section 77(1) requires every candidate at an election to keep a separate and correct account of expenditure in connection with the election incurred or authorised by him or by his election agent between certain dates. This is to be kept either by himself or by his election agent. This provision does not provide as to what expenses shall be incurred or authorised by a candidate or his election agent. Sub-section (2) provides that the account shall contain such particulars, as may be prescribed, namely, prescribed by the rules. Sub-section (3) provides that the expenditure shall not exceed such amount as may be prescribed under the rules. Sub-section (3), therefore, is the only provision which issues a mandate against a candidate or his election agent against incurring or authorising expenditure beyond a certain limit. It is the breach of this mandate which amounts to corrupt practice under sub-section (6) of Section 123 of the Representation Act. The fact that the candidate or his election agent entered certain items of expenditure in his statement of return of expenses does not mean that he has incurred any expenditure against the mandate under sub-section (3) of Section 77 or that any such expenditure was authorised. It is, therefore, not a case of the corrupt practice covered by sub-section (6) of Section 123.

64. It at the most amounts to the non-compliance with the provisions of the Representation Act, as contained in sub-sections (1) and (2) of Section 77 and this non-compliance will be of no avail to the petitioner unless he shows that this non-compliance has materially affected the result of the election (vide Section 100(1)(a)(ii) of the Representation Act). There is no allegation in the case at all that the non-compliance of this provision of Section 77 of the Representation Act has materially affected the result of the election.

65. This view is supported by a number of authorities also of which only two of our High Court need be mentioned, namely, Chavar Ali Khan v. Keshav Gupta, AIR 1959 All 264 and Karan Singh v. Jamuna Singh, AIR 1959 All 427.

66. It is laid down in Chavar Ali's case, AIR 1959 All 264 that the corrupt practice mentioned in section 123(6) does not cover a case where the accounts under Section 77(1) have not been daily and regularly kept by the candidate or his election agent. That sub-section defines corrupt practice as "the incurring or authorising an expenditure in contraven-

tion of section 77." The corrupt practice thus does not consist in not maintaining the account as required by sub-section (1) of Section 77, but it consists of incurring or authorising an expenditure in contravention of Section 77, which would be a case where the total of the expenditure exceeds the amount prescribed under the rules, as mentioned in sub-section (3) of Section 77. It is the incurring or authorising an expenditure in contravention of Section 77 which has been made a corrupt practice and not an irregular maintenance of accounts. It would thus appear that the only contravention of Section 77 which falls under Section 123(6) is the contravention of sub-section (3) of Section 77. The irregularity in maintaining accounts does not fall under Section 123(6) of the Act at all.

67. Similarly, in Karan Singh's case, AIR 1959 All 427 (supra) it is laid down that under Section 123(6) of the Act, a corrupt practice consists in incurring or authorising of expenditure in contravention of Section 77 of the Act. Sub-sections (1) and (2) of Section 77 merely require that correct and separate accounts be kept and give the contents of those accounts. They do not prescribe any limitation on the incurring or authorising of expenditure. All that is laid down by sub-section (1) is that expenses which have been incurred or have been authorised are to be included in the accounts. Inclusion in the accounts is not a condition of incurring or authorising of an expenditure. The incurring or authorising of an expenditure is only limited by the provisions of sub-section (3) of Section 77 which lay down that the said expenditure shall not exceed such amount as may be prescribed.

68. It is further pointed out therein that where the issue as framed only relates to omission of certain items from account and there is no allegation that the expenditure incurred or authorised by the respondent was in excess of the prescribed limitation, the issue does not really deal with the question of commission of corrupt practice covered by Section 123(6) of the Act, but really amounts to raising questions about the non-compliance with the provisions of the Act and the Rules framed thereunder which could be a ground for setting aside an election under Section 100(1)(d)(iv) of the Act, provided there was allegation and proof that the result of the election has been materially affected by that non-compliance.

69. This issue is accordingly decided in the negative.

RSK/D.V.C.

Order accordingly.

AIR 1969 ALLAHABAD 105 (V 56 C 18)

SATISH CHANDRA J.

The Purtabpore Co. Ltd., Petitioner v. Cane Commissioner, Bihar, New Secretariat Patna in the State of Bihar and others, Respondents.

Civil Misc. Writ No. 3841 of 1967, D-1-1-1968.

(A) Constitution of India, Art. 226 (1A) — 'Cause of action, wholly or in part, arises' — Sugarcane Control Order (1966), Cl. 6 — Order under Cl. 6(1)(a) by Cane Commissioner, Bihar, at Patna, reducing area for sugarcane purchase reserved for petitioner's sugar factory situate in U. P. — Another order allotting excluded area for respondent's Sugar Factory in Bihar—Allahabad High Court has no jurisdiction to entertain petition for quashing these orders as no part of cause of action arose within its territorial jurisdiction — Place of communication of order according to law or of consequence arising from order — If furnishes cause of action.

Under Art. 226(1-A) of the Constitution of India a High Court is competent to issue a writ against any Government authority or person situated or residing outside its territorial jurisdiction provided it is established that the cause of action for the relief claimed arose wholly or partly within its territorial jurisdiction.

(Para 4)

The Cane Commissioner, Bihar, at Patna passed two Orders on 14-11-1967. By his first order he superseded his earlier order of 30-12-1966 passed under Cl. 6(1)(a) Sugar-cane (Control) Order 1966 in favour of the petitioner's sugar factory situate in U. P. and also reduced the number of villages (all situate in Bihar) constituting the reserved area of the factory for the purchase of sugarcane. This order was communicated to the petitioner's factory in U. P. By his second order of the same date which was not communicated to the petitioner he directed that the villages excluded from the petitioner's reserved area should be allotted to R, another sugar factory in Bihar. The petitioner filed a writ petition in the Allahabad High Court for quashing these two orders dated 14-11-1967.

Held that as no part of the cause of action for the reliefs claimed arose within the territories of U. P. the High Court could not entertain the petition.

(Para 11)

Even assuming that the communication of the order to the petitioner in U. P. gave rise to a part of cause of action for setting aside that order no cause of action in relation to the order passed in favour of R could arise in U. P. Even

if the order superseding the earlier one is set aside the other order in favour of R would remain in operation. That by itself would constitute modification of the earlier order passed on 30th December, 1966. Without setting aside the order passed in favour of R, no effective relief could be granted to the petitioner.

(Para 6)

If the law provides for the method of communication of an order made under it, the order would acquire legal force and operation only when it is communicated in that manner. Clause 6 of the Sugarcane (Control) Order, 1966 provides for the manner of communication namely, by notification in the official gazette. An order passed under clause 6 would have the force of law only when it is notified in the official gazette. Till then it will be merely an opinion of the relevant authority. So the receipt of the order by the petitioner Company would be immaterial. The Cane Commissioner's, Bihar, order would have had to be notified in the official gazette of the State of Bihar. That fact would give rise to a part of the cause of action, if any, within the State of Bihar. The legally recognizable mode of communication of an order of the Cane Commissioner, Bihar, under clause 6(a), would not create a cause of action within Uttar Pradesh. AIR 1963 SC 395, Ref. to.

(Para 7)

The impugned order reducing the reserved area had not the effect of frustrating the contracts entered into by the petitioner with certain co-operative societies for supply of Sugarcane at the premises of the factory after the passing of the earlier order of reservation. In the absence of any order under Cl. 6(1)(c) or (d) the rights and liabilities of the parties to those contracts could not be affected by a mere reservation order passed under Cl. 6(1)(a). Therefore, no cause of action could arise in U. P. as a consequence of such order. AIR 1967 Bom 355, Dist.

(Paras 8, 9)

No part of the cause of action could arise in U. P. merely on the ground that the impugned order of the Cane Commissioner, Bihar was in violation of the decision of the Joint Sugarcane Board for U. P. and Bihar which was situated at Lucknow in U. P. No statutory provision recognises such a Joint Board. The Sugarcane (Control) Order envisages the State Government or the Cane Commissioners of the respective States of Uttar Pradesh and Bihar as the relevant authorities entitled to make orders thereunder. Further, any such decision would not have the force of law. It will not be enforceable in a court of law. An order passed in exercise of the statutory authority flowing from the Sugarcane (Control) Order, 1966, could

not be held invalid on the ground that it infringes the informal decision of the Joint Sugarcane Board.

(Para 10)

(B) Sugarcane Control Order (1966), Cl. 6(1) — Order under Cl. 6(1)(a) reserving particular area for sugar factory — Effect of.

A reservation order under Cl 6(1)(a) of the Sugarcane Control Order, 1966 is passed with a view to enable the factory to purchase the quantity of sugarcane required by it. It at the most confers a sort of privilege to enter the reserved areas with a view to purchase sugarcane, it confers no rights. The order of reservation does not have the effect of making any sugarcane grower liable to sell sugarcane only to the factory in whose favour the area has been reserved. That liability arises when an order under paragraph (c) or (d) has been passed. So, a mere reservation order would not reserve any area exclusively for that particular factory nor would oblige the sugarcane growers in that area to sell their sugarcane only to that factory.

(Para 8)

Cases Referred: Chronological Paras

(1967) AIR 1967 Bom 355 (V 54) —

ILR (1967) Bom 223, Damomal Kausomal Raisinghani v. Union of India

9

(1967) Civil Writ Juri. Case No. 63 of 1967 (Pat)

2

(1963) AIR 1963 SC 395 (V 50) — 1962 Supp (3) SCR 713, Bachhittar Singh v. State of Punjab

7

Vinod Swarup, for Petitioner; Standing Counsel, for Respondents

ORDER :— The Purtabpore Company Limited, the petitioner, prays for a certiorari to quash the orders passed by the Cane Commissioner, Bihar, on 14th November, 1967, modifying his earlier order dated 30th December, 1966, in relation to the reservation of certain villages in Bihar for the petitioner Company. In my opinion this Court has no jurisdiction to entertain this petition. It fails on that preliminary ground.

2. In exercise of the powers conferred by section 3 of the Essential Commodities Act, 1955, the Central Government on 16th July, 1966, passed the Sugarcane (Control) Order, 1966 Clause 6(1)(a) of this Order entitled the Central Government to make an order reserving any area where sugarcane is grown for a factory. Under clause 11 the Central Government could delegate all or any of the powers conferred upon it on, inter alia, the State Government or any officer or authority of the State Government. The same day, that is 16th July, 1966, the Central Government delegated the powers conferred on it by clauses 6, 7, 8 and 9 of the Order on, inter alia,

the State Governments of Bihar and Uttar Pradesh as well as on the Cane Commissioners of Bihar and Uttar Pradesh. Utilising this delegated power, the Cane Commissioner, Bihar, on 30th December, 1966, made an order (No. 3088) directing that the villages named in the list shall constitute the reserved area of Purtabpore Sugar Factory Limited, Mairwa, for the purposes of sugarcane during the seasons 1966-67 and 1967-68. The list included 208 villages. All these villages were situated in the district of Saran in the State of Bihar. Feeling aggrieved the Standard Refinery and Distillery Limited, respondent no. 9, questioned the validity of this reservation order by instituting a writ petition under Article 226 of the Constitution before the High Court at Patna C. W. J. C No. 63 of 1967. The petitioner contested it. During its pendency, respondent no. 9 made representations to various authorities for re-opening the question of reservation of 208 villages in favour of the petitioner. Coming to know of these moves, the petitioner Company made representations to the Government of Bihar and the Cane Commissioner and further prayed that the said 208 villages should continue to be reserved in favour of the petitioner on a long term basis. The Cane Commissioner, Bihar, passed two orders on 14th November, 1967. By one order (No. 2332) the Cane Commissioner superseded his earlier order no. 3088 dated 30th December, 1966, and further directed that the villages named in the list below shall constitute the reserved area for the petitioner factory for purchase of sugarcane during the season 1967-68. The list mentioned only 109 out of the 208 villages. A copy of this order was forwarded to M/s. Purtabpore Sugar Factory Limited, Mairwa, the petitioner. This order had the effect of cancelling the earlier reservation order of 208 villages completely for the year 1968-69. It confined the reservation for the year 1967-68 to only 109 villages. By another order the Cane Commissioner directed that the remaining 99 villages shall constitute the reserved area of respondent no. 9 for purposes of sugarcane during the season 1967-68. This order was forwarded to respondent no. 9. The petitioner wants both these orders to be quashed.

3. The same day, that is on 14th November, 1967, respondent no. 9 applied for withdrawal of the writ petition filed by it before the High Court at Patna. The petitioner Company contested that application but the prayer was granted. The same day the present writ petition was instituted in this Court.

4. At the hearing Mr. Khare, appearing for respondent no. 9, as well as Mr. Gopi Nath, appearing for the Cane Com-

missioner, Bihar, raised a preliminary objection to the competence of the writ petition. They urged that no part of the cause of action had accrued within the territorial jurisdiction of this High Court and so this Court had no jurisdiction to entertain this writ petition. Under Clause (1-A) of Article 226 of the Constitution, the power conferred by clause (1) to issue certain writs to any Government, authority or person, may be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such a Government or authority or the residence of such person is not within those territories. The petitioner desires that the orders of the Cane Commissioner, Bihar, be quashed and consequential mandamus be issued to him and the State Government of Bihar not to act in virtue of or in pursuance of the orders passed by the Cane Commissioner, Bihar, on 14th November, 1967. The seat of the Government of Bihar as well as the residence of the Cane Commissioner of Bihar are in the State of Bihar, that is outside the territories of the State of Uttar Pradesh to which alone the jurisdiction of this Court extends. The petitioner can invoke the jurisdiction of this Court only if it establishes that the cause of action for the claimed relief arose wholly or in part within the territories of Uttar Pradesh.

5. The person making the impugned order as well as the subject-matter of the order, namely the 208 villages, are both situate outside Uttar Pradesh. The order was passed at Patna in the State of Bihar. Any part of the cause of action based on these facts would arise outside the territories of Uttar Pradesh. For the petitioner Mr. Ray relied on a composition of facts for establishing that the cause of action did arise within the territories of Uttar Pradesh. The learned counsel stated that the petitioner Company's factory is situate within the territories of Uttar Pradesh. The order of the Cane Commissioner superseding his earlier order of the 30th December, 1966, was forwarded to the petitioner Company and was received by it at its factory, that is within Uttar Pradesh. The communication of the order constituted a relevant and material fact to be proved in order to gain relief. On that basis a part of the cause of action would arise within Uttar Pradesh. Mr. Ray also relied upon the circumstances that after the initial reservation order dated 30th December, 1966, the petitioner Company had entered into contracts with the Mairwa Cane Development and Cane Marketing Union Limited respondent no. 10, and the Sirisia Cane Development and

Cane Marketing Union Limited, respondent no. 11, for the purchase of sugar-cane from 208 villages reserved for the petitioner. The contract with these co-operative societies provided that the sugarcane would be supplied to the petitioner at the weigh-bridge situate at the factory gate. The impugned order has the effect of frustrating this contract. The cause of action for preventing or restraining the frustration of the contract would arise inter alia at the place where delivery of the goods was agreed upon. That place being within Uttar Pradesh, a part of the cause of action for such relief would arise within Uttar Pradesh. The present writ petition was designed to that end and would be cognizable by this Court. It was at the end urged that the initial reservation order dated 30th December, 1966 was passed in pursuance of the decision taken by The Joint Sugarcane Board for Uttar Pradesh and Bihar at Lucknow. The impugned order contravenes that decision. The cause of action for enforcing the decision of the Joint Board would arise at Lucknow within Uttar Pradesh.

6. The first part of the learned counsel's submission relating to the communication of the order raises many difficulties. One order by which the earlier order dated 30th December, 1966, was expressly superseded and which reduced the number of villages constituting the petitioner's reserved area to 109 alone, was forwarded to the petitioner company. The other order passed in favour of respondent no. 9 was not communicated to the petitioner Company. On this basis no cause of action in relation to the order passed in favour of respondent no. 9 could arise within Uttar Pradesh. Even if the order superseding the earlier one is set aside the other order in favour of respondent no. 9 would remain in operation. That by itself would constitute modification of the earlier order passed on 30th December, 1966. Without setting aside the order passed in favour of respondent no. 9, no effective relief could be granted to the petitioner.

7. Mr. Ray urged that in view of the decision of the Supreme Court in Bachhittar Singh v. State of Punjab, AIR 1963 SC 395 before an opinion of a statutory authority can amount to an order, it must be communicated to the person affected by that order. Then alone that person can be bound by the order; because till its communication it would be open to the authority to consider the matter again. Hence, till its communication the order cannot be regarded as anything more than provisional in character. Thus the order of the Cane Commissioner became binding on the petitioner only when it was communicated to it. The communication was

at its factory within the State of Uttar Pradesh. If the law provides for the method of communication of an order made under it, the order would acquire legal force and operation only when it is communicated in that manner. Clause 6 of the Sugarcane (Control) Order, 1966, provides that the Central Government (which includes its delegates) may by an order notified in the gazette reserve any area for a factory. This clause provides for the manner of communication namely by notification in the official gazette. An order passed under clause 6 would have the force of law only when it is notified in the official gazette. Till then it will be merely an opinion of the relevant authority. The decision of the Cane Commissioner, Bihar, would not become an order under clause 6(a) merely by its being forwarded and received by the petitioner Company. So the receipt of the order by the petitioner Company would be immaterial. The Cane Commissioner's, Bihar, order would have had to be notified in the official gazette of the State of Bihar. That fact would give rise to a part of the cause of action, if any, within the State of Bihar. The legally recognizable mode of communication of an order of the Cane Commissioner, Bihar, under clause 6(a), would not create a cause of action within Uttar Pradesh.

8. The second point related to the place of delivery. In this connection Mr. Khare, learned counsel for the respondent, urged that an order of reservation by itself does not oblige any sugarcane grower or a co-operative society to supply or agree to supply sugarcane to the factory in whose favour the reservation order has been passed. That obligation arises under paragraph (2) of clause 6 when an order has been made under paragraph (c) of sub-clause (1), so a mere modification of the order of reservation would not impinge on the enforceability of the petitioner's contract with the sugarcane suppliers. Mr. Ray on the other hand contended that the order of reservation created and conferred a right on the petitioner factory to purchase sugarcane from the reserved villages. To resolve these rival contentions the relevant and material portions of clause 6 may be read:

"6. Power to regulate distribution and movement of sugarcane.

1. The Central Government may, by order notified in the official Gazette.—

(a) reserve any area where sugarcane is grown (hereinafter in this clause referred to as 'reserved area') for a factory having regard to the crushing capacity of the factory, the availability of sugarcane in the reserved area and the need for production of sugar, with a view to

enabling the factory to purchase the quantity of sugarcane required by it;

(b)

(c) fix, with respect to any specified sugarcane grower or sugarcane growers generally in his reserved area the quantity or percentage of sugarcane grown by such grower or growers, as the case may be, which each such grower by himself or, if he is a member of a co-operative society of sugarcane growers operating in the reserved area, through such society, shall supply to the factory concerned;

(d) direct a sugarcane grower or a sugarcane growers' co-operative society, supplying sugarcane to a factory, and the factory concerned to enter into an agreement to supply or purchase, as the case may be, the quantity of sugarcane fixed under paragraph (c);

(e)

(f)

2. Every sugarcane grower, sugarcane growers' co-operative society and factory, to whom or to which an order made under paragraph (c) of sub-clause (1) applies, shall be bound to supply or purchase, as the case may be, that quantity of sugarcane covered by the agreement entered into under the paragraph and any wilful failure on the part of the sugarcane grower, sugarcane growers' co-operative society or the factory to do so, shall constitute a breach of the provisions of this order;

"...
A reservation order under paragraph (a) is passed with a view to enable the factory to purchase the quantity of sugarcane required by it. It at the most confers a sort of privilege to enter the reserved areas with a view to purchase sugarcane; it confers no rights. The order of reservation does not have the effect of making any sugarcane grower liable to sell sugarcane only to the factory in whose favour the area has been reserved. That liability arises when an order under paragraph (c) or (d) has been passed. So, a mere reservation order would not reserve any area exclusively for that particular factory nor would oblige the sugarcane growers in that area to sell their sugarcane only to that factory. Till now no orders under paragraph (c) or (d) have been passed. The agreements which the petitioner Company alleges it entered into with the co-operative societies on 27th September, 1967, were not as a result of any right or liability flowing from the order of reservation. Similarly the impugned order modifying the reservation order would not affect, much less frustrate, that contract. The parties to that contract would still be free to perform their respective promises. The rights and liabilities of the parties under that contract could possibly be affected by an order under paragraph (c) or (d)."

but no such order has yet been passed. It was urged that the contract envisaged that the sugarcane would be supplied at the factory gate in such quantities and on such dates as may be specified in the instructions issued by the Cane Commissioner, Bihar. Such instructions would, if at all, fall within the purview of paragraph (c) or (d). A reservation order under paragraph (a) could not be the instructions in relation to the quantities or the dates of supply of the sugarcane. It cannot hence be said that the impugned order frustrates the petitioner's contracts with the co-operative societies. The impugned orders do not afford any cause of action to the petitioner on that ground.

9. Learned counsel for the petitioner relying on Damomal Kausomal Raisin-ghani v. Union of India, AIR 1967 Bom 355 urged that a part of the cause of action would arise where the consequence of an order occurs. In view of the finding that the impugned order does not frustrate the petitioner's contract, no such consequence would arise within Uttar Pradesh.

10. The last submission for the petitioner related to the infringement of the decision of the Joint Sugarcane Board. No statutory provision recognises such a Joint Board. The Sugarcane (Control) Order envisages the State Governments or the Cane Commissioners of the respective States of Uttar Pradesh and Bihar as the relevant authorities entitled to make orders thereunder. Under other laws prevailing in the States of Uttar Pradesh and Bihar like the Bihar Sugar Factories Control Act, 1937 and the U. P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 contemplated the creation of a Sugarcane Board for their respective States. In view of the territorial affinity of the two States, each State included representatives of the other State in its own Sugarcane Board. Such Sugarcane Boards used to hold meetings together, to discuss and deliberate on matters of mutual interest, and to formulate common policies. The petitioner's allegation is that at one such meeting on 3rd February, 1964, at Lucknow it was decided that 208 villages would be kept reserved for the petitioner factory. The minutes of such a meeting filed by the petitioner do not show that any such decision was recorded. Further, any such decision would not have the force of law. It will not be enforceable in a court of law. An order passed in exercise of the statutory authority flowing from the Sugarcane (Control) Order, 1966, could not be held invalid on the ground that it infringes the informal decision of the Joint Sugarcane Board. No cause of action for the setting aside of these orders or for passing

consequential mandamus would arise on this basis.

11. In the result, no part of the cause of action for the reliefs claimed in the present petition arose within the territories of Uttar Pradesh. The present petition is hence not cognizable by this Court. It is accordingly dismissed on that preliminary ground. The petitioner will pay one set of costs to respondents nos. 1 and 2 and another set of costs to respondent no. 9. The other parties will bear their own costs.

KSB

Petition dismissed.

AIR 1969 ALLAHABAD 109 (V 56 C 19)
S. D. SINGH, J.

Ram Dass, Applicant v. The State,
Opposite Party.

Criminal Revn. No. 911 of 1966, D/-1-12-1967.

(A) Prevention of Food Adulteration Act (1954), S. 10(7) — Prosecution for offences under S. 16 read with S. 7(1) of the Act — Two persons called at the time the sample was taken — Their signature also taken by the Food Inspector — Held, the requirements of S. 10(7) were fully complied with. (Para 4)

(B) Prevention of Food Adulteration Act (1954), Ss. 10(7), 16 and 7(1) — Prosecution under — Evidence and proof.

What has to be seen in a particular case is whether on the basis of the evidence which has been examined in the case it can be believed that the sample which was found to be adulterated was taken by the Food Inspector or if the evidence produced is unreliable or shaky or of a doubtful nature. Even if the evidence is not altogether unreliable, if it is shaky or doubtful in nature, the Courts would certainly give the benefit of the same to the accused; but if the evidence established that the sample was taken from the shop of a particular dealer, then even though no witness has been called in the witness box in support of the statement of the Food Inspector, there is no reason why his solitary statement may not be believed. Normally the prosecution will no doubt examine one or more of the witnesses whose signatures are obtained on the documents prepared at the time of the taking of the sample, but if for some reason or the other the prosecution does not rely upon their statements, or does not find it possible to examine them as witnesses in the case, surely the prosecution case will not be thrown out on that account. The prosecution is entitled to urge that the truth of the allegations which are being made against an accused person may be judged on the basis of the evidence which is in fact examined in the case and if

that evidence is satisfactory and there is no reason whatsoever to doubt the truth thereof, then the prosecution can very well urge that even though certain witnesses may not have been examined, the court should record a finding of guilty against the accused. (1963) 1 Cri LJ 658 (Cal). Foll (Para 6)

Further, an accused is certainly not required to produce evidence merely to negative an allegation made against him in the evidence examined on behalf of the prosecution. The prosecution case will stand or fall on the merits of the evidence examined in support of the same. But certainly if an accused puts forward a positive case in his defence and is unable to produce any evidence in support of the same, surely the evidence examined on behalf of the prosecution will not be disbelieved merely because of a vague suggestion or allegation that such and such thing might have happened. (Para 8)

(C) Prevention of Food Adulteration Act (1954), S. 10(7) — Criminal P. C. (1898), S. 103 — Taking sample of adulterated milk by Food Inspector — Witnesses — There is no requirement that they should be respectable persons as is the requirement under S. 103 Criminal P. C. in case of search — Irregularity if any cannot vitiate the taking of sample from the accused. AIR 1963 SC 822. Ref. to. (Para 9)

(D) Prevention of Food Adulteration Act (1954), Ss. 16 and 7(1) — Punishment.

Those who indulge in adulteration of food are parasites to the society and if an offence is made out against them, there is no reason why a punishment contemplated under the law may not be awarded to them. (Para 13)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 822 (V 50)=1963

(1) Cri LJ 809, Radha Kishan v. State of Uttar Pradesh 9
(1963) 1963 (1) Cri LJ 658 (Cal). Ganesh Lal Shaw v. Asansole Municipality 5

D. P. Mital, for Applicant; Govt. Advocate, for the State.

ORDER :— This application in revision arises out of a prosecution under Section 16 read with Section 7(1) of the Prevention of Food Adulteration Act (XXXVII of 1954).

2. At about 7.30 a. m. on 25th March, 1965, the Food Inspector K. P. Batish of Hapur Municipality in district Meerut took a sample of milk from the shop of the applicant Ram Dass. He purchased 12 chhataks of milk for Rs 1 n. p. and sealed and signed it in three phials, one of which was given to the applicant, the other retained in the office of the Hapur Municipality and the third sent to the

Public Analyst for examination and report. The Public Analyst found, as is indicated by his report Ex. Ka. 3, that the sample was deficient in non-fatty solids to the extent of 21%, the standard applied being that for mixed cow and buffalo milk the mixture of the two milks being supposed to be half and half. The applicant was consequently prosecuted under Section 16 read with Section 7(1) of the aforesaid Act. He was convicted by the Magistrate and sentenced to six months rigorous imprisonment and a fine of Rs 1000/- He went up in appeal which was dismissed by the Additional District and Sessions Judge, Meerut, and hence this application in revision by him.

3. The applicant denied that he sold any sample of milk to the Food Inspector, his allegation being, that, there was milk placed in a can underneath his shop, that it belonged to one other milk seller who had come there and that the sample was taken by the Food Inspector from that can and documents prepared by him were in respect of the same and he merely signed them as a witness. The applicant did not examine any evidence in his defence. The prosecution evidence was considered by the Magistrate. It appears that when the sample was taken, two witnesses Shadi Ram and Nathi were required to sign the documents prepared at the time, including the receipt which was given to the applicant, but none of them was examined in the case. The oral evidence in the case consists of the testimony of the Food Inspector, K. P. Batish and one other person, Charan Singh, who is said to have been present when this sample was taken.

4. Some arguments were advanced by the learned counsel for the applicant as to the requirements of sub-section (7) of Section 10 of the Prevention of Food Adulteration Act (referred to hereafter as the Act) and the amendments made therein under the Amendment Act 49 of 1964. Under sub-section (7), as it stood before the amendment, the Food Inspector was required to "as far as possible call not less than two persons to be present at the time when such action is taken and take their signatures." Under the amended sub-section (7) the Food Inspector shall "call one or more persons to be present at the time when such action is taken and take his or their signatures." Under the law prior to the amendment, therefore, the Food Inspector was required to call not less than two persons as far as possible, while under the sub-section, as it stands after the amendment, he may call only one or more persons to be present at the time but the verb used in respect of them is "shall call" which means that it is now mandatory on him to call one or more

persons when he takes sample; but nothing turns upon this interpretation of this sub-section (7) so far the case against the applicant is concerned, for we have it in the evidence that two persons Shadi Ram and Nathi were called by the Food Inspector when he took the sample and he even took their signatures over the documents which were prepared at the time. One of these documents is the report which the Food Inspector submitted to the Medical Officer of Health, but it does not appear to bear any exhibit mark. Another document is Ex. Ka. 1 which is a notice in form no. 6 given to the applicant regarding the taking of the sample and another document is receipt Ex. Ka. 2 which the applicant gave to the Food Inspector for having received the price of the Milk and one of the phials containing the sample of the milk taken from his shop. If two persons were, therefore, called at the time the sample was taken and their signatures also taken by the Food Inspector, the requirements of sub-section (7) of Section 10 of the Act were fully complied with.

5. Reliance was placed by the learned counsel for the applicant on Ganesh Lal Shaw v. Asansole Municipality, 1963 (1) Cri. LJ 658 (Cal), in which it has been observed that it is desirable that in a case of this nature the prosecution should examine all the search witnesses, if possible, to dispel all doubts about the manner in which the sample was taken, and about the place where, and the person from whom the sample was taken, in other words, to put the entire transaction above board. In that particular case also there were two witnesses of the taking of the sample; one of them was supposed to be one who always accompanied the Food Inspector. Only he was examined as a witness in the case in addition to the Food Inspector of course, and it was the evidence of this witness which was urged to be unreliable, but even so it was held that there was compliance with the provisions of Section 10, sub-section (7) of the Act and the application in revision was dismissed. Even though, therefore, it was observed in the case that it was desirable for the prosecution to examine all the search witnesses as witnesses in the case, the evidence of only one of the witnesses was considered enough to support the statement of the Food Inspector, even though that witness was not supposed to be very independent.

6. It has been observed by Das Gupta, J. himself in the aforesaid case itself that the point involved for decision in such cases is a pure question of fact. What has, therefore, to be seen in a particular case is whether on the basis of the evidence which has been examin-

ed in the case it can be believed that the sample which was found to be adulterated was taken by the Food Inspector or if the evidence produced is unreliable or shaky or of a doubtful nature. Even if the evidence is not altogether unreliable, if it is shaky or doubtful in nature, the Courts would certainly give the benefit of the same to the accused; but if the evidence establishes that the sample was taken from the shop of a particular dealer, then even though no witness has been called in the witness box in support of the statement of the Food Inspector, there is no reason why his solitary statement may not be believed. Normally the prosecution will no doubt examine one or more of the witnesses whose signatures are obtained on the documents prepared at the time of the taking of the sample, but if for some reason or the other the prosecution does not rely upon their statements, or does not find it possible to examine them as witnesses in the case, surely the prosecution case will not be thrown out on that account. The prosecution is entitled to urge that the truth of the allegations which are being made against an accused person may be judged on the basis of the evidence which is in fact examined in the case and if that evidence is satisfactory and there is no reason whatsoever to doubt the truth thereof, then the prosecution can very well urge that even though certain witnesses may not have been examined, the Court should record a finding of guilty against the accused.

7. The documents which were prepared regarding the taking of the sample, namely the notice (Ex. Ka. 1) and the receipt (Ex. Ka. 2) are both in Hindi. Copies thereof were given to the applicant. They are even signed by him, Ex. Ka. 1 at two places and Ex. Ka. 2 at one place. Ram Dass signs the documents in Hindi and if one may hazard an opinion as to the nature of his writing, it can be said that he is not a mere novice in that language. He could certainly have understood or made out what was written in the two documents before he signs them. The two documents it appears make it absolutely clear that the sample was taken from the applicant himself against a payment of 51 nP., the milk was divided into three parts, each part filled in three separate phials and signed and sealed on the spot and one of these phials was given to the applicant himself. The notice (Ex. Ka. 1) makes it clear that the applicant was given notice of the fact that the sample will be sent for analysis to a Public Analyst. It is impossible to believe that Ram Dass signed these documents without caring to understand the nature thereof. The two other persons Shadi Ram and Nathi have signed the documents at the places

meant for the signatures of the witnesses. If Ram Dass was required to sign as a witness, he must have been told that he was required to sign as a witness and in that case he would have easily noticed the place where a witness had to sign and he would have put his signatures at that place and not at the place where the notice and the receipt were to be signed either by the seller of the milk or at the place where it was to be signed by the person who received the notice from the Food Inspector.

8. Even in the face of this evidence it was open to the applicant to produce evidence to show that the Food Inspector had taken milk from the can of another dealer and he was made to sign the documents only as a witness, and under some confusion, influence or coercion he signed it at the place where the documents were to be signed by the dealer in milk. If that was the contention of the applicant it should have been supported by some evidence. An accused is certainly not required to produce evidence merely to negative an allegation made against him in the evidence examined on behalf of the prosecution. The prosecution case will stand or fall on the merits of the evidence examined in support of the same. But certainly if an accused puts forward a positive case in his defence and is unable to produce any evidence in support of the same, surely the evidence examined on behalf of the prosecution will not be disbelieved merely because of a vague suggestion or allegation that such and such thing might have happened.

9. There was no irregularity in the case in the taking of the sample and even if there were any, that irregularity cannot vitiate the taking of sample from the applicant. In cases of a search under Section 103 of the Code of Criminal Procedure the Officer who takes the search is not merely required to call two persons and take their signatures, but the two persons have to be respectable persons and that too of the locality. There is no such requirement under sub-section (7) of Section 10 of the Act. But even while interpreting Section 103 of the Code of Criminal Procedure, their Lordships of the Supreme Court have observed in Radha Kishan v. State of Uttar Pradesh, AIR 1963 SC 822:

"It may be that where the provisions of Sections 103 and 165 of the Code of Criminal Procedure are contravened the search could be resisted by the person whose premises is sought to be searched. It may also be that because of the illegality of the search the court may be inclined to examine carefully the evidence regarding seizure. But beyond these two consequences no further conse-

quence ensues and the seizure of the articles is not vitiated."

10. It has been conclusively established in the case that the sample of the milk was taken from the shop of the applicant. The Magistrate was not impressed by the statement of Charan Singh (P.W. 2). I have gone through his statement and I do not find anything which may discredit his statement. Nor has the Magistrate shown anything which may go against the witness except this that he is not a witness who signed the documents relating to the taking of the sample. He has been an ex-employee of the Municipal Board, but he will not be disbelieved merely on that account.

11. Both the courts below have recorded a clear finding of fact that the sample of milk was taken from the applicant, and even on an independent scrutiny of the evidence in the case, there can be no other view of the evidence than the one which has been taken by the court below.

12. The sample taken from the applicant being deficient in non-fatty solids, he was clearly liable to be convicted under Section 16 read with Section 7(1) of the Act.

13. It was urged that the punishment awarded to the applicant is rather excessive. I do not, however, think it is so. Those who indulge in adulteration of food are parasites to the society and if an offence is made out against them, there is no reason why a punishment contemplated under the law may not be awarded to them.

14. The application is dismissed. The applicant is on bail. He will surrender to his bail bonds immediately failing which necessary steps will be taken for his arrest. The order staying realisation of fine will stand vacated.

MVJ/D.V.C. Application dismissed.

AIR 1969 ALLAHABAD 112 (V 56 C 20)
SATISH CHANDRA, J.

Krishna Kumar Saxena and others,
Petitioners v. Chief Justice of the High
Court of Judicature at Allahabad and
another, Respondents.

Civil Misc. Writ No. 4102 of 1967, D/
9-1-1968.

Advocates Act (1961), Ss. 50(2), 55 and
58(4) (as inserted by Act 14 of 1962) —
Legal Practitioners Act (1879), Ss. 6, 7
— Repeal of certain provisions of Act —
High Court's power to admit pleaders or
renew certificates of existing one abrogated
with effect from 1-12-1961.

Chapter III of the Advocates Act, consisting of Ss. 16 to 28, dealt with ad-

mission and enrolment of advocates. This chapter came into force on 1st December, 1961 (vide Notification No. S. O. 2790 dated 24th November, 1961, issued by the Central Government under sub-section (3) of section 1 of the Act). Chapter IV of the Advocates Act, which dealt with the right to practise, has not yet been enforced. In the result, sections 6, 7, 18 and 37 and so much of Sections 8, 9, 16, 17, 19 and 41 of the Legal Practitioners Act as relate to the admission and enrolment of Legal Practitioners stood repealed on 1st December, 1961. AIR 1963 Cal 614, Foll. (Para 3)

Section 6 of the Legal Practitioners Act authorised the High Court to frame rules relating inter alia to qualifications, admission and certificate of proper persons to be pleaders and mukhtars. Under Section 7, on the admission under Section 6 of any person as a pleader or a mukhtar, the High Court shall cause a certificate to be issued to such person authorising him to practise upto the end of the current year. The certificate was entitled to be renewed by the High Court each year by the issuance of a fresh certificate and the cancellation of the existing one. Thus, with effect from 1st December, 1961, the High Court's power to admit as well as the function of issuing the certificate or renewing it, stood abrogated. So the High Court could neither admit pleaders nor renew the certificates of the existing ones.

(Para 4)

S. 55 of the Act of 1961 would apply to such pleaders or vakils who were in the eye of law validly practising as such immediately before the date on which Chapter IV came into operation. A person must be practising lawfully as a pleader or a vakil. A person who happens to obtain a certificate as a pleader by mistake or contrivance could not be said to be practising as a pleader or vakil "as such", because in the eye of law he is not a pleader or Vakil. This provision would not preserve the right to practise for a person who was not lawfully admitted as a pleader.

(Para 12)

Cases Referred: Chronological Paras (1963) AIR 1963 Cal 614 (V 50),

Sunil Kumar Sinha v. State
of West Bengal 13

S. C. Kharey and E. D. Mandhyam,
for Petitioners; Standing Counsel, for
Respondents.

ORDER :— Petitioners nos. 1 and 2 were enrolled as pleaders by the High Court in 1962. Petitioners nos. 3 and 4 were similarly enrolled in 1964. Petitioners nos. 5 to 9 were also enrolled as pleaders, according to the learned counsel, in 1966. The certificates issued to the petitioners were in due course renewed each year. The current certificate enti-

ties them to practise upto 31st December, 1967. On 20th July, 1967, the Joint Registrar of this Court issued a circular letter to all District Judges indicating that it was doubtful whether the High Court could admit pleaders after the coming into force of Chapter III of the Advocates Act on 1st December, 1961. Under the circumstances it will be advisable for the pleaders enrolled after that date not to apply for renewal of their certificates of practise or for re-enrolment or for simultaneous enrolment but to get themselves enrolled as advocates by moving the Bar Council in the matter. Petitioners nos. 1 and 2 submitted a representation to the Joint Registrar through the District Judge, Shahjahanpur on 21st September, 1967. They contended that in view of the various provisions of the Advocates Act read with the Legal Practitioners Act their enrolment was valid and was liable to be renewed by the High Court. On 27th October, 1967, the Joint Registrar replied that the power to "admit" was not reserved by section 58 of the Advocates Act. Consequently admitting new pleaders after 1st December, 1961, was unauthorised.

Subsequently on 17th November, 1967, the Joint Registrar issued another circular letter to all District Judges directing that only pleaders enrolled prior to 1st December, 1961, are entitled to get their certificates of practice renewed under the Legal Practitioners Act as hitherto. The certificates of pleaders enrolled on or after 1st December, 1961, should not be renewed. The petitioners question the validity of the view taken by the Joint Registrar. The principal question canvassed at the hearing by Mr. Khare appearing for the petitioners related to the interpretation of the phrase "issue and renewal of the certificate of a legal practitioner" occurring in sub-section (4) of Section 58 of the Advocates Act, 1961, and also the impact of Sections 50 and 55 on the right of the High Court to enrol pleaders.

2. Prior to the coming into force of the Advocates Act, 1961, the enrolment of pleaders was governed, inter alia, by the Legal Practitioners Act, XVIII of 1879. Section 50 of the Advocates Act provided for repeal of certain enactments. Sub-section (2) stated that on the date on which Chapter III comes into force the following shall stand repealed. Clause (a) alone is relevant. It reads :—

"(a) Sections 6, 7, 18 and 37 of the Legal Practitioners Act, 1879, and so much of Sections 8, 9, 16, 17, 19 and 41 of that Act as relate to the admission and enrolment of legal practitioners."

Under sub-section (3) of Section 50 certain provisions were to stand repealed on the date Chapter IV comes into

force. Clause (c) mentioned sections 4, 5, 10 and 20 of the Legal Practitioners Act, 1879, and so much of Ss. 8, 9, 19 and 41 of that Act as conferred on legal practitioners the right to practise in any Court or before any authority or person. Similarly, under sub-section (4) of Section 50 some other provisions of the Legal Practitioners Act were to stand repealed on the date on which Chapter V came into force.

3. Chapter III of the Advocates Act, consisting of Sections 16 to 28, dealt with admission and enrolment of advocates. This chapter came into force on 1st December, 1961 (vide Notification No. S.O. 2790 dated 24th November, 1961, issued by the Central Government under sub-section (3) of Section 1 of the Act). Chapter IV of the Advocates Act, which dealt with the right to practise, has not yet been enforced. In the result, sections 6, 7, 18 and 37 and so much of Sections 8, 9, 16, 17, 19 and 41 of the Legal Practitioners Act as relate to the admission and enrolment of legal practitioners stood repealed on 1st December, 1961.

4. Section 6 of the Legal Practitioners Act authorised the High Court to frame rules relating inter alia to qualifications, admission and certificate of proper persons to be pleaders and mukhtars. Under Section 7, on the admission under Section 6 of any person as a pleader or a mukhtar, the High Court shall cause a certificate to be issued to such person authorising him to practise upto the end of the current year. The certificate was entitled to be renewed by the High Court each year by the issuance of a fresh certificate and the cancellation of the existing one. Thus, with effect from 1st December, 1961, the High Court's power to admit as well as the function of issuing the certificate or renewing it stood abrogated. So the High Court could neither admit pleaders nor renew the certificates of the existing ones.

5. The Advocates Act did not initially contain any provision for the transitional period. The amending Act 14 of 1962 introduced, inter alia, Section 58 in the Act. Sub-section (4) of Sec. 58 provided that notwithstanding the repeal of the provisions of the Legal Practitioners Act by sub-section (2) of Section 50, the provisions of that Act and any rules made thereunder shall, in so far as they relate to "the issue and renewal of the certificate of a legal practitioner" have effect until Chapter IV comes into force. It further provided that accordingly every certificate issued or renewed to a legal practitioner (who is not enrolled as an advocate under this Act) which is or purports to be issued or renewed under the provisions of the Legal Practitioners Act during the period beginning with

the 1st day of December, 1961, and ending with the date on which Chapter IV comes into force, shall be deemed to have been validly issued or renewed. This provision came into force on 24th January, 1962. Thus, the power of the High Court to issue or renew a certificate of practice to a legal practitioner was revived retrospectively with effect from 1st December, 1961, and was to continue till Chapter IV came into force. All certificates issued or renewed during this period were to be deemed to have been validly issued or renewed.

6. Before dealing with the arguments of the learned counsel another development may be noticed. Section 24 of the Advocates (Amendment) Act, 1964, further amended sub-section (4) of Section 58. It provided that in sub-section (4) of Section 58 of the principal Act, for the words "the issue and renewal" the words "the renewal or the issue by way of renewal" shall be substituted. This Amendment Act came into force on 16th May, 1964. With effect from this date the pre-existing power of renewal or the issue by way of renewal alone remained in operation.

7. For the petitioners Mr. Khare submitted that the phrase "the issue and renewal" as used in Section 58(4) included the function of admission of pleaders. The High Court thus continued to retain the power of enrolment of proper persons to be pleaders. In order to judge the significance and import of a provision it is permissible to look at its legislative history. Under Section 6 of the Legal Practitioners Act, the High Court could frame rules relating to admission and certificates of proper persons to be pleaders. Under Section 7 on the admission under section 6 of any person as a pleader the High Court has to issue a certificate to him. Such certificate could be renewed each year by the issuance of a fresh certificate and the cancellation and retention of the old one. These provisions indicate that the power of the High Court related to admission. After the exercise of power the High Court had to perform more or less a ministerial function of issuing a certificate and of renewing it subsequently. The issuance of the certificate under Section 7 followed the admission under Section 6. The issuance was the consequence of the exercise of the power of admission. It was not the power itself.

8. The rules framed by this court lead to the same position. Rules 12 and 13 of Chapter XXV, prescribe the qualifications for admission as a pleader. Rule 14 contemplates an application for admission as a pleader. Under Rule 15 if the application is granted by the Court, a certificate is to be issued to the applicant under section 7 of the Legal Practitioners

Act under the signature of the Registrar. Thus, the issuance of the certificate by the Registrar follows the grant by the Court of the application for admission. The act of admission is done by the Court. The ministerial function of issuing the certificate is performed by an executive official of the Court. The issuance of the certificate thus is not the power of enrolment.

9. In this background the use of the phrase "issue and renewal of the certificate" in sub-section (4) of Section 58 clearly excludes the continuance of the power of admission possessed by the High Court under the Legal Practitioners Act. The word "issue" of the certificate would relate to Section 7 of the Legal Practitioners Act and Rule 15 of Chapter XXV of the Rules of this Court. It would not attract or preserve the power conferred by Section 6 of the Act read with the relevant rules. The word "issue" has been used in conjunction with the word certificate. The function of issuing the certificate alone has been preserved. Similarly the work of renewing the certificate continues.

10. The amendment of 1964 restricts the content of the preserved power. The power to issue the certificate no longer remains in force. Only the renewal or the issue by way of renewal of a certificate remained operative. From then onwards even a certificate could not be issued for the first time. It could only be issued by way of renewal.

11. The policy of the Legislature in making this transitional provision appears to have been to provide for the continuance of the conditions under which pleaders could practise till Chapter IV came into force. The policy of the Legislature had from the beginning been to have only advocates practising the profession of law. Section 16 in Chapter III contemplated only advocates though of two classes, namely senior advocates and other advocates. Section 29 (which is in Chapter IV) provides that from the appointed day there will be only one class of persons entitled to practise the profession of law, namely the advocates. The Act contemplated that all the varieties of legal practitioners like pleaders, mukhtars, vakils, Revenue agents, etc., would in due course be enrolled as advocates under the Act; but to obviate hardships in the period of transition, Section 58(4) provided the continuance of power of renewal of existing certificates. Initially the power to issue a certificate was also continued to cater for those limited classes of cases where the High Court had prior to 1st December, 1961, made an order of admission of a person as a pleader, but had not for

some reason been able to issue the requisite certificate. In my opinion the registry of this Court was right in taking the view that after 1st December, 1961, the High Court did not possess the power to admit or enrol fresh persons as pleaders.

12. Learned counsel placed reliance upon Section 55 of the Act. This section provides that notwithstanding anything contained in the Advocates Act every pleader or vakil practising as such immediately before the date on which Chapter IV comes into force, by virtue of the provisions of the Legal Practitioners Act, 1879, who does not elect to be or is not qualified to be enrolled as an advocate under the Act, shall, notwithstanding the repeal of the relevant provisions of the Legal Practitioners Act, 1879, continue to enjoy the same rights as respects practice in any court and be subject to the disciplinary jurisdiction of the same authority which he enjoyed or, as the case may be, to which he was subject immediately before the said date. It further provided that accordingly the relevant provisions of the Acts or law aforesaid shall have effect in relation to such persons as if they had not been repealed. This provision does not purport to confer any power of enrolling fresh persons as pleaders. It preserves right to the existing practitioners, who did not wish to be enrolled as an advocate, to continue to enjoy pre-existing rights and liabilities as respects practice.

In my opinion this provision would apply to such pleaders or vakils who were in the eye of law validly practising as such immediately before the date on which Chapter IV comes into operation. A person must be practising lawfully as a pleader or a vakil. A person who happens to obtain a certificate as a pleader by mistake or contrivance could not be said to be practising as a pleader or vakil "as such", because in the eye of law he is not a pleader or vakil. This provision would not preserve the right to practise for a person who was not lawfully admitted as a pleader. As seen above the High Court could not validly admit any person as a pleader after 1st December, 1961. The order of admission in the cases of all the present petitioners was passed by the High Court after that date. Their enrolment was invalid. The Joint Registrar was right in directing that the certificates of such persons should not be henceforth renewed.

13. Learned Senior Standing Counsel appearing for the respondents invited my attention to Sunil Kumar Sinha v. State of West Bengal, AIR 1963 Cal 614. In that case a Division Bench took the same view as I have expressed above.

14. In the result, the petition fails and is dismissed but I decline to make any order as to costs.

MVJ/D.V.C.

Petition dismissed.

AIR 1969 ALLAHABAD 116 (V 56 C 21)

G. C. MATHUR, J.

Paras Nath and others, Applicants v.
State, Respondent.

Criminal Revn. No. 1950 of 1963, D/-
28-7-1967.

Criminal P. C. (1898), Ss. 386(1) Proviso and 401 — Penal Code (1860), Ss. 64, 68 and 69 — Imprisonment in default of fine — Undergoing of imprisonment does not operate as discharge or satisfaction of fine — Special circumstances to be mentioned — Remission of part of imprisonment under S. 401 is illegal — Remission cannot amount to undergoing the whole term awarded.

The undergoing of imprisonment awarded in default of payment of the fine does not operate as a discharge or satisfaction of the fine which may nevertheless be levied in the manner prescribed by Sec. 386(1) Cr. P. C. Where the offender has undergone the whole of the sentence of imprisonment in default of payment of the fine, the warrant for the levy or realisation of the fine will not be issued unless the court considers it necessary to do so for special reasons to be recorded in writing. Where no special reasons have been recorded by the Magistrate for issuing the warrant and if in law and fact the accused has undergone the whole of the period of imprisonment imposed upon him in default of payment of the fine the issue of the warrant would be illegal as they are issued contrary to the provisions of the proviso to S. 386(1). (Para 2)

The sentence of imprisonment in default of payment of the fine is not punishment for the offence for which the offender has been convicted but is punishment for his failure to pay the fine imposed upon him by way of punishment for the offence. The sentence of imprisonment in default of payment of the fine, not being punishment for the offence for which the offender is convicted, cannot be remitted by the State Government under Section 401(1), Cr. P. C. Therefore where the State Government remits a portion of the sentence of imprisonment imposed upon the accused in default of payment of fine it is beyond the powers of the State Government and is illegal and is ineffective in remitting this part of the sentence. In law, therefore, the sentence of imprisonment imposed upon the accused in default of

payment of the fine remains and, he having served out only a portion of that sentence, can be legally sent to jail to serve out the remaining period of imprisonment until, in the meantime, the fine is paid and the provisions of Section 68 or 69 I. P. C. are attracted. The accused cannot be said to have, either in fact or in law, undergone the whole of the term of imprisonment awarded to him in default of payment of the fine. The proviso to Section 386(1) Cr. P. C. is not attracted to such a case and it would not be necessary for the Magistrate, before issuing warrants for realisation of the fines, to record any special reasons why he considered it necessary to issue such warrants. AIR 1951 Nag 342, Rel. on.

(Para 3)

Cases Referred: Chronological Paras (1951) AIR 1951 Nag 342 (V 38)= ILR (1951) Nag 760, Abdul Gani v. State of Madhya Pradesh 3 R. Pandey, for Applicant.

ORDER:— The 27 applicants are members of the Samyukt Socialist Party of India. In connection with the Food Agitation, they entered the court of the Additional Sub-Divisional Magistrate, Gyanpur, Varanasi, and interrupted the judicial proceedings which were going on there. The learned Magistrate, on September 25, 1964, convicted them for contempt of court and sentenced each one of them to a fine of Rs. 50 and, in default of payment of fine, to undergo simple imprisonment for 15 days. As the applicants did not deposit the fines, they were sent to jail and warrants for realisation of the fines were also issued. On October 2, 1964, the applicants were released from jail under an order passed by the State Government under Section 401 Cr. P. C. The relevant portion of their order reads:

"The Government remits under Section 401 of the Code of Criminal Procedure, 1898, unexpired period of substantive sentence of imprisonment and sentence in lieu of fine of such prisoners who were convicted in Food Agitation during August and September, 1964, and whose unexpired period pertains to substantive sentence of imprisonment and sentence in lieu of fine remains to be served for one month or less on 2nd October, 1964, and direct their release on Gandhi Jayanti on 2nd October, 1964."

On the release of the applicants, the learned Magistrate withdrew the warrants for realisation of fines which had been issued. Subsequently, the learned Magistrate referred the matter regarding the realisation of fines to the State Government and was ultimately informed that the fines had not been remitted. He accordingly issued fresh warrants for realisation of the fines. On March 19, 1965, an application was filed by the ap-

plicants before the learned Magistrate, contending that, since the remaining sentence of imprisonment had been remitted, it meant that the sentence of fine had also been remitted by the State Government and prayed that the warrants issued for realisation of the fines be withdrawn. This application was rejected by the learned Magistrate on April 6, 1965. Against the order of the learned Magistrate, the applicants filed two revisions before the learned Sessions Judge, Gyanpur. The learned Sessions Judge was of the view that the State Government had no power under Section 401 Cr. P. C. to remit a sentence of imprisonment in default of payment of the fine. He was further of the view that, even if the applicants could be said to have served out the sentence of imprisonment in default of payment of the fine, the fine could still be realised as it had not been remitted by the Government. He accordingly dismissed the revisions. The applicants have now come up in revision to this Court.

2. The first question, which arises for consideration in this case, is whether a fine can still be recovered after the defaulter has undergone the whole of the imprisonment awarded in default of payment of the fine. The provisions, which govern imposition of the sentence of imprisonment in default of payment of the fine, are sections 64, 68 and 69 of the Indian Penal Code. These Sections stand thus:—

"64. In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment of fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of payment is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate."

There is no provision in the Indian Penal Code like section 68 providing that,

on the undergoing of the whole period of imprisonment, the fine shall not be recoverable. The procedure for recovery of such fines is provided for in Section 386 of the Code of Criminal Procedure. Sub-section (1) of Section 386 Cr. P. C. which is relevant, provides:

"386(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may —

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter.

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so."

The absence of any specific provision to the effect that the fine shall not be realisable if the whole of the period of imprisonment for default has been undergone and the language of the proviso to sub-section (1) of Section 386 Cr. P. C. lead to the conclusion that the undergoing of imprisonment awarded in default of payment of the fine does not operate as a discharge or satisfaction of the fine which may nevertheless be levied in the manner prescribed by section 386 (1) Cr. P. C. Where the offender has undergone the whole of the sentence of imprisonment in default of payment of the fine, the warrant for the levy or realisation of the fine will not be issued unless the court considers it necessary to do so for special reasons to be recorded in writing. In the present case, admittedly, no special reasons have been recorded by the learned Magistrate for issuing the warrant and if, in law and fact, the applicants have undergone the whole of the period of imprisonment of 15 days imposed upon them in default of payment of the fine, the issue of the warrants would be illegal as they were issued contrary to the provisions of the proviso to sub-section (1) of Section 386 Cr. P. C.

3. The next question, therefore, which arises for consideration, is whether the applicants have, in fact and law, undergone the period of 15 days' imprisonment awarded to them in default of payment of the fine. Factually, they have not undergone the 15 days' imprisonment as

they were released on October 2, 1964, before completing that period. The case of the applicants is that the remaining period of their imprisonment in default of payment of the fine was remitted by the State Government under Section 401 Cr. P. C. and, therefore, they must be deemed to have undergone the entire period of imprisonment. Section 401 Cr. P. C. confers the power to suspend or remit sentences. Sub-section (1) of this section, which is relevant, reads thus—

401(1) When any person has been sentenced to punishment for an offence, the appropriate Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced."

It is first to be seen whether section 401(1) Cr. P. C. empowers the State Government to remit a sentence of imprisonment awarded in default of payment of fine. In Abdul Gani v. State of Madhya Pradesh, AIR 1951 Nag 342, a Division Bench of the Nagpur High Court has observed:

"When a person undergoes imprisonment in default of payment of fine, it is obvious that that imprisonment can come to an end in one of these three ways: efflux of time, payment of fine or remission of fine. In our opinion, there is no scope under Section 401, Cr. P. C. for merely remitting a sentence in default of payment of fine. For, what that section speaks of is a remission of the punishment for an offence. Now, here, the punishment is really payment of fine and under section 401 what the Government can do is to remit that punishment wholly or in part. In other words, what that section appears to us to empower the Government is to remit in whole or in part a substantive sentence, whether of fine or imprisonment (because that would be the punishment for the offence awarded by the Court), passed on a person but not imprisonment in default of payment of fine. Imprisonment in default of payment of fine is suffered by a person not because he committed an offence but because he has failed to pay the fine inflicted on him for the offence. There is thus, in our opinion, a distinction between the sentence of imprisonment awarded to a person for committing an offence and the sentence of imprisonment ordered to be undergone by such person in default of payment of fine."

Learned counsel for the applicants has not contested the proposition that section 401 provides only for the remission of sentences imposed by way of punishment for the offence for which the offender has been convicted; but he con-

tests the view of the Nagpur High Court that a sentence of imprisonment in default of payment of fine is not punishment for the offence. According to him, such a sentence is also punishment for the offence. To test this argument, let us consider a case where an offence is punishable with fine alone. If a person is convicted of such an offence and is sentenced to pay a fine and by the sentence it is further provided that, in default of payment of the fine, the offender shall undergo imprisonment for a specified period, can it be said that the imprisonment is punishment for the offence? Obviously not; for a punishment of imprisonment is not permissible for the offence. Then what is the nature of this sentence of imprisonment? It can only be punishment for the default in payment of the fine which is permissible under S. 64 IPC. Let us take another case where an offence is punishable with imprisonment and fine both. If, for such an offence, an offender has been sentenced to the maximum term of imprisonment and also sentenced to pay a fine and it is directed that, in default of payment of the fine, he shall undergo imprisonment for a specified period, can it be at all said that the sentence of imprisonment in default of payment of the fine is punishment for the offence? Again, the answer must be no; for, if it were to be treated as punishment for the offence, then the sentence of imprisonment would be more than the maximum permissible for the offence. We may now consider an ordinary case where an offender has been sentenced to a substantive sentence of imprisonment and a fine and, in default of payment of the fine, to undergo further imprisonment. Does the punishment for the offence consist of three items, namely, the substantive sentence of imprisonment, the fine and the imprisonment in default of payment of the fine or of only two of the items? If he undergoes the substantive sentence of imprisonment and pays the fine, he cannot be required to undergo the imprisonment imposed in default of payment of the fine.

But, if he undergoes the substantive sentence of imprisonment and, in addition, the sentence of imprisonment in default of payment of the fine, he can still be required to pay the fine. In all events, he must undergo the substantive sentence of imprisonment and pay the fine. Therefore, it appears that the punishment for the offence, for which he has been convicted, is the substantive sentence of imprisonment and the fine and the sentence of imprisonment in default of payment of fine is not punishment for the offence for which the offender has been convicted but is punish-

ment for failure to pay the fine. Learned counsel for the applicants relied upon the words "direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term" occurring in Section 64 I. P. C. in support of his contention that the imprisonment in default of payment of the fine is also a sentence or punishment for the offence I am unable to accept this interpretation. It is to be noticed that the words are not "in lieu of payment of the fine" but are "in default of payment of the fine". It is not that the two are alternative punishments for the offence.

The sentence of imprisonment in default of payment of the fine is not punishment for the offence for which the offender has been convicted but is punishment for his failure to pay the fine imposed upon him by way of punishment for the offence. The sentence of imprisonment in default of payment of the fine, not being punishment for the offence for which the offender is convicted, cannot be remitted by the State Government under section 401(1) Cr. P. C. The order of the State Government under Section 401 Cr. P. C. in the present case remitting the remaining period of the sentence of imprisonment imposed upon the applicant in default of payment of the fine is beyond the powers of the State Government and is illegal and is ineffective in remitting this part of the sentence. In law, therefore, the sentence of 15 days' imprisonment imposed upon the applicants in default of payment of the fine of Rs. 50 remains and, they having served out only a portion of that sentence, can be legally sent to jail to serve out the remaining period of imprisonment until, in the meantime, the fine is paid and the provisions of section 68 or 69 I. P. C. are attracted. The applicants cannot be said to have, either in fact or in law, undergone the whole of the term of imprisonment awarded to them in default of payment of the fine.

The proviso to Section 386(1) Cr. P. C. is not attracted to their cases and it was not necessary for the learned Magistrate, before issuing warrants for realisation of the fines, to have recorded any special reasons why he considered it necessary to issue such warrants. The applicants' contention that the warrants were issued in violation of the provisions of the proviso to Section 386(1) Cr. P. C. has not been substantiated. The argument of learned counsel for the applicants that since it was on account of the illegal action of the State Government in releasing them from jail prematurely before they had undergone the whole of the term of imprisonment which they were ready and willing to do, they could not be deprived of the benefit of the proviso

to section 386(1) Cr. P. C. cannot be accepted. That proviso can only apply if the conditions mentioned therein are satisfied. In the view that I have taken, those conditions are not satisfied.

4. The revision application is without force and is hereby dismissed. The stay order dated October 21, 1965, is vacated. MVJ/D.V.C.

Application dismissed.

AIR 1969 ALLAHABAD 119 (V 56 C 22)

(LUCKNOW BENCH)

LAKSHMI PRASAD, J.

Babu Khan and another, Petitioners v. The Regional Transport Authority, Meerut Region, Meerut and others, Respondents.

Writ Petn. No. 720 of 1965, D/- 31-3-1967.

(A) U. P. Motor Vehicles Rules (1940), R. 72 — Interpretation of — Rule is mandatory and not directory — Failure to implead persons to be affected, on date of appeal — Effect — Civil P. C. (1908), Pre. — Interpretation of Statutes — Motor Vehicles Act (1939), S. 64.

In deciding whether a particular provision is directory or mandatory language alone cannot be the basis but several other considerations have to be taken into account and such considerations include the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the subject. (Para 8)

Having regard to the provisions of S. 64 of the Motor Vehicles Act which envisages that the appeal is to be filed within the time prescribed and in the manner prescribed it is competent to the rule-making authority to frame rules prescribing limitation and also the manner including the array of parties. The rule requiring the impleadment of persons to be affected is a wholesome rule in so far as it gives effect to the principle of natural justice that no order can be passed to the prejudice of a person behind his back. Considering all these facts there is no justification for not giving effect to the mandatory language of the Rule 72. R. 72 is mandatory and not directory. (Para 8)

Where in an appeal, filed on 24-10-1962, against the grant of permits one of the grantees, R was impleaded as respondent not on the date of appeal but in August 1965, the failure to implead R on the date of appeal would mean that there was no appeal pending against R till R came to be impleaded and hence there was no controversy in regard of permit to R on 31-10-1964, the date on which

R transferred the permit. Hence the transferees having taken the transfer prior to any controversy in regard to the permit, were necessary parties to the appeal and the appellate authority was not competent to give a decision affecting the transferees without impleading them as respondents in appeal.

(Para 8)

(B) Motor Vehicles Act (1939), S. 64 — Appeal against grant of permits to eight persons — Appellate authority while considering question if or not appellant was better entitled to permit as against grantees not judging relative merits of all grantees, vis-a-vis appellant — Grant of permit to appellant after cancelling permit of one of grantees — Order based on comparison between claim of appellant and that of the grantee — Order cancelling permit is vitiated. (Para 10)

Cases Referred: Chronological Paras (1966) Special Appeal No. 157 of 1966, D/- 20-4-1966 (All), Jagdish Singh Yadav v. State Transport Appellate Tribunal, U. P. Lucknow 10 (1963) AIR 1965 SC 895 (V 52) = (1965) 1 SCR 970, Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur 8

A. J. Fanthome, for Petitioner, Standing Counsel, (for No. 2); K. S. Verma, B. N. Sharma and Bireshwari Nath (for No. 5), for Opposite Parties.

ORDER :— This is a petition under Article 226 of the Constitution. The Regional Transport Authority, Meerut, by a notification published in the U. P. Gazette dated the 27th of June, 1959, invited applications for five stage carriage permits on the Bulandshahr, Siana, Garhbagri route. A number of persons including opposite parties nos. 3 to 6 applied. The applications were published in due course in the Gazette dated the 2nd of January, 1960 and it was notified that these will be taken up for consideration at the meeting dated the 23rd of January, 1960. The said meeting was not held for some reason not relevant for the purpose of this case. Then another notification in the Gazette dated the 7th of April 1962, appeared notifying the meeting to be held on the 8th, 9th and 10th of May, 1962. That meeting was adjourned to the 29th and 30th of May and the 2nd of June, 1962. It was at this last mentioned meeting that eight persons out of the numerous applicants were granted permits. Srimati Rama Devi is one of those eight persons. The permit granted to her was valid for a period of three years from 11-6-1962 to 10-6-1965. Some of those who were not granted permit by the Regional Transport Authority preferred appeals. One such appeal was preferred by opposite party no. 5. She preferred her appeal on 24-10-1962. A copy

of the memorandum of appeal is annexure 4. She did not implead any of the grantees in her appeal. She impleaded only the Regional Transport Authority as respondent in the appeal. It may be because, as is alleged in paragraph 4 of the memorandum of appeal (Annexure 4), she was under an impression that a vacancy was left unfilled after the grant of eight permits, and she pressed her claim for that 9th vacancy.

2. On the 1st of August, 1964 a joint transfer application under Section 59(1) of the Motor Vehicles Act was made by the petitioners and Srimati Rama Devi. It was published in the Gazette dated the 27th of August, 1964, for objections. No objection was filed. The Regional Transport Authority at its meeting dated the 30th and 31st of October, 1964 allowed the transfer of permit granted to Srimati Rama Devi by her to the petitioners and on 13-11-1964 the change was actually effected by entering the names of the petitioners in place of that of Rama Devi in the permit. On 24-3-1965 the petitioners applied for renewal of their permit which was to expire in June, 1965. The application for renewal was published in the Gazette dated the 3rd of April, 1965. No objection was filed. The Regional Transport Authority at its meeting dated the 6th of May, 1965 allowed renewal to the petitioners for a period of three years from 11-6-1965 to 10-6-1968. In appeal No. 175 of 1962 filed by Srimati Shamim Banu which was one of the several appeals preferred against the order of the Regional Transport Authority (Annexure 1) the appellate authority passed an order on the 27th of August, 1965 (Annexure 7) in the following terms:

"It has been pointed out on behalf of the appellant that Sri Haji Peelu, one of the respondents, has died. It was also brought to my notice that some of the respondents have transferred their permits to others. She is, therefore, directed to bring the legal heirs of Sri Haji Peelu and also the persons in whose favour the permits have been transferred on record. The appeals are adjourned to 20-10-1965."

It was on the date of the aforesaid order that opposite party no. 5 moved an application in her appeal no. 412 of 1962 for impleading all the eight grantees as respondents and the appellate authority allowed the application on the same date with the result that on 27-8-1965 all the eight grantees of permit including Srimati Rama Devi were ordered to be impleaded as respondents in Appeal No. 412 of 1962. The petitioners were, however, not made parties to this appeal either at that stage or at any subsequent stage till it came to be disposed of by the impugned order dated the 16th of Novem-

ber, 1965 (Annexure 8) cancelling the permit of Srimati Rama Devi and allowing the permit granted to her to opposite party no. 5 the appellant in Appeal No. 412 of 1962.

3. The present petition is filed to have the above mentioned appellate order dated the 16th of November, 1965 Annexure 8 quashed for the reasons which shall appear from the discussion of the arguments raised at the bar.

4. The petition is opposed by opposite party no. 5.

5. I have heard learned counsel for the petitioners and learned counsel for opposite party no. 5.

6. The first contention raised by the learned counsel for the petitioners is that in so far as Srimati Sarojini, opposite party no. 5 did not appear before the Regional Transport Authority as appears from its order Annexure 1 she had no right to maintain the appeal. I am unable to accept the contention. When opposite party no. 5 had put forth her case in her application for a permit it was for the authority to judge the relative merits of the various applicants before it and to grant permits to persons it thought suitable for the purpose. The failure on the part of opposite party no. 5 to appear before the Regional Transport Authority did not in any manner absolve it from its obligation indicated above. So if opposite party no. 5 felt that the decision contained in Annexure 1 refusing to grant her a permit was unfair she had every right to challenge its propriety and correctness by an appeal irrespective of the fact whether or not she had appeared before the Regional Transport Authority at the particular meeting at which the application came up for consideration. I, therefore, repel the contention.

7. The next contention raised by the learned counsel for the petitioners is that a perusal of the memorandum of appeal Annexure 4 shows that opposite party no. 5 never sought a permit for herself in place of any of the eight permits granted to different persons by the Regional Transport Authority and her only grievance which she wanted to be redressed by means of her appeal was that she deserved to be granted a permit as against the 9th vacancy which had been kept unfilled by the order under appeal. It is thus urged that if that was the scope of appeal filed by opposite party no. 5, there was no occasion for the appellate authority, opposite party no. 2 to grant her permit by cancelling the permit of one of the eight grantees. In the alternative he argues that in case the appeal (Annexure 4) be taken to cover the case that opposite party no. 5 asserted her preferential right to a per-

mit as against one of those granted permits by the Regional Transport Authority then the appeal should be held to be incompetent in so far as notwithstanding the requirement of Rule 72 of the U. P. Motor Vehicles Rules opposite party no. 5 failed to implead any of the eight grantees when she instituted her appeal in 1962 and took no steps to implead them till August 1965, long after the expiry of the period of limitation prescribed by the aforesaid rule for filing an appeal.

There has been a lot of controversy with regard to these points urged by the learned counsel for the petitioners. Learned counsel for opposite party no. 5 has contended with reference to the allegations in paragraph 3 of the memorandum of appeal (Annexure 4) that opposite party no. 5 in effect did raise the question that she was entitled to a permit in preference to those granted permits by the Regional Transport Authority. In other words he contends that there is no warrant to confine the appeal of opposite party no. 5 only to a permit for the 9th vacancy even though she might have urged that also as one of the grounds in appeal. With regard to the alternative contention raised by the learned counsel for the petitioners, the contention of the learned counsel for opposite party no. 5 is that notwithstanding the use of the word "shall" in Rule 72, the provision, regarding the impleadment in appeal of the persons likely to be affected by the result of the appeal, is only directory and not mandatory.

As regards the question of limitation he points out that the expression "suit" as defined in the 'Limitation Act', whether we refer to the old or the new Limitation Act, does not include an appeal and that being so, whether we refer to Section 22 of the old Limitation Act or to Section 21 of the New Limitation Act, the provision therein can have no application to an appeal and hence no question of limitation arises on the score that the various grantees including Srimati Rama Devi, the transferor of the petitioners, came to be impleaded in the year 1965 whereas the limitation for filing an appeal had expired in 1962. He thus contends that so long as the appeal itself was filed within limitation, the appellant was competent to have the various grantees impleaded at any time during the pendency of the appeal without offending any rule of limitation.

8. Having considered the various arguments indicated above I have come to the conclusion that the contention of the learned counsel for opposite party no. 5 that no question of limitation arises because of the impleadment of Srimati Rama Devi at a late stage and that the appeal of opposite party no. 5 must be

taken to cover the question that she was entitled to preference as against the grantees is not without substance. But that by itself does not appear to be of any great consequence. The fact remains that the petitioners were never impleaded as respondents to appeal no. 412 of 1962. I am not prepared to accept the contention of the learned counsel for opposite party no. 5 that since Srimati Rama Devi was impleaded as a party in the appeal and the petitioners are her transferees, they are as much bound by the result of the appeal as Srimati Rama Devi herself. This would have been the position had Srimati Rama Devi been impleaded in appeal prior to the transfer in favour of the petitioners.

As already indicated the transfer in favour of the petitioners was given effect to in November, 1964 whereas Rama Devi came to be impleaded in August, 1965. There appears to be absolutely no basis for contending that the impleadment of Srimati Rama Devi, though effected in August, 1965, would relate back to the date of institution of the appeal which was instituted in October, 1962. I do not agree with the contention of the learned counsel for opposite party no. 5 that the provision in Rule 72 in regard to the impleadment of persons affected by the appeal is only directory and not mandatory. In support of his contention that the said provision be treated as directory the learned counsel places reliance on the following observations occurring in paragraph 7 of the judgment of their Lordships of the Supreme Court in *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, AIR 1965 SC 895.

"The question whether a particular provision of a statute which on the face of it appears mandatory — inasmuch as it uses the word "shall" as in the present case—or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."

It is obvious from the observations reproduced above that in deciding whether a particular provision is directory or mandatory language alone cannot be the basis but several other considerations have to be taken into account and such considerations include the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the subject. It may be that Section 64 of the Motor Vehicles Act does not specifically provide for the impleadment of the persons affected by the result of the appeal even though it specifically mentions that the appellant, and the Regional Transport Authority shall be given an opportunity of being heard, the fact nonetheless remains that Section 64 envisages that the appeal is to be filed within the time prescribed and in the manner prescribed.

That being so, it is competent to the rule-making authority to frame rules prescribing limitation and also the manner including the array of parties. It cannot be denied that the rule requiring the impleadment of persons to be affected is a wholesome rule in so far as it gives effect to the principle of natural justice that no order can be passed to the prejudice of a person behind his back. Considering all these facts there it appears to be no justification for not giving effect to the mandatory language of the rule under consideration and I fail to see anything in the Supreme Court case referred to above to detract from the view I take in regard to the interpretation of Rule 72. It thus must be held that Rule 72 is mandatory and not directory. And that being so, the failure of opposite party no. 5 to implead Srimati Rama Devi on the date of the appeal would necessarily mean that there was no appeal pending against Srimati Rama Devi till she came to be impleaded in August, 1965.

It may be that it was open to the appellate authority to implead Srimati Rama Devi even in August, 1965 but that does not mean that her impleadment in August, 1965 would mean that the controversy between opposite party no. 5 and Srimati Rama Devi arising in appeal subsequent to her impleadment was there before the appellate authority right from the date of the appeal. Once that view is accepted it is evident that there was no controversy in regard to grant of permit to Srimati Rama Devi on the date she made the transfer in favour of the petitioners. And hence the petitioners, having taken the transfer prior to any controversy in regard to the permit of which they took a transfer, were necessary party to the appeal of opposite party

no. 5 if she took it into her head to challenge the permit granted to Srimati Rama Devi so as to assert her preferential claim to a permit as against Srimati Rama Devi. For these reasons my conclusion is that the appellate authority was incompetent to give a decision affecting the petitioners without impleading them as respondents in the appeal.

9. The above finding by itself is sufficient to grant relief to the petitioners. Still I may notice another contention raised by the learned counsel for the petitioners and which also appears to be not without substance.

10. The last contention urged by the learned counsel is that the appellate authority erred in comparing the case of opposite party no. 5 with Srimati Rama Devi alone and in cancelling the permit of Srimati Rama Devi so as to give it to opposite party no. 5 on coming to the conclusion that opposite party no. 5 appeared to be better entitled to a permit as compared to Srimati Rama Devi. He argues that in such cases the duty of the authority concerned is to compare the relative merits of all the grantees vis-a-vis the appellant in order to come to a definite conclusion as to the case of which of the grantees is the worst so as to make room for the appellant. In support of his contention he places reliance on the unreported decision of a Division Bench of this Court in the case of Jagdish Singh Yadav v. State Transport Appellate Tribunal, U. P. Lucknow, Special Appeal No. 157 of 1966, D/- 20-4-1966 (All). A certified copy of the judgment in the said case has been produced before me. It clearly supports the contention of the learned counsel. That the appellate authority in the instant case failed to do so is obvious from a perusal of that portion of the impugned order which deals with Appeal No. 412 of 1962 filed by opposite party no. 5. In the circumstances it must be held that the impugned order stands vitiated also for the reason that the appellate authority while considering the question if or not opposite party no. 5 was better entitled to a permit as against the grantees did not judge the relative merits of the grantees vis-a-vis the appellant but confined itself only to the comparison between the claim of opposite party no. 5 and that of Srimati Rama Devi.

11. No other point has been urged before me.

12. In the end the petition is allowed with costs and the impugned order Annexure 8 is quashed with the direction that the appellate authority shall proceed to dispose of Appeal No. 412 of 1962 afresh in the light of the observations made in the body of the judgment.

LGC/D.V.C.

Petition allowed.

AIR 1969 ALLAHABAD 123 (V 56 C 23)

S. D. SINGH, J.

Panna Lal, Applicant v. State of U. P.. Opposite Party.

Criminal Revn. Nos. 366 and 608 of 1966, D/- 25-10-1967, from order of S. J. Allahabad, D/- 28-2-1966.

(A) Essential Commodities Act (1955), Ss. 3, 5 — U. P. Foodgrains Dealers Licensing Order (1964), Cls. 3(2), 2(a) — Presumption under Cl. 3(2) — Person engaged in business of selling and purchasing goods — Wheat found in his possession in excess of ten quintals — Presumption under Cl. 3(2) would be that it was stored for purpose of sale — He would be person engaged in business of selling or purchasing foodgrains. (Para 7)

(B) Criminal P. C. (1898), Ss. 251A, 251, 252, 173, 190, 537 — Essential Commodities Act (1955), Ss. 7, 3 — Prosecution under — Offence, a non-cognizable offence — Report by police officer even though in non-cognizable case must be treated as police report within the meaning of Ss. 251, 251A and 252 — Proceedings before Magistrate on basis thereof cannot but be under S. 251-A — AIR 1965 SC 1185 and Cr. A. No. 201 of 1963 D/- 11-12-1964, Rel. on. Case law Discussed — Defect in investigation — Cognizance so taken is only in nature of error in proceeding antecedent to trial — Defect will be cured under S. 537 — AIR 1955 SC 196, Rel. on. (Paras 16, 18)

(C) Essential Commodities Act (1955), S. 7(1)(a), Proviso — Prosecution under S. 7 read with S. 3 — Sentence of fine only awarded — Reasons given by Magistrate being age of accused, his being first offender, length of trial and loss sustained by accused — Reasons held to be most unsatisfactory — Reduction of fines from Rs. 2000 to Rs. 1000 by Sessions Judge in appeal held not justified — Offences of this type deserve deterrent punishment. (Para 19)

Cases Referred:	Chronological Paras
(1967) 1967 All Cr. R. 142 = 1967 All WR (H. C.) 156, Haji Nasir v. State	6
(1967) 1967 All LJ 377 = 1966 All WR (HC) 836, Mannoo Lal v. State	6
(1966) AIR 1966 Madh Pra 1 (V 53) = 1966 Cri LJ 29 (FB), Ashiq Miyan v. State of Madhya Pradesh	14, 17
(1966) AIR 1966 Madh Pra 5 (V 53) = 1966 Cri LJ 33, State of Madhya Pradesh v. Baital Naher Singh	10, 13
(1966) AIR 1966 Orissa 27 (V 53) = 1966 Cri LJ 48, M. Subba Rao v. State	6

(1965) AIR 1965 SC 1185 (V 52)= 1965 (2) Cri LJ 250, Pravin Chandra Mody v. State of Andhra Pradesh	14, 15
(1964) AIR 1964 SC 1533 (V 51)= 1964(2) Cri LJ 465, Manipur Ad- ministration v. Nila Chandra Singh	6
(1964) Criminal Appeal No. 201 of 1963, D/- 11-12-1964 (SC), Amal Shah v. State of Madhya Pra- desh	14, 17
(1963) AIR 1963 Madh Pra 337 (V 50) = 1963(2) Cri LJ 629, Sardar Khan v. State	10, 13
(1958) AIR 1958 Cal 213 (V 45)= 1958 Cri LJ 622, Prem Chand Khetry v. State	13
(1957) AIR 1957 Mad 292 (V 44)= 1956 Cri LJ 750, In re, Pavadai Goundan	13
(1955) AIR 1955 SC 196 (V 42)= 1955 Cri LJ 526, H. N. Rishbud v. State of Delhi	18
(1947) AIR 1947 PC 67 (V 34)= 48 Cri LJ 533, Pulukuri Kottaya v. Emperor	10
D. N. Misra, for Applicant	

ORDER :— This revision and revision No. 608 of 1966 are based on similar facts and the questions of law which have been raised in the two revisions are also the same and I therefore, propose to deal with both the cases in this judgment.

2. According to the prosecution case, Panna Lal, who is applicant in this revision, and Prabhu Nath, who is applicant in Criminal Revision No. 608 of 1966, are dealers in foodgrains. A search of their premises was taken at about 10-30 or 11 a. m. on 26th September, 1964, in the presence of Sri R. K. Dubey, Sub-Divisional Magistrate, Phulpur, by the Station Officer of Phulpur Police Station. Several witnesses were also present at the time of the search. Fifteen bags of wheat, weighing 37 maunds, was recovered from the premises in the possession of Panna Lal, and 37 bags containing 92 maunds of wheat from the possession of Prabhu Nath. The wheat found with Panna Lal would be nearabout 15 quintals and that found with Prabhu Nath 37 quintals.

3. Under sub-section (1) of Section 3 of the Essential Commodities Act (X of 1955) "if the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein." Under sub-section (2) clause (a) of the same section, an order under sub-section (1) aforesaid may provide for "regulating by licences, permits or otherwise the production or

manufacture of any essential commodity. "Under Section 5 of the same Act the powers of the Central Government may be delegated to the State Government. Under the powers so delegated, the Uttar Pradesh Foodgrains Dealers Licensing Order, 1964, was promulgated and published in the Gazette Extraordinary dated 29th February, 1964. Clause 3 of this order reads:

"3. Licensing of Dealers — (1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority.

(2) For the purpose of this clause, any person who stores any foodgrains in quantity of ten quintals or more of any one of the foodgrains or twenty-five quintals, of all foodgrains taken together at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purposes of sale."

The quantity of wheat found with both the applicants was in excess of the quantity mentioned in sub-clause (2) of clause 3 aforesaid and they, therefore, according to the prosecution case, committed a breach of sub-clause (1) of this clause 3.

4. Under Section 7(1)(a) of the Essential Commodities Act 1955, any person who contravenes an order made under Section 3 shall be liable to be convicted and punished, if the order is one under clause (h) of clause (1) of sub-section (2) of Section 3, with imprisonment for a term which may extend to one year, and in other cases to three years and in either case he shall also be liable to fine. In this particular case the order which is said to have been contravened was one which was passed under clause (a) of sub-section (2) of Section 3 and it would, therefore, be the later part of clause (a) of Section 7(1) which would apply. The two applicants were prosecuted under this provision read with Rule 125 of the Defence of India Rules. The Magistrate, who tried the two applicants, treated the report submitted by the police as a police report within the meaning of clause (a) of S. 251-A of the Cr. P. C. and tried the two applicants under the aforesaid provision and convicted them under Section 7 of the Essential Commodities Act and sentenced each one of them to a fine of Rs. 2,000. The applicants went up in appeal. While their conviction was upheld the fine was reduced by the Sessions Judge, Sri J. P. Chaturvedi, to Rs. 1,000 for no other reason than this that the ends of justice would be met if the fine was reduced to Rs. 1,000. The applicants have now come up in revision against the aforesaid orders.

5. On facts the contention of both the applicants was that the quantity of wheat which was recovered from their posses-

sion did not wholly belong to them. Panna Lal's contention was that seven bags out of the fifteen bags found in his possession belonged to one Mujai, and Prabhu's contention was that fifteen bags out of the thirty seven bags found with him belonged to one Lala and twelve to one Ram Charan. It has been admitted by the witnesses who have been examined in the case that the bags were placed inside the premises of the two applicants in different lots. Panna Lal examined Mujai and he deposed that seven bags belonged to him. His statement was disbelieved by the trial court and all the fifteen bags were found to belong to Panna Lal. Prabhu Nath, the applicant in revision No. 608 of 1966, did not produce any evidence and the finding of fact even in his case is that all the bags belonged to him. Whether or not the applicants were in possession of the entire quantity of wheat which was found in their possession is a pure question of fact. The findings recorded by the Magistrate on this point have been confirmed by the Sessions Judge and there is no justification for interfering with the same in revision. The findings are based on evidence and there has been no misappreciation of the evidence either by the Magistrate or the Sessions Judge.

6. The next contention of the applicants was that they are not dealers and not doing the business of selling or purchasing or storing foodgrains and, therefore, clause 3 of the U. P. Foodgrains Dealers Licensing Order, 1964, would not apply to them. The expression "dealer" is defined in sub-clause (a) of clause 2 of the aforesaid order. A dealer under this clause means "a person engaged in the business of purchase, sale or storage for sale of any one of the foodgrains in quantity of ten quintals or more at any one time or in quantity of twenty-five quintals or more of all foodgrains taken together," but does not include certain persons referred to in the later part of the definition of the expression "dealer". What was contended on behalf of the applicants, therefore, was that they are not "engaged in the business of purchase, sale or storage for sale" of the wheat which was found in their possession.

Reliance for the purpose was placed upon two decisions of this Court reported in Haji Nasir v. State, 1967 All Cr. R. 142 and Mannoo Lal v. State, 1967 All LJ 877, one decision of the Supreme Court reported in Manipur Administration v. M. Nila Chandra Singh, AIR 1964 SC 1533 and another of the Orissa High Court in M. Subbarao v. State, AIR 1966 Orissa 27. It is not, however, necessary to refer to these decisions in detail as the principle laid down in each of them is obvious. No person is liable to

be convicted for infringement of clause 3 of the U. P. Foodgrains Dealers Licensing Order, 1964, unless it is proved that he was engaged in the business of purchase, sale or storage for sale. The question, therefore, is one of fact whether in these two particular cases this fact has been established. If it is, then the applicants were rightly prosecuted under Section 7 of the Essential Commodities Act, 1955. If they are not, then their conviction and sentence will have to be set aside.

7. Under sub-clause (2) of clause 3 of the Foodgrains Dealers Licensing Order, 1964, there will be a presumption, rebuttable of course, that the foodgrains which are found to be in excess of ten quintals in quantity were stored for purposes of sale. The only question that remains to be seen is whether the two applicants were engaged in the business of purchase, sale or storage. This requirement of the law is fully satisfied by the evidence on the record. In Panna Lal's case Mahabir Prasad (P. W. 1) clearly deposed that Panna Lal was doing "dukandari ka kam."

In cross-examination he further stated that two or four persons were present at the shop at the time of wheat was seized. Harish Chandra (P. W. 2) has stated in his cross-examination that 'beoparis' arrive at the shop for selling and purchasing the goods, and then he adds that if somebody's goods are not sold, they are even stocked. The evidence is thus quite sufficient to call for a finding that the applicant Panna Lal is a dealer who is engaged in the business of selling or purchasing goods. If he is engaged in the business of selling and purchasing goods and if the wheat which was found in his possession is to be presumed under sub-clause (2) of clause 3 of the Foodgrains Control Order to be for purposes of sale, the conclusion is irresistible that Panna Lal is engaged in the business of selling or purchasing foodgrains.

8. In the case of Prabhu Nath, Mahabir Prasad (P. W. 1) deposed in examination-in-chief that the business of purchase and sale is transacted by Prabhu Nath at the shop. Harish Chandra (P. W. 2) also deposed in examination-in-chief that Prabhu Nath was doing business of purchase and sale. My remarks in respect of Panna Lal will apply mutatis mutandis to the case of Prabhu Nath also and he would on the basis of the same reasoning be deemed to be a dealer engaged in the business of purchase or sale of foodgrains.

9. Another question which was raised on behalf of Prabhu Nath was that it was not he but his father who was the owner of the shop, and, therefore, he could not be prosecuted for the recovery of these thirty-seven quintals of foodgrains. Maha-

bir Prasad (P. W. 1) has stated in the cross-examination, that Prabhu Nath's father Narain Prasad was the owner of the shop but earlier in the cross-examination he has clearly stated that the business was transacted at the shop by Prabhu Nath. Harish Chandra (P. W. 2) has stated in cross-examination that though the shop belongs to Prabhu Dass' father, Narain Das, Narain Das works at another shop and Prabhu Dass works at this shop. Then he states that Prabhu Nath works at this shop for a pretty long time. For the purpose of this shop, therefore, Prabhu Nath will be deemed to be a dealer and the stock of wheat will be deemed to have been recovered from his possession and from that point of view, therefore, there can be no question of interfering with their conviction.

10. It was then urged that, in any case, the trials are vitiated by wrong procedure being followed by the Magistrate. According to the applicants their trials should have been under Section 251-A (252?) and not under Section 252 (251-A?) of the Code of Criminal Procedure and it was urged that if there has been a trial under a wrong provision, the case of the applicants has been considerably prejudiced inasmuch as they were deprived of their right for second cross-examination which would have been available to them under Section 252 and that, therefore, the conviction of the applicants is liable to be quashed. Reliance was placed for the purpose of *Pulukuri Kottaya v. Emperor*, AIR 1947 PC 67. Their Lordships of the Privy Council have observed in this case that if a trial is conducted in a manner different from that prescribed by the Code, the trial is bad and no question of curing an irregularity arises.

In two Madhya Pradesh cases, *Sardar Khan v. State*, AIR 1963 Madh Pra 337 and *State of Madhya Pradesh v. Baital Nahar Singh*, AIR 1966 Madh Pra 5 a similar case was held to be triable under Section 252 and not under Section 251-A of the Code of Criminal Procedure and it was consequently held that the trial was vitiated and conviction liable to be set aside on that ground. There is, therefore, no doubt that if the applicants were liable to be tried under Section 252 of the Code of Criminal Procedure their trial under Section 251-A would be illegal and their conviction consequently liable to be set aside on that account. The question, however, remains whether they should have been tried under Section 252 or Section 251-A as the Magistrate actually did.

11. In case against the applicants started on the basis of a police report against the two applicants under Rule 125 of the Defence of India Rules and Section 7 read with Section 3 of the Es-

sential Supplies Act, 1955, the applicants were actually convicted only under Section 7 of the Essential Supplies Act and their prosecution under Rule 125 of the Defence of India Rules may, therefore, be ignored. Under Section 7 aforesaid the applicants were liable to be punished with imprisonment for a term which can extend upto three years and it was not disputed that the offence with which the applicants were charged was a non-cognizable offence.

12. The Investigating Officer submitted a report against the applicants and this was treated by the Magistrate to be "a police report" and he, therefore, proceeded against the applicants under section 251-A. The main question to be considered, therefore, is whether the report which was submitted by the Investigating Officer in a non-cognizable case which he could not investigate without being properly authorised by the Magistrate could be treated as "a police report" or if the case was to be treated "Instituted otherwise than on a police report" within the meaning of Sec. 252 of the Code.

13. Reliance was placed by the learned counsel for the applicants on two Madhya Pradesh decisions to which reference has already been made earlier, namely, AIR 1966 Madh Pra 5 and AIR 1963 Madh Pra 337. The 1966 Madhya Pradesh case merely follows the decision in 1963 Madhya Pradesh and it is that decision which may be looked into. Madhya Pradesh High Court in this decision followed an earlier decision of the Calcutta High Court report in *Prem Chand Khetry v. State*, AIR 1958 Cal 213 and also referred to another decision of the Madras High Court in *re Pavadai Goundan*, AIR 1957 Mad 292. The reasoning of the Calcutta High Court in AIR 1958 Cal 213, was that prior to the amendment in 1923 by Amendment Act 18 of 1923 cognizance could be taken by a Magistrate under clause (b) of sub-section (1) of Section 190 only on the basis of a police report which meant a report submitted under Section 173 of the Code and that whenever a report made by a police officer was other than a report submitted under Section 173(1) of the Code it was merely by way of an information received by the Magistrate from any person other than a police officer under clause (c) of sub-section (1) of Section 190. In the same decision even clause (a) of the same sub-section was also referred to which clause provides that cognizance may be taken by a Magistrate upon receiving a complaint of facts which constituted an offence.

14. It is not necessary to examine the Madhya Pradesh decisions in detail as it was conceded by the learned counsel for the applicants that these decisions have

been overruled by the Madhya Pradesh High Court itself in *Ashiq Miyan v. State of Madhya Pradesh*, AIR 1966 Madh Pra 1 (FB). This decision of the Madhya Pradesh High Court is based on two decisions of the Supreme Court, one of which is reported in *Pravin Chandra Mody v. State of Andhra Pradesh*, AIR 1965 SC 1185 and the other *Amal Shah v. State of Madhya Pradesh* (Criminal Appeal No. 201 of 1963, D/- 11-12-1964 (SC) but not reported hitherto). This decision was not available during the hearing of the appeal even in the file of blue prints of the Supreme Court judgments.

15. The Calcutta decision was, however, examined by their Lordships of the Supreme Court in AIR 1965 SC 1185 where a similar argument was raised before their Lordships. In that case the report which was submitted by the Investigating Officer was in respect of two offences, one of which was cognizable and the other non-cognizable. In respect of that part of the case it has been pointed out by their Lordships that when a police officer is investigating a cognizable case, he can also investigate a non-cognizable case which is based on the same facts. But the facts in this case are different and we are not concerned with this part of the observations of their Lordships so far as these two revisions are concerned. What is directly relevant however, is that part of judgment in which their Lordships dealt with the question whether the report submitted by the police officer is "a police report" or a document other than a police report.

Their Lordships have discussed as to whether a report submitted by a police officer in a non-cognizable case is to be treated as other than "a police report", which, it was urged before their Lordships, meant nothing else but a document which has come to be called or termed a "charge sheet" and in that case cognizance on the basis thereof could be taken by a Magistrate only under clauses (a) and (c) of sub-section (1) of Section 190 of the Code of Criminal Procedure, or if it was in any case "a police report" on which cognizance could be taken under clause (b) of sub-section (1) of Section 190 and proceedings on the basis thereof could be under Sec. 251-A of the Criminal Procedure Code. Their Lordships have pointed out that a report submitted by a police officer cannot be a complaint so that it could not be covered by clause (a) and it is not an information received from any person other than a police officer and could not, therefore, be governed by clause (c) and must, therefore, be governed only by clause (b) of sub-section (1) of Section 190. Their Lordships referred to the argument advanced be-

fore them on page 1186 of the report where they mention:

"Contention of the appellant is that by the words 'police report' in Section 251-A of the Code of Criminal Procedure, is meant the report mentioned in Section 173 which the police officer makes to a Magistrate in respect of offences investigated by him under Chapter XIV." Their Lordships then referred to the provisions of section 190 and after discussing the provisions of sections 251-A and 252 arrived at their conclusion in the beginning of the next paragraph where they observed:

"In our judgment the meaning which is sought to be given to a 'police report' is not correct."

It is thus in simple words clear indication that the contention which was put forward before their Lordships that the word "police report" used in Section 251-A could mean only that document which is called a "charge sheet" was wrong; and if this contention was wrong, it is obvious that the expression "police report" would include even those reports which are submitted by the police otherwise than under Chapter XIV. Their Lordships further discussed this question in paragraph 4 and pointed out that there are three clauses of Section 190 (1) of the Code of Criminal Procedure which provide for initiation of a Criminal Proceeding before a Magistrate:

(a) Upon receiving a complaint of facts which constituted such an offence;

(b) Upon a report in writing of such facts made by any police officer; and

(c) Upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such an offence has been committed.

Then their Lordships pointed out:

"We are thus concerned to find out whether the report of the police officer in writing in this case can be described as a "complaint of facts" or as "information received from any person other than a police officer". That it cannot be the latter is obvious enough because the information is from a police officer. The term "complaint" in this connection has been defined by the Code of Criminal Procedure and it "means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer (see Sec. 4(1)(b))."

Then their Lordships further observed that Section 252 of the Code would apply only to those cases which are instituted otherwise than on a police report, that is to say, upon complaints which are not reports of a police officer or upon information received from persons other than a police officer.

16. This case is, therefore, clear authority for the fact that the report of a police officer even though it may be in a non-cognizable case has to be treated as a police report within the meaning of Sections 251, 251-A and 252 and proceedings before a Magistrate on the basis thereof cannot but be under Section 251-A.

17. In Criminal Appeal No. 201 of 1963, D/- 11-12-1964 (SC) the judgment of which is not available, it appears that the Excise Officer, who submitted the report had the powers of a police officer under the law of the State in which the case had arisen. A portion of the judgment of their Lordships is cited in AIR 1966 Madh Pra 1 (FB) where the Supreme Court is said to have observed:

"On the record as it stands, there is no justification for assuming that the report on which the Magistrate acted was sent to him by the Excise Officer; on the contrary the evidence shows that this report was made by a police officer and so Section 251-A in terms would apply."

Their Lordships thus treated the report submitted by the Excise Officer as a report submitted by a Police Officer and held that it would be the provisions of Section 251-A which would apply and not Section 252. This is all what can be said in respect of this decision.

18. Another point which was urged during the hearing of these revisions was that in any case the report which was submitted by the Investigating Officer in the non-cognizable case was an invalid report and the prosecution based thereon would itself be vitiated on that account. This contention need not detain us long. The proposition of law involved is covered by the decision of their Lordships of the Supreme Court in H. N. Rishbud v. State of Delhi, AIR 1955 SC 196. Their Lordships pointed out on page 203 of the report:

"A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Cr. P. C. as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance. Section 190, Cr. P. C. is one out of group of sections under the heading "conditions requisite for initiation of proceedings." The language of this section is in marked contrast with that of the other sections of the group under the same heading i. e. Sections 193 and 195 to 199."

A little later their Lordships pointed out that —

"Such an invalid report may still fall either under clause (a) or (b) of Section

190(1) (whether it is the one or the other we need not pause to consider) and in any case the cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation Section 537, Cr. P. C. would apply."

It is thus clear that what their Lordships meant was not that the defect would be cured only if the report falls under either clause (a) or clause (b) of Section 190, sub-section (1) of the Code of Criminal Procedure, but because the cognizance so taken is only in the nature of an error in a proceeding antecedent to the trial, the defect, if any, would be cured by Section 537 of the Code. In that view, therefore, there is no force in either of these two applications.

19. Before I conclude, however, I cannot help mentioning that the punishment which has been awarded to the applicants is extremely inadequate. Section 7 of the Essential Commodities Act, 1955, provides that in a case of this type the accused can be sentenced to imprisonment for a term which may extend to three years and shall also be liable to fine. There is a proviso to Section 7(1)(a) which provides that if a sentence of fine is only awarded the Magistrate has to record reasons for the same. The Magistrate in this case did give reasons by way of after-thought. He imposed a fine of Rs. 2,000/- on Panna Lal on account of his age and his being a first offender. He mentions that he had also taken into consideration the length of the trial and the loss sustained by the accused in the deposit of grains. The same reason is given by him in the case of Prabhu Dass.

The reasons given by the Magistrate are altogether unsatisfactory and did not justify the imposition of mere fine for such an offence to meet which special laws had to be adopted. The Sessions Judge reduced the fine to Rs. 1,000/- in each case. This again was an exercise of the discretion which was not based on any judicial reasoning. The Sessions Judge thought that a reduced fine of Rs. 1,000 would meet the ends of justice. That is an argument which can be advanced in support of any order which the Sessions Judge might think proper to pass. He might have reduced the fine to Re. 1/- and said that the ends of justice would be met by that technical amount of fine. The offences of this type deserve to be punished with what may even be termed deterrent punishment so that those who indulge in such activities may feel that it is not in their interest to go against the provisions of law.

20. In the result the applications are dismissed.

SSG/D.V.C.

Applications dismissed

AIR 1969 ALLAHABAD 129 (V 56 C 24)

K. B. ASTHANA J.

M/s. Bengal Hemp Supply Co. and another, Appellants v. Radha Kishan Sheo Datt Rai, Respondent.

First Appeal No. 269 of 1957, D/- 23-11-1967.

Civil P. C. (1908), O. 30, R. 1 — Death of partner before suit — A was registered partnership firm of which B and C were two partners — A entered into contract with D in 1950 for supply of hemp rope cuttings — In 1951 B died — After B's death, his son was taken as partner in the firm — In 1954 A filed suit for damages for breach of contract through C — Held that suit as framed by A was not maintainable, since son of B was not partner when contract was entered into and since on death of B, the firm stood dissolved — AIR 1966 SC 24 & AIR 1952 All. 506 Appld. — (Partnership Act (1932), S. 42). (Paras 4, 5)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 24 (V 53)=

(1965) 3 SCR 488, Commr. of Income Tax Madhya Pradesh v. Seth Govindram Sugar Mills 3, 4

(1953) 1953-24 ITR 488 (All), Kshetra Mohan Sanyasi Charan Sadhukhan v. Commr. of Excess Profits Tax, West Bengal 3

(1952) AIR 1952 All 506 (V 39)= 1952 All LJ 696, Mt. Sughra v. Babu 4

V. P. Tewari, B. C. Dey and B. L. Gupta, for Appellants; S. N. Singh and K. P. Singh, for Respondent.

JUDGMENT :— This appeal arises out of a suit brought by firm partnership of M/s. Radha Kishan Sheo Datt Rai against M/s. Bengal Hemp Supply Company for recovery of certain amount of money as damages for breach of contract for supply of forty tons of specified quantity of a material described as New Indian hemp rope cuttings. It is not necessary for the purposes of deciding this appeal to state the facts relating to the contract and the alleged failure on the part of the M/s. Bengal Hemp Supply Co. to fulfil the terms of the contract as in my judgment this appeal can succeed on the technical plea raised by M/s. Bengal Hemp Supply Co. in their written statement which was to the effect that the plaintiff firm M/s. Radha Kishan Sheo Datt Rai having been dissolved on the death of one of its partners Mahadeo in the year 1951, no suit after that date was legally maintainable in the name of that firm.

2. It is an admitted fact that M/s. Radha Kishan Sheo Datt Rai was a registered partnership firm of which Mahadeo

Prasad and Ram Kumar were two partners. The said firm entered into a contract of supply with M/s. Bengal Hemp Supply Co., Calcutta in the year 1950. The contract was to be completed in second half of the month of November 1950. In the year 1951 it is not disputed Mahadeo Prasad died. The suit giving rise to this appeal was brought in the year 1954. In the plaint the plaintiff was impleaded as firm Radha Kishan Sheo Datt Rai, a registered firm carrying on business having its Head Office at Kuntha Pran Nath Chowk, Banaras City through Babu Ram Kumar aged about sixty years son of late Babu Shivadatta Rai, residing at 20/36, Chowk Banaras, one of the partners of the said firm. It has come in evidence on the record that on the death of Mahadeo Prasad his eldest son Madan Gopal gave a notice under Section 63(1) of the Indian Partnership Act stating that Babu Mahadeo Prasad died on 1-4-1951. Apparently the case of the plaintiff was that deceased Mahadeo Prasad was a partner in the plaintiff firm as the head of the joint Hindu family consisting of himself and his sons and it was the joint family as such which was the partner and therefore the death of Mahadeo Prasad did not bring about any dissolution of the partnership and it was sufficient in law to give a notice of the change in the constitution of that partnership. The learned Judge of the Court below held that after the death of Mahadeo Prasad his eldest son Madan Gopal Gupta was rightly taken as a partner in the plaintiff firm as his heir and successor and the partnership in law never dissolved but continued and was entitled to maintain the suit.

3. It was urged by the learned counsel for the defendant appellant before me that this view of the learned Judge of the lower court was legally erroneous. Reliance was placed on a decision of the Supreme Court in the case of Commr. of Income-tax, Madhya Pradesh v. Seth Govindram Sugar Mills, AIR 1966 SC 24. In that case which arose out of assessment proceedings under the Income tax Act the learned Judges of the Supreme Court had occasion to discuss the question whether a joint Hindu family as such could be a partner in a firm under the Indian Partnership Act. In paragraph 11 of the reported judgment at p. 28 the learned Judges of the Supreme Court observed as follows:—

"Another principle which is also equally well settled may be noticed. A joint Hindu family as such cannot be a partner in a firm, but it may, through its Karta, enter into a valid partnership with a stranger, or with the Karta of another family. This Court in Kshetra Mohan Sanyasi Charan Sadhukhan v. Commr. of Excess Profits Tax, West Bengal, (1953)

24 ITR 488 (All) pointed out that when two Kartas of different families constituted a partnership the other members of the families did not become partners, though the Kartas might be accountable to them."

4. The law as declared above clearly shows that the son of deceased Mahadeo Prasad was not a partner in the plaintiff firm as it existed at the time when the contract with the defendant appellant was entered into. It cannot be disputed that on the death of Mahadeo Prasad the firm stood dissolved as there were only two partners in the firm, namely, Mahadeo Prasad and Ram Kumar. The partnership could not continue with Ram Kumar alone as in charge of the affairs of business. There was no third partner at the time of the death of Mahadeo Prasad along with whom Ram Kumar, the surviving partner could continue the partnership business. The Supreme Court in the case of AIR 1966 SC 24 (supra) approved of the observations of Agarwala, J. of Allahabad High Court in the case of Mst. Sughra v. Babu, AIR 1952 All 506 which observations were as follows:-

"In the case of a partnership consisting of only two partners, no partnership remains on the death of one of them and, therefore, it is a contradiction in terms to say that there can be a contract between two partners to the effect that on the death of one of them the partnership will not be dissolved but will continue partnership is not a matter of status, it is a matter of contract. No heir can be said to become a partner with another person without his own consent, express or implied".

5. The position on the death of Mahadeo Prasad and on the application made by his eldest son Madan Gopal under Section 3(1) of the Partnership Act then reduced itself to this that at best a new partnership can be said to have come into being between Ram Kumar and Madan Gopal under the name and style M/s. Radha Kishan Sheo Datt Rai which happened to be the name of the old dissolved partnership also. It was not the case of the plaintiff in the court below that it was the new partnership which had come before the court for the recovery of damages from the defendant for breach of contract on the basis that the new partnership had taken over the assets and liabilities of the dissolved partnership. Since the Court below legally erred in holding that the suit was rightly filed by M/s. Radha Kishan Sheo Datt Rai as plaintiff and it was maintainable this appeal must succeed on that point alone. It is not necessary for me to examine the merits of other grounds of appeal raised in the memorandum questioning the validity of the decree of the court below. I

am satisfied that the suit as brought by the plaintiff was not maintainable.

6. It appears from the record that Ram Kumar through whom the plaintiff respondent was impleaded in this appeal died. Time was granted to the learned counsel for the appellant to take steps. The learned counsel for the appellant did not take any steps and I think rightly so as the mere death of Ram Kumar would not make the appeal defective. It is well settled that a registered partnership under Order 30 of C.P. Code can be sued by its name only and it is not necessary that it should be sued through any one of its partners. The words which are usually added "through so and so", have been held to be a mere surplusage. Therefore, the death of Ram Kumar does not have any effect on this appeal. It is unfortunate that no counsel appeared before me on behalf of the plaintiff respondent though I had repeatedly adjourned the hearing to enable the proper representation to be made on its behalf. I had not the benefit of hearing arguments on the question in reply to the contentions raised on behalf of the defendant appellant which I have accepted above.

7. The result is that this appeal is allowed. The decree of the court below is set aside and the plaintiff's suit stands dismissed with costs. As nobody has appeared to oppose this appeal I make no order as to costs.

SSG/D.V.C.

Appeal allowed.

**AIR 1969 ALLAHABAD 130 (V 56 C 25)
GANGETHSHWAR PRASAD, J.**

Hanuman Singh and others, Appellants
v. State, Respondent.

Criminal Appeals Nos. 1667, 1668 of 1964, D/- 7-11-1966, from order of Addl. S. J. Hardoi, D/- 20-7-1964.

(A) **Penal Code (1860), Sec. 141 and 143**
— Unlawful assembly — Common object should be one of those specified in section 141 — Election meeting — Some persons carrying firearms — Do not become members of unlawful assembly merely on that ground — What prosecution has to prove — Assembly lawful at its inception when becomes unlawful.

An assembly of five or more persons acquires the character of an unlawful assembly only when the common object of the persons composing that assembly is one or more of the things enumerated in the five clauses of Section 141 I. P. C. Therefore, persons assembled at an election meeting of a party do not become members of an unlawful assembly merely

by reason of the fact that some of them carry firearms. (Paras 11, 12)

An assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts. AIR 1916 Mad 1062 (2), Rel. on. (Para 13)

It is true that common object has to be a matter of inference, but for establishing that an unlawful assembly had been formed the prosecution has to show not merely that it was likely that the assembly in question had for its object one or more of the things specified in Section 141, I. P. C. but that the existence of such object or objects is the only reasonable conclusion possible in the circumstances of the case. (Para 14)

The question whether the assembly which was initially a lawful assembly became subsequently converted into an unlawful assembly, again is a matter of inference deducible from the conduct of the person composing the assembly. The conduct which may lead to the inference must, however, be of a clear and unequivocal nature and the inference must be irresistible. If the conduct of the assembly is consistent with its having remained a lawful assembly and a reasonable possibility of its having retained its original lawful character is not excluded, it is not possible to hold that the assembly changed into an unlawful assembly. (Para 15)

(B) Criminal P. C. (1898), Ss. 127 and 128 — Power to disperse assembly — Who can exercise — Refusal or failure to disperse — Effect — Action can be taken under S. 128 — Unlawful character of assembly has to be determined under S. 141 I. P. C. — Disobedience of command under S. 127 is not a relevant consideration — (Penal Code (1860), S. 141).

Under S. 127 Cr. P. C. the power to command an assembly to disperse has been conferred only upon a Magistrate or officer in charge of a police station. The failure of an assembly of persons to disperse or even its refusal to do so has the effect of calling into play the provisions of Section 128, Cr. P. C. and of empowering a Magistrate or an officer in charge of a police station to proceed under that section, but it does not result in the conversion of a lawful assembly into an unlawful assembly. The unlawful character of the assembly has to be determined with reference to Section 141, I. P. C. alone and the disobedience of a command issued under Section 127 Cr. P. C. is not a relevant consideration for that purpose. AIR 1922 Lah 135, Rel. on. (Para 21)

(C) Penal Code (1860), S. 142 — Scope and interpretation — Being a member of an unlawful assembly — Conditions for applicability — Actual knowledge of facts

rendering assembly into unlawful assembly and intentional joining or continuing in it essential — Assembly lawful at its inception — Some members forming themselves into unlawful assembly — Merely physical presence of all persons cannot make them members of unlawful assembly.

The first condition for the applicability of Section 142 is that a person should be aware of facts specified in S. 141 which render any assembly an unlawful assembly. The assembly may actually be or have become an unlawful assembly, but if a person is not aware of the facts which impart that character to the assembly, S. 142 I. P. C. does not come into operation. S. 142 Indian Penal Code speaks of a person being aware of facts and not merely suspecting the existence of facts or having reason to believe that they exist. The second condition is that a person should intentionally join the assembly or continue in it. 'Continuance' in an unlawful assembly is not in all circumstances to be equated with physical presence, although, unless the contrary is shown either by evidence of circumstances, physical presence would lead to the inference that it was accompanied by the mental element necessary for continuance. AIR 1933 All 535 & AIR 1950 All 418, Rel. on.

(Paras 24, 25, 28)

Section 142 I.P.C. besides being a part of a penal statute provides for something which becomes the basis of constructive liability and the words used therein must, therefore, receive a strict interpretation. (Para 29)

Where some of the members of a large assembly of four thousand persons, which was perfectly lawful at its inception, formed into an unlawful assembly at some stage, it cannot be said that all those who were participating in the meeting continued in the unlawful assembly merely because they were physically present in the meeting. The mere fact that they are with the offending members at the time does not make them members of the unlawful assembly formed by those members. They must be shown to have joined or continued in that smaller assembly. AIR 1925 Rang 243, Rel. on. (Para 29)

Cases Referred:	Chronological	Paras
(1950) AIR 1950 All 418 (V 37)=51 Cri LJ 1133, Rex v. Sadla		27
(1933) AIR 1933 All 535 (V 20)=35 Cri LJ 360, Emperor v. Sheo Dayal		26
(1925) AIR 1925 Rang 243 (V 12)=26 Cri LJ 1186, Maung Oh Kyan v. Emperor		29
(1922) AIR 1922 Lah 135 (V 9)=64 Ind Cas 373=23 Cri LJ 5, Girdhara Singh v. Emperor		21

(1916) AIR 1916 Mad 1062 (2) (V 3)=

31 Ind Cas 343-16 Cri LJ 743,

In re Mukka Muthrian

peal no. 1668 of 1964 have all been convicted under Section 148 I. P. C. and sentenced to 2½ years' rigorous imprisonment, under section 307/149 I. P. C. and sentenced to seven years' rigorous imprisonment, and also under Section 323/149 I. P. C. and sentenced to nine months' rigorous imprisonment. All the sentences passed against the appellants in both the appeals have been directed to run concurrently.

JUDGMENT: — These are two connected criminal appeals arising out of the same sessions trial. The incident which led to the trial was the tragic sequel of two election meetings held in close proximity to each other by two rival parties to a contest for election to the Uttar Pradesh Vidhan Sabha from the Gondwa constituency of District Hardoi in connection with the general elections of 1962. The two contesting candidates for the election were Sri Mohan Lal Verma and Sri Rajendra Singh, the former being a candidate of the Congress party and the latter a candidate of the Jan Sangh party. The incident occurred on the 7th of February, 1962 in the Bazar of Lumamau, police station Sandila, District Hardoi and it resulted in the death of three persons and in injuries to many others.

2. Three reports were lodged about the incident at three different police stations. The first report was by Mohan Singh (P. W. 9) at police station Sandila, situate at a distance of about six miles from the place of incident, on the 7th of February 1962 at 7.00 p. m. This was against thirteen persons of the Congress party and twelve persons of the Jan Sangh party. The second report was lodged by Sri Mohan Lal Verma appellant at police station Atrauli, situate at a distance of about 12 miles from the place of incident, on the 7th of February 1962 at 7.15 p. m. and it was against 24 persons of the Jan Sangh party. The third report was lodged by Harnath Singh (P. W. 25) at police station Kotwali of Hardoi on the 8th of February 1962 at 4.35 a. m. and it was against 42 persons of the Congress party. After investigation, cross cases against a number of persons of both the parties were sent up by the police. The trial out of which these appeals have arisen related to 45 persons alleged to have belonged to the Congress party. Out of them 19 persons have been convicted and the remaining 26 have been acquitted. The appellants in appeal no. 1667 of 1964 are 13 in number. Among them Hanuman Singh has been convicted under Section 148 I. P. C. and sentenced to 2½ years' rigorous imprisonment and also under Section 323/149 I. P. C. and sentenced to nine months' rigorous imprisonment. The remaining appellants of that appeal have been convicted under Section 147 I. P. C. and sentenced to 1½ years' rigorous imprisonment and also under Section 323/149 I. P. C. and sentenced to nine months' rigorous imprisonment. The appellants in ap-

3. Briefly stated, the prosecution story in regard to the incident is this. In the afternoon of the 7th of February, 1962, i. e., a few days before the start of the polling in respect of the general elections of 1962 for the Uttar Pradesh Vidhan Sabha, Sri Rajendra Singh the Jan Sangh candidate was holding an election meeting in the Bazar of Lumamau. The meeting was attended by 200 to 250 persons and was being held on the eastern side of a Galiara which was to the east of the Bazar. At about 3 p. m. some persons started making arrangements for a meeting of the Congress party at the Chabutra of Chhotey Lal Bania which was at a distance of 30 or 40 steps from the place where the Jan Sangh meeting was being held. Mukhtar Ali S. I. of police station Sandila (p. w. 17) had been directed by the station officer of police station Sandila to be present in the Bazar as election meetings were likely to be held there and he was, accordingly, present there along with some constables and Chaukidars.

Sri Rajendra Singh the Jan Sangh candidate pointed out to Mukhtar Ali that the Congress party was going to hold a meeting close to the meeting of his party and that might lead to some trouble. He also suggested to Mukhtar Ali that the meeting of the Congress party should be shifted to a more distant place. Thereupon Mukhtar Ali met the persons who were making arrangements for the Congress meeting and asked to hold their meeting at some more distant place, but those persons said that the matter could be decided only by Sri Mohan Lal Verma. Shortly afterwards, Sri Mohan Lal Verma arrived at that place followed by a crowd of 1000 to 1200 persons who were shouting slogans and he started holding his meeting at the Chabutra of Chhotey Lal Bania. Mukhtar Ali went up to Sri Mohan Lal Verma and requested him to shift his meeting to some other place but the latter expressed his unwillingness to do so and asked Mukhtar Ali to tell Sri Rajendra Singh to shift his own meeting to some other place. Mukhtar Ali then tried to persuade Sri Rajendra Singh to change the place of his meeting but he too was unwilling to do so. Feeling helpless, Mukhtar Ali stationed himself in the Galiara which divided the two meetings, along with the police

constables and Chaukidars who were with him and also some other persons whom he had called to his aid. Sri Trijugi Nath Gupta meanwhile stood up on the Jan Sangh platform and began delivering a speech which contained some aspersions against Sri Mohan Lal Verma. The Congress meeting was at that time being addressed by Sri Raj Bahadur Singh Chandel and he was characterising the Jan Sangh party as a communal party and making uncomplimentary remarks against the Jan Sangh candidate. Some objectionable slogans were also being shouted in both the meetings. As a result, the people participating in the two meetings became agitated and started moving nearer each other. Mukhtar Ali apprehended trouble and he, therefore, sent a note to police station Sandila requisitioning additional police force.

At 4.00 or 4.30 p. m. a person present in the Congress meeting is said to have given a lathi blow to one of the participants of the Jan Sangh meeting. Thereupon some people in the Jan Sangh meeting began throwing brickbats on the Congress meeting and some people in the Congress meeting retaliated by throwing brickbats on the Jan Sangh meeting. Meanwhile a lathi fight also started between the two parties. While this was going on Ram Bilas appellant who belonged to the Congress party fired a pistol shot from the Congress meeting towards the Jan Sangh meeting. Thereafter, firing took place from both the sides as a result of which a number of persons were injured. Ten or twelve persons carrying firearms arrived at this stage on the side of the participants of the Congress meeting and there was a vigorous firing from that side on the Jan Sangh meeting. The result was that the Jan Sangh party took to its heels. The Congress party chased the Jan Sangh party upto some distance and then set fire to a number of articles which the Jan Sangh party had brought there in connection with the arrangements for its meeting and broke the loud speaker which had been installed there. Two persons, i. e. Mool Chand and Jagannath, who are said to have been members of the Jan Sangh party, died at the spot on account of the injuries received by them, and third person, Ram Jiwan, was seriously injured and died the next day in the hospital. Apart from these three persons, nineteen others including Mukhtar Ali S. I. and four constables were also injured in the course of the fight. Mukhtar Ali was not able to proceed to the police station himself because of his injuries and also because of the situation there. He, therefore, suggested that someone from amongst the persons present there should go to police station Sandila and make a report about the occurrence.

Mohan Singh (P. W. 1) offered to do so, and he went to the police station and lodged a report there at 7.00 p. m.

Sri B. S. Negi (P. W. 22) S. I. of police station Sandila, took up investigation, informed the Superintendent of Police Hardoi about the occurrence on phone, and proceeded to the place of occurrence. He found the dead body of Jagannath near the platform of the Congress meeting and the dead body of Mool Chand close to the Chabutra of Mahadeo Ji which was within the area where the Jan Sangh meeting was held. After holding inquests he despatched the dead bodies for post mortem examination. From the place of occurrence, Sri Negi recovered three empty cartridges; two of them were near the platform of the Congress meeting and one was at the place of the Jan Sangh meeting. He also recovered one big gunshot and four small gunshots from the Chaukhat of the eastern door of Chhotey Lal Bania's Baithak and he found gunshot marks on bamboo clumps to the north of the Chabutra of Mahadeo Ji. Some burnt and partly burnt articles and a broken horn of a loud speaker were also found by him at the place where the Jan Sangh meeting was being held. It may here be noted that on 8th February 1962 at 10.00 a. m. Sri Negi handed over the investigation to V. N. Singari (P. W. 26) Circle Inspector as directed by the Superintendent of Police, but he was present at the time of the recoveries mentioned above and prepared recovery memos relating to them under the supervision of V. N. Singari.

4. The post mortem examinations of the dead bodies of Jagannath and Mool Chand and also that of Ram Jiwan, who died in the hospital, were performed by Dr. R. K. Malhotra (P. W. 12) on 8th February 1962. The doctor found that Jagannath had four lacerated wounds and one bruise; Mool Chand had four lacerated wounds; and Ram Jiwan had three lacerated wounds. All the lacerated wounds were, in the opinion of the doctor, caused by firearms. Besides these three persons, nineteen others are said to have been injured in the incident but it is not necessary to give the details of their injuries and it is sufficient to indicate that some of them received injuries from firearms, some received injuries from blunt weapons, and some from both kinds of weapons.

5. The charges against the appellants were under Sections 147, I. P. C., 148, I. P. C., 302/149, I. P. C., 307/149, I. P. C. 323/149, I. P. C., 435/149, I. P. C., 152/149 I. P. C. and section 127 of the Representation of the People Act. The learned Sessions Judge, however, convicted them only on the charges mentioned by me at

the beginning of the judgment and acquitted them of the other charges.

6. The appellants pleaded not guilty Ram Bilas, Sardar Singh, Pyare Lal, Nawab Singh, Parwan Singh, Sri Mohan Lal Verma, Maharaj Singh, Bal Mukund, Shri Dhar and Shyam Lal appellants admitted their presence in the Congress meeting but stated that the meeting was being held peacefully and it was the Jan Sangh candidate, Sri Rajendra Singh, who came later and tried to disturb their meeting and started a meeting of his party at a short distance. They also stated that the throwing of brick-bats and the firing were done by Sri Rajendra Singh and his supporters, and that as soon as the firing began persons in the Congress meeting ran away. They denied that any firing had taken place from their side and alleged that as a result of the firing done by the Jan Sangh party three persons present in the meeting of the Congress party were killed and some others received injuries. They also alleged that they were falsely implicated in the case by Sri Onkar Singh Dy. Superintendent of Police as Sri Mohan Lal Verma the Congress candidate had made a complaint of corruption against him to the Home Minister some time before the incident.

7. The prosecution examined fifteen persons as eye-witnesses, viz. Gangu (P. W. 3), Gulab Singh (P. W. 4), Jagat Jeet Singh (P. W. 5), Chheda (P. W. 7), Sobaran (P. W. 8), Mohan Singh (P. W. 9), Dayal (P. W. 10), Sobran Singh (P. W. 11), Surendra Nath (P. W. 15), Fakirey (P. W. 16), Mukhtar Ali (P. W. 17), Nauratan Singh (P. W. 19), Puttoo (P. W. 21), Bisheshwar Dayal (P. W. 23), and Harnath Singh (P. W. 25). Out of these, P. Ws. 8, 16, 19, 21, 23 and 25 have not been relied upon by the learned Sessions Judge and the conviction of the appellants is based upon the testimony of the remaining nine witnesses. These nine witnesses have supported the prosecution case and their evidence in effect is that the incident happened in the manner in which it has been narrated above, that the appellants were present in the meeting of the Congress party, and that out of them Sri Mohan Lal Verma, Ram Bilas, Kaushal Kishore, Porwan Singh, Suraj Pal and Prakash Chandra Bajpai had firearms and excepting Sri Mohan Lal Verma all others named above indulged in firing on the Jan Sangh meeting. Among these witnesses P. Ws. 4, 5, 15 and 17 are police men, P. Ws. 19 and 25 admittedly belong to Jan Sangh party and the remaining four i. e. P. Ws. 3, 7, 9 and 10, state that they were only visitors to Lummanau Bazar and were not attending either of the two meetings.

8. From the evidence led by the prosecution and the circumstances of the

case the following facts must be taken to have been established and, indeed, the argument of the learned counsel for the appellants has proceeded on the basis that they have been established. The incident took place at the time and place alleged by the prosecution. The meeting of the Jan Sangh party was already being held to the east of the Galiara when arrangements for holding a meeting of the Congress party on the Chabutra of Chhotey Lal Bania started. Sri Mohan Lal Verma arrived there with a large crowd far out-numbering the people present in the Jan Sangh meeting, and he was not prepared to shift the meeting of his party to some more distant place in spite of having been requested to do so by Mukhtar Ali S. I. Speeches containing uncomplimentary remarks against the other party or its candidate were delivered in both the meetings and some improper slogans were also shouted. Tempers rose and feelings ran high with the result that there was a fight between two parties in which firearms were used from either side causing the death of three persons and injuries to a number of others also. In the circumstances of the case, however, these facts appear to be inconclusive and altogether insufficient for a finding of guilt against the appellants. The judgment of the learned Sessions Judge proceeds on the footing that these facts are in themselves sufficient to make the appellants guilty of the offences for which they have been convicted. According to the learned Judge the persons present at both the meetings had assembled with the determined object of trying their strength by force or show of force. The assemblies at these meetings were, in his opinion, unlawful assemblies from the inception and it was, therefore, a matter of no consequence which party started the fight, how it developed and in what sequence events happened, and neither party can be said to have acted in the exercise of the right of private defence. If this conclusion which is the basic foundation of the finding of guilt recorded by the learned Judge in respect of the appellants is found to be incorrect or not borne out by the circumstances, there can be no denying the fact that the entire structure of the finding must fall.

9. It is in the evidence of Chheda (P. W. 7) that people knew from before that the Jan Sangh party and the Congress party were both going to hold their meetings in the Lummanau Bazar on the date of occurrence and from the mere fact of the Congress party having started their meeting later in point of time, it cannot be inferred that its object was to create disturbance. It has also to be noted that Sri Mohan Lal Verma, on being requested by Mukhtar Ali S. I. to

hold his meeting elsewhere, told him that Sri Rajendra Singh, the Jan Sangh candidate, should be asked to shift his own meeting to some other place. The attitude adopted by Sri Mohan Lal Verma might not have been a reasonable attitude, but insistence on holding a meeting at the Chabutra of Chhotey Lal Bania cannot be regarded as indicative of a desire to create disturbance. The number in which people had collected for the meeting of the Congress party cannot, obviously, be taken as suggesting that they had any unlawful object in their minds. Election meetings naturally attract crowds and excite interest and if more than a thousand persons had come to attend the meeting of the Congress party neither Sri Mohan Lal Verma nor for the matter of that anybody else can be said to have been at fault. Shouting of slogans is a very common feature of election propaganda and very often they are of an objectionable nature and transgress the limits of propriety and decency. The fact, therefore, that the participants of the meeting of the Congress party shouted improper slogans when they came to the Chabutra of Chhotey Lal Bania or thereafter, cannot lead to the conclusion that they had assembled with the determination of proving their superiority over the other party by resort to force or show of force. As to the speech delivered at the meeting of the Congress party, it was one by Sri Rajendra Bahadur Singh Chandel who was a member of the Communist party and the only evidence about the contents of the speech is that he characterised the Jan Sangh as a communal party. Clearly, there was nothing in the circumstances so far dealt with which could stamp the assembly at the meeting of the Congress party with the character of an unlawful assembly.

10. The question then is whether the fact that some of the members of the assembly had armed themselves with weapons including firearms altered the situation. The answer, in my opinion, has to be in the negative. It appears to be indisputable that a state of tension must have prevailed in the electorate and the atmosphere must have been charged with passion. Resort to violence by supporters of either party was, therefore, an eventuality which cannot be said to have been unlikely and the station officer of the Police station Sandila too had considered it necessary to direct Mukhtar Ali S. I. to be present in the Bazar of Lumamau in order to guard against that eventuality. In these circumstances is it possible to say that those who carried weapons must necessarily have done so for using them for an unlawful purpose?

11. Undoubtedly, every person has a right to arm himself for protection and

to prepare himself beforehand for repelling a possible attack on himself or any other person. If he anticipates danger to his own body or to that of any other person in the course of a lawful activity the law does not compel or require him to abstain from that activity so that he may not be called upon to use force. He has a right to keep himself armed for averting the danger and he is not deprived of that right merely because his preparedness may itself, in some cases, have the effect of enhancing the danger. It must, therefore, be held that the persons assembled at the meeting of the Congress party did not become members of an unlawful assembly by reason of the fact that some persons of the assembly carried weapons including firearms.

12. It is also obvious that an assembly of five or more persons acquires the character of an unlawful assembly only when the common object of the persons composing that assembly is one or more of the things enumerated in the five clauses of section 141 I. P. C. Going to or participating in a public meeting with arms is certainly not a desirable thing to do, but undesirability is not criminality, and so however improper the behaviour of an assembly may be it cannot be designated an unlawful assembly unless it has a common object falling within one of the clauses of the aforesaid section. In the instant case it is not possible to hold that the persons assembled in the meeting of the Congress party had any such common object.

13. It may be that the manner in which the people in the meeting of the Congress party behaved tended to provoke the other party and was thus fraught with the danger of exciting it into violence, but that cannot be a reason for holding that they had formed an unlawful assembly by reason of the unlawfulness of its object and not because of its having a tendency to inflame the passions of others and to rouse them to indulge in an unlawful activity. I may draw attention here to *In re Mukka Muthrian*, 31 Ind Cas 343=(AIR 1916 Mad 1062 (2)), where a learned Judge of the Madras High Court observed that an assembly lawful in itself does not become unlawful merely by reason of its lawful acts exciting others to do unlawful acts.

14. I have dealt above with the circumstances from which the learned Sessions Judge derived the conclusion that the participants in the meeting of the Congress party were members of an unlawful assembly from the beginning, and it seems obvious that these circumstances, neither individually nor cumulatively, justify the conclusion. It is true that common object has to be a matter of in-

ference, but for establishing that an unlawful assembly had been formed the prosecution has to show not merely that it was likely that the assembly in question had for its object one or more of the things specified in section 141 I. P. C. but that the existence of such object or objects is the only reasonable conclusion possible in the circumstances of the case. The circumstances of the present case, far from being of such a conclusive nature, do not even make it probable that the assembly at the Congress meeting was formed with any such common object as could have made it an unlawful assembly.

15. What has next to be seen is whether the assembly which was initially a lawful assembly became subsequently converted into an unlawful assembly. That this could happen cannot be disputed, but the question is whether it did happen. No doubt, this again is a matter of inference deducible from the conduct of the persons composing the assembly. The conduct which may lead to the inference must, however, be of a clear and unequivocal nature and the inference must be irresistible. If the conduct of the assembly is consistent with its having remained a lawful assembly and a reasonable possibility of its having retained its original lawful character is not excluded, it is not possible to hold that the assembly changed into an unlawful assembly. I may now proceed to examine in this light the conduct of the assembly apart from the speech delivered there and the slogans shouted.

16-20. (After discussion of evidence the judgment proceeds). The result of the above discussion is that it is not possible to hold that persons assembled in the Congress meeting were members of an unlawful assembly to start with or became members of an unlawful assembly at any later stage so long at least as the exchange of firing was going on. Note may here be made of the fact that Mukhtar Ali S. I. states that he too fired six shots from his service revolver towards east, and that when he did so he was towards west of the Gallara and near the Chabutra of Chhotey Lal Bania. This would suggest that the situation required firing towards east of the Galiara where the Jan Sangh meeting was held. However, it seems undeniable that on the evidence and the circumstances of the case a reasonable possibility that those persons in the Congress meeting who used force did so only for a defensive purpose cannot be excluded.

21. Before passing on to another aspect of the case I must refer to the statement of Mukhar Ali S. I. to the effect that when lathi fight between the two parties

began he declared that the two assemblies had become unlawful and they should disperse. If what Mukhtar Ali said is construed as an expression, at the spot, of Mukhtar Ali's opinion as to the legal character of the two assemblies and an effort on his part to disperse them nothing need be said about it. If, however, it is suggested that it had itself the effect of making the assemblies unlawful or that upon the failure of the members of the assemblies to disperse after having been commanded to do so, they automatically became members of unlawful assemblies the suggestion has to be repelled. The statutory provision relating to dispersal of assemblies is contained in Section 127 Cr. P. C. which runs as follows:

"(1) Any Magistrate or officer in charge of a police station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

(2) This section applies also to the police in the town of Calcutta."

It is obvious that the power to command an assembly to disperse has been conferred only upon a Magistrate or officer in charge of a police station, and Mukhtar Ali was, therefore, incompetent to act under the above provision. Further, the failure of an assembly of persons to disperse or even its refusal to do so has the effect of calling into play the provisions of section 128 Cr. P. C. and of empowering a Magistrate or an officer in charge of a police station to proceed under that section, but it does not result in the conversion of a lawful assembly into an unlawful assembly. The unlawful character of the assembly has to be determined with reference to Section 141 I. P. C. alone and the disobedience of a command issued under section 127 Cr. P. C. is not a relevant consideration for that purpose. Reference in this connection may be made to Giridhara Singh v. Emperor, 64 Ind Cas 373 = (AIR 1922 Lah 135).

22. Even if it is supposed that some of the persons participating in the Congress meeting were there for any of the objects specified in Section 141 I. P. C. a conclusion not warranted by the circumstances. I do not think it is possible to say definitely that their number was five or more. As mentioned above there is nothing to indicate the number of persons who took part in the throwing of brickbats or in using lathis from amongst the participants of the Congress meeting and it would be wrong to assume that at least five must have indulged in an activity of this nature. There is certainly evidence to the effect that six persons

in the Congress meeting had firearms with them and ten or twelve others came there with firearms when the firing was going on. So far as ten or twelve persons who came later, it must be admitted that they could not be credited with any of the objects mentioned in Section 141 I. P. C., because they came when fire was being exchanged and the object might only have been to defend the members of the Congress party meeting by repelling the attack on them. Apart from that, this part of the prosecution story does not appear to be correct. It is strange that none of the prosecution witnesses has been able to give the name of even one of these ten or twelve persons and it is difficult to accept that all of them were not only unknown persons but their names could not be ascertained even by investigation. The story relating to six persons being present at the meeting with firearms does not also appear to be free from doubt.

I have already noted that the part assigned to Ram Bilas appellant is obviously exaggerated, and what he actually did and at what stage cannot be determined with certainty. Then, it will be seen that Sri Mohan Lal Verma appellant did not actually fire although strangely enough, he is said to have kept his pistol in position. About the firing done by others there is no evidence except that of the policemen. I do not mean that the evidence should be rejected merely because it is that of policemen but I certainly regard it as strange that no other witness except the policemen saw any of these four persons firing. On a careful consideration of the evidence I find it difficult to arrive at the conclusion that five or more persons indulged in firing from the side of the Congress party. Even assuming, therefore, that the object of some of the members of the Congress party meeting became unlawful within the meaning of section 141 I. P. C. at some stage, it cannot be held that such persons were five or more in number.

23. But suppose that five or more persons in that assembly came to have at some point of time one or more of the objects mentioned in Section 141 I. P. C. and that they then constituted an unlawful assembly. Would that be sufficient for holding that all those who were participating in the Congress party meeting and they were, it must be remembered, more than 1000 in number and were present there when the fight took place became members of that unlawful assembly? All of them could not possibly have shared the common object of the unlawful assembly if any such assembly ever came to exist. They must have been drawn to and stayed at the place where the Congress party meeting was held for

different reasons and it is not possible to suggest that they ever had any community of object. The question then is whether the mere presence of a person at that place made him a member of the unlawful assembly.

24. Section 142 I. P. C. has to be considered in this connection. The section reads as follows:

"Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

The first condition for the applicability of the section is that a person should be aware of facts which render any assembly an unlawful assembly. The assembly may actually be or have become an unlawful assembly, but if a person is not aware of the facts which impart that character to the assembly Section 142 I. P. C. does not come into operation. The facts which have the above result are specified in section 141 I. P. C. and it naturally follows that before section 142 I. P. C. can apply to a person he must be proved to have been aware of the existence of the said facts. It is also to be borne in mind that Section 142 I. P. C. speaks of a person 'being aware of facts' and not merely suspecting the existence of facts or having reason to believe that they exist. Obviously, in the circumstances of this case awareness of facts which had brought into existence any unlawful assembly cannot be attributed to a person merely because of his having been present at the place where the Congress meeting was held.

25. What the section next requires is that a person should intentionally join the assembly or continue in it. On the facts of the present case the question of joining an unlawful assembly does not arise because, as I have held above, there was no unlawful assembly to start with. In any case, the considerations which should be taken into account in determining whether a person continued in an unlawful assembly have to be taken into account also in determining whether a person joined an unlawful assembly. In fact section 142 I. P. C. requires the presence of an additional factor before a person can be said to have become a member of an unlawful assembly by reason of joining it, and that factor is that the joining must have been intentional. Let me now examine whether by reason of merely having been present at the time of the fight and at the place where the Congress meeting was held, a person can be said to have continued in an unlawful assembly, assuming that such an assembly came to be formed.

26. In a Division Bench case of this Court, Emperor v. Sheo Dayal, AIR 1933

All 535 it was certainly observed that the word 'continues' in Section 142 I. P. C. "merely means physically present as a member of the unlawful assembly, that is he physically present in the crowd". The Bench, however, proceeded to say that if the defence is that a particular person was present among the rioters with an innocent intention, the burden of proving that intention lies upon the defence. It may be noted that section 142 I. P. C. does not provide that under the conditions laid down in that section a person is merely presumed to be a member of an unlawful assembly, but that he is said to be a member of an unlawful assembly'. Obviously, therefore, what the Bench intended to lay down was that physical presence in an unlawful assembly would indicate continuance in the assembly unless innocent intention is proved. The mental element is not therefore, to be excluded or ignored in considering whether a person has continued in an unlawful assembly, because in that case there would be no escape for the person concerned from the effect of Section 142 I. P. C. by proof of innocent intention. It appears undeniable that physical presence has at least to be voluntary before it can amount to 'continuing' within the meaning of the section. The law laid down in the above case, therefore, is not that physical presence even if it is unaccompanied by volition, would amount to 'continuing', but that physical presence will be deemed to be the result of volition unless the absence of volition is shown.

27. That volition is an essential requisite for 'continuance' in an unlawful assembly as contemplated by Section 142 I. P. C. has been made clear by a later Division Bench case of this Court, *Rex v. Sadla*, AIR 1950 All 418, where Raghubar Dayal, J. observed as follows in relation to one of the accused persons involved in that case:

"The question whether Sadla can be said to have been a member of the unlawful assembly after he had fallen down and been beaten depends on the determination of the fact whether he, who formed a member of the unlawful assembly from the beginning, had withdrawn himself from the unlawful assembly and had thus dissociated himself with any further membership. It does not solely depend on the fact that he became incapable of taking part in the attack. His withdrawal from the unlawful assembly could be either actual and voluntary, which would be if he removed himself from the assembly and went away, clearly indicating that he was averse to taking any further part in the incident. If a member of an unlawful assembly is not able to walk away like this and has perforce to remain on the

spot either because he is so injured that he cannot remove himself or because he is held up by others, he may still continue to be a member of the unlawful assembly if he shares the common object of the assembly subsequent to his being made helpless in assaulting the victim. He can, however, in such a position disallow his share in the common object by expressions, leaving no doubt that he did not share the object any more. If he is also unable to express himself in this respect, it would be fair to presume that he was incapable of both taking part and of sharing the objects of the unlawful assembly and that he had withdrawn himself from the unlawful assembly."

28. The position, therefore, is that 'continuance' is not in all circumstances to be equated with physical presence, although, unless the contrary is shown either by evidence of circumstances, physical presence would lead to the inference that it was accompanied by the mental element necessary for continuance.

29. It should also be noted that Section 142 I. P. C. uses the words 'continues in' which necessarily carries the implication that the person concerned remains a part of the assembly. Physical presence near about the place where an unlawful assembly has been formed cannot by itself and in all situations prove remaining a part of the assembly or, to use the words of the section, continuing 'in' the assembly. In the present case there was admittedly a crowd of over 1000 persons in the Congress party meeting. People present in the meeting were evidently members of a lawful assembly to start with. If at a later stage some persons out of them formed an unlawful assembly the result was that there came into existence two assemblies at that place, one a lawful assembly and the other an unlawful assembly. Further, it is not known where the members of the unlawful assembly were sitting whether they were scattered about or were sitting in a group. Is it possible in these circumstances to say that all those who were participating in the meeting 'continued' in the unlawful assembly of those five persons merely because they were physically present. Section 142 I. P. C. besides being a part of a penal statute provides for something which becomes the basis of constructive liability and the words used therein must, therefore, receive a strict interpretation. Both on principle and on authority it seems clear that mere presence at the place of the Congress meeting could not amount to 'continuing in' an unlawful assembly even if it is supposed that such an assembly came to be formed by some persons at some stage. It will be useful to refer in this connection to the case of *Maung Oh Kyan v. Emperor*, AIR 1925

Rang 243 where a learned Judge of the Rangoon High Court, referring to the presence of a person in a meeting of about 40 or 50 persons observed:

"The learned Sessions Judge's view was that by remaining in the meeting he became a member of the unlawful assembly formed by those members who did use force. This appears to me to be an unjustifiable extension of the meaning of Ss. 141 and 142 of the Indian Penal Code. The five or more persons who used violence may have formed an unlawful assembly. But I see no ground for holding that all the persons assembled at the meeting were also members of this unlawful assembly. If this view of the law be correct, then at any public meeting however peaceful be its objects, the whole meeting at once becomes an unlawful assembly directly five or more persons present at the meeting act with a common object of using criminal force. The actions of a few members of an assembly which is gathered together for a perfectly lawful purpose, cannot by themselves, make the whole assembly an unlawful assembly. The circumstances must be such as at least to justify the presumption that the other persons present associated themselves with the offending members. The mere fact that they are with the offending members at the time does not make them members of the unlawful assembly formed by those members. They must be shown to have joined or continued in that smaller assembly. It is not shown in the present case that the majority of the original members of the meeting approved of the tactics of violence or in any way associated themselves with those tactics. If the petitioner be held to have been a member of an unlawful assembly in these circumstances then the prosecution witnesses who were the victims of the violence would also have to be held to be such members. There is nothing to show that these witnesses could not have left the meeting if they had wished to do so, and all that has been found against the petitioners is that he did not leave the meeting.

In my opinion the facts held to be established did not justify the finding that the petitioner was ever a member of the unlawful assembly formed by those persons present at the meeting who employed violence."

30. In the above discussion I have supposed that at some stage of the Congress party meeting an unlawful assembly was formed and even on that supposition I find that nobody can be said to have become a member of the assembly by reason of his mere presence at the place of the meeting. However, the evidence and the circumstances of the case do not

establish that any unlawful assembly was formed until the Jan Sangh party took to its heels. The individual acts alleged by the prosecution have not been satisfactorily established. Further, the circumstances show that such acts were justified and, at any rate, a reasonable possibility of their having been justified is not excluded.

31. There is certainly evidence to the effect that some participants of the Congress meeting chased the Jan Sangh party when the latter was running away and also burnt and destroyed some articles which the Jan Sangh party had brought for its meeting. These acts were clearly unjustified and cannot be said to have been done in the exercise of the right of private defence. The persons who did so, if they were five or more in number, did form an unlawful assembly at the time of doing it, but the question is who they were. These persons are not known and the learned Sessions Judge too has on this ground acquitted the appellants of the charge under Section 435 I. P. C.

32. In the result I hold that none of the appellants has been proved to be guilty of the charges of which they have been convicted. On the view that I take of the case it is unnecessary for me to deal with the criticism to which the bona fides and genuineness of the investigation have been subjected by the learned counsel for the appellants. It is also unnecessary to deal with the defence evidence, particularly because no reliance was placed on it in the course of argument.

33. The two appeals are allowed. The convictions and sentences of the appellants in both the appeals are set aside and they are acquitted. The appellants are on bail, they need not surrender to their bails and their bail bonds are discharged.

KSB Convictions and sentences set aside.

AIR 1969 ALLAHABAD 139 (V 56 C 26)

S. N. SINGH, J.

Agrawal Pathshala, Mohalla Mandi Bans Moradabad, Applicant v. Karim Bux and others, Opposite Party.

Civil Revn. No. 89 of 1967, D/- 14-9-1967, from order of Munsif, Moradabad, D/- 31-12-1966.

Civil P. C. (1908), O. 21, R. 58 Proviso and S. 115 — "Objection designedly or unnecessarily delayed" — There must be evidence on record to that effect — Dismissal of objection without evidence — Illegality and material irregularity in

exercise of jurisdiction — Case covered by Sub-ss. (b) and (c) of S. 115.

In order that a Court may come to the conclusion that an objection is designedly and unnecessarily delayed there must be some evidence to the effect that the delay in filing the objection was intentional and with some purpose. Filing of an objection five days after knowledge cannot ordinarily be said to be unnecessarily and designedly delay, when except for the objection and the counter objection of the parties there was no evidence to come to such conclusion. When there is no time limit, a reasonable time has to be considered. In considering the question of designedly and unnecessary delay the Court has to apply its mind. (Para 4)

Objection was filed 25 days after the attachment and 5 days after the knowledge of attachment. After the notice was served on decree-holder and objection was taken by him, the case was listed on various dates. More than 2 years after that, the Court dismissed the objection under the proviso to R. 58 of O. 21 without deciding the case on merits.

Held that the Court acted illegally and with material irregularity in the exercise of jurisdiction inasmuch as there was no evidence in support of its finding about unnecessary delay and it also failed to exercise jurisdiction rejecting the objection without going into the merits of the case. The case was covered both by subsections (b) and (c) of S. 115, C. P. C. (Para 9)

Cases Referred: Chronological Paras (1959) 1959 MPLJ (Notes) 67, Parasmal v. R. S. Rekhchand Gopaldas Mohta 4

(1937) AIR 1937 Oudh 268 (V. 24) — 1937 Oudh WN 48, Barati Milan v. Ram Adhin 6. 9

(1933) AIR 1933 All 751 (1) (V 20) — 145 Ind Cas 444, Mt. Rajeshwari Bibi v. Hari Ram 6. 9

(1917) AIR 1917 Cal 9 (2) (V 4) — 41 Ind Cas 446, Surendra Nath v. Rajani Kanta Das 4

K. C. Agrawal, for Applicant; R. B. Misra, for Opposite Party.

ORDER: — This revision is directed against an order rejecting the objection under the proviso to Order 21, Rule 58 C. P. C.

2. It appears that the property in dispute was attached on 6th January 1964 and an objection to this attachment was filed on 31st January 1964 by the petitioner Agrawal Pathshala. After the filing of this objection notice was issued and in pursuance of that notice on 4th April 1964 an objection was filed on behalf of the decree-holder. Thereafter the case was listed on various dates and the same could not be taken because of other work. For some time the case could not

be disposed of because of the death of one of the judgment-debtors and pendency of substitution application. More than two years after when the case was taken up on 13th August 1966 the learned Munsif issued notice to the petitioner to show cause why the objection be not dismissed under the proviso to Order 21, Rule 58 C. P. C. The proviso is as follows:—

"Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed."

3. The petitioner filed an application in reply to the show cause notice and submitted that the petitioner was an institution and that it did not know about the attachment, it was stated that as soon as the attachment was known to the petitioner it called a meeting of the members of the institution and thereafter having passed the resolution filed the present objection within five days of the passing of the resolution. The application of the petitioner was objected to by the decree-holder. Thereafter the Munsif without recording any evidence and without applying his mind as to what was meant by the expression "designedly and unnecessarily delayed" he rejected the objection under the proviso to Order 21, Rule 58 C. P. C. without going in the merits of the claim.

4. Against this order the present revision has been filed. It has been contended on behalf of the petitioner that the Munsif was not justified in summarily rejecting the objection on the ground of its being designedly and unnecessarily delayed. It was submitted that this could have been done at the preliminary stage. When the objection was filed, the Munsif without issuing notice to the decree-holder could have called upon the petitioner to show cause why the claim be not rejected under the proviso. It was submitted that once the Munsif started investigation the power under the proviso could not be exercised. Reliance was placed on the cases of Surendra Nath v. Rajni Kanta Das, AIR 1917 Cal 9 (2) and Parasmal v. R. S. Rekhchand Gopaldas Mohta, 1959 MPLJ (Notes) 67 wherein the Madhya Pradesh High Court held "that the power of summarily rejecting an objection under the proviso to Order 21, Rule 58, C. P. C. on the ground of delay has to be exercised before commencing the investigation. That power cannot be exercised if the Court has started investigation of the case on merits. If this power is not exercised before commencing the investigation, the Court has to decide the case on merits. It has no inherent power to reject a claim or objection on the ground of delay."

5. My attention was also drawn to the amendment by this Court. This Court

directed the addition of the following words at the end of sub-rule (2):—

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

It was contended that by the addition of this sub-rule this Court considered that the objection could be filed even after the sale had taken place. Learned counsel submitted that when there was no period of limitation prescribed for the filing of an objection and sale in pursuance of the attachment could not be held within a period of one month thereof, a period of one month should be taken to be a reasonable time within which an objection under Order 21, Rule 58 C. P. C. could be filed and such an objection should not be held to be designedly and unnecessarily delayed.

6. As against this submission of the learned counsel it was submitted by the learned counsel for the opposite parties that the court having considered the question of delay under the proviso after having afforded opportunity to the objector the order was not revisable. Reliance was placed on the cases of Mt. Rajeshwari Bibi v. Hari Ram, AIR 1933 All 751 (1) and Barati Mian v. Ram Adhin, AIR 1937 Oudh 268. It was also submitted that the word 'investigation' used in Order 21, Rule 58 C. P. C. would not mean merely issuing of notice. According to the learned counsel investigation starts when evidence in support of the objection was taken and not before it. It was argued that in this case before the Munsif proposed to start investigation he issued notice and without actually starting the investigation considered the question of unnecessary delay and rejected the objection on that ground. His submission is that howsoever erroneous that finding may be it has to be accepted in revision and the revision in the instant case was not maintainable.

7. I have considered the respective submissions of the learned counsel but in my opinion the contention put forth on behalf of the petitioner has force. The statement of facts given above would show that the objection had been filed only 25 days after attachment and the case of the petitioner was that it came to know about this objection much after the attachment and it was only five days after the knowledge that the objection had been filed. The learned Munsif does not appear to have considered as to when did the petitioner come to know about the attachment. It appears that he assumed that the petitioner came to know of it only five days before filing the actual objection. He considered that

even if the petitioner filed objection after five days of the passing of the resolution it was designedly and unnecessarily delayed. In order that one may come to the conclusion that an objection is designedly and unnecessarily delayed there must be some evidence to the effect that the delay in filing the objection was intentional and with some purpose. Filing of an objection five days after knowledge cannot ordinarily be said to be unnecessarily and designedly delayed. Except for the objection and the counter objection of the parties there is no evidence nor has the Munsif shown as to what was the circumstance which impelled him to come to this conclusion.

8. When the decree-holder at the first instance filed objection on 5th May 1964 he did not object to the filing of the objection on the ground of delay. He had contested the objection on merits and had not said a word about limitation.

9. I agree with the learned counsel for the petitioner that when there is no time limit a reasonable time has to be considered and when the objection was filed within five days of the knowledge it could not be considered to be unnecessarily and designedly delayed. In considering the question of designedly and unnecessary delay the learned Munsif has not applied his mind to this aspect at all. It is true that he couched his order in the same words as have been mentioned in the proviso to Order 21, Rule 58, C. P. C. There is nothing on the record to suggest as to how he came to that conclusion. There does not appear to be any basis in evidence for the conclusion arrived at by the learned Munsif. I am also of opinion that in this case investigation had started when the present order was passed. The objection had been filed on 31st January 1964. Notice was issued on the same date to the decree-holder and thereafter objection was filed on the 4th April 1964. Dates were fixed for finally disposing of the matter but for one reason or the other the case could not be disposed of. After a lapse of two years to dispose of the matter summarily without deciding the merits in my opinion is not a proper exercise of the discretion by the learned Munsif. The decisions relied on by the learned counsel for the opposite parties in my opinion do not help the opposite parties.

In the case of AIR 1933 All 751(1) an objection had been summarily rejected on the ground of delay without affording opportunity to the petitioner of that case. This Court allowed the revision and set aside the order on the ground that without giving opportunity to the petitioner it was not at all proper for the trial Court to have rejected the objection. In the body of the judgment no doubt there is an observation that if the Munsif had

afforded opportunity to the petitioner and he had considered the question of unnecessary delay then the revision would not have been maintainable. Reliance is placed on this observation of this Court but this observation has to be considered in the light of the decision of that case and this observation alone cannot give strength to the objection of the opposite parties. To the same effect is the case of AIR 1937 Oudh 268. In my opinion the learned Munsif acted illegally and with material irregularity in the exercise of jurisdiction inasmuch as there was no evidence in support of his finding about unnecessary delay and he also failed to exercise jurisdiction in rejecting the objection without going into the merits of the case. Thus this case is covered both by Section 115(b) and (c) C.P.C.

10. In the result this revision is allowed, the order of the learned Munsif summarily rejecting the objection is set aside and he is directed to decide the objection on merits. There will be no order as to costs.

HGP/D.V.C.

Revision allowed.

AIR 1969 ALLAHABAD 142 (V 56 C 27)**FULL BENCH**

**JAGDISH SAHAI, R. S. PATHAK AND
A. K. KIRTY, JJ.**

Chandra Bhushan Misra, Appellant v.
Smt. Jayatri Devi, Respondent.

Civil Misc. Appln. No. Nil of 1967, In
Second Appeal No. 3105 of 1963, D/
20-12-1967.

(A) Court Fees and Suits Valuations — Court-fees Act (1870), S. 13 — Refund of court-fee — Remand in appeal under O. 41, R. 23, Civil P. C. (as amended in U. P.) on ground that it was in the interest of justice to do so — Appellant entitled to refund of court-fee.

Per Majority (Jagdish Sahai J. contra): Whenever an appeal is remanded by the High Court under O. 41, R. 23 (as amended in U. P.) on the ground that it is in the interest of justice to do so, the appellant is entitled to a refund of the court-fee paid on the memorandum of appeal. 1964 All LJ 868. Approved.
(Paras 5, 53 & 31)

When reading S. 13 of the Court-fees Act the reference therein to Section 351 of the Code of 1859 must be construed as a reference to Order 41, Rule 23 of the Code of 1908. At the time when S. 13 was framed there was no power in High Courts to amend the provisions of the Civil P. C. That power was vested in the High Courts, for the first time by Section 122 of the Code of 1908. It was certainly not contained in the Code of

1859, and that was the Code, which governed civil procedure when the Court-fees Act was enacted. It is not possible to contemplate that when the Legislature framed section 13 of the Court-fees Act, it could have had in mind that subsequently almost four decades later there would be a Code which would confer such power upon the High Courts. Far less could it have contemplated that still a half century thereafter a High Court would so amend the power to remand a suit in appeal as to add to further ground in which the power of remand may be exercised. Therefore the grounds which the Legislature can be said to have had in mind are those which must be discovered within the scope of Section 351 of the Code of 1859 alone.

(Para 40)

Clause 8 of the General Clauses Act can be of no assistance. The Code of 1908, was enacted after the General Clauses Act was brought into operation. But it repealed and enacted in Order 41, Rule 23 the provisions of Section 562 of the Code of 1882. The Code of 1908 did not repeal the Code of 1859.

(Para 41)

(B) Civil P. C. (1908), Ss. 121 and 128 — "Body of the Code" in S. 128 — Expression refers to only sections of the Code and not to first Schedule and the Rules framed thereunder.

The expression "body of the Code" in S. 128 is not defined. But upon an analysis of the several provisions of the Act it will be clear that the expression "body of the Code" is employed only where reference is intended to the Sections of the Act. That is so will appear from a perusal of the provisions of Sections 7, 8, 96, 100, 104, 121 and 128. These sections are jurisdictional provisions and having regard to their subject-matter the expression "body of the Code" can refer to the sections only and not to the rules. The conclusion is reinforced if regard is had to Section 121 and Section 128. Section 121 declares that the rules in the First Schedule shall have effect "as if enacted in the body of this Code". Section 128 provides that the rules made by the High Courts "shall be not inconsistent with the provisions in the body of this Code", which rules by Section 127 are deemed to have the same force and effect as if they had been contained in the First Schedule. It is clear from Sections 121 and 128 that the rules contained in the First Schedule and the rules framed by the High Courts are in fact outside the "body of the Code". The sections alone therefore comprise the "body of the Code."

(Paras 45 & 46)

The Sections of the Act namely the "body of the Code", can be altered by legislation only. Legislation may be effected by Parliament or by a State Legislature. The sections cannot be altered or

amended by the High Courts. In that sense the "body of the Code" consists of provisions which are fundamental and less easily amenable to amendment than the rules contained in the First Schedule. The sections enjoy a certain status and a related degree of permanency denied to the rules contained in the First Schedule which can be annulled, altered or added to by rules made by the High Courts under Section 122. The power to annul, modify or add to the rules contained in the First Schedule has been conferred upon the High Courts for the purpose of answering local needs and adapting the First Schedule to effectively serve that purpose. In regard to their force and effect the rules framed by the High Courts, are assimilated into the First Schedule. By virtue of S. 121 the rules in First Schedule have effect as if enacted in the body of the Code. Accordingly, the rules contained in the First Schedule as well as the rules framed by the High Courts must be considered in their effect as if they are further provisions in the body of the Code. With section 128 safeguarding that the rules framed by the High Courts would not be inconsistent with the sections of the Code, the Legislature provided a harmonious balance between the sections, the rules in the First Schedule, and the rules framed by the High Courts. The mutual relationship in which these three classified categories of law have been placed demonstrates the organic unity running through the entire content of the Code. AIR 1917 Cal 657 & AIR 1942 All 387 & AIR 1945 Nag 83 & AIR 1917 Cal 44 (FB) & AIR 1946 Bom 361 & AIR 1954 Madh B. 156 & AIR 1957 Andh Pra 172, Ref.

(Paras 47 and 49)

When S. 158 speaks of the "corresponding rule" of the Code of 1908 it refers to the rule in the First schedule as amended, supplemented or replaced by the rule framed by the High Court. It is not possible to come to a contrary conclusion. There is no ground for limiting the reference in Section 13 of the Court-fees Act to those provisions only of Order 41, Rule 23 which were originally enacted in the First Schedule. The terms of Section 158 are wide enough to refer to the entire sweep of the rule. There is nothing in the terms of section 158 which limits the reference to the rule to the terms in which it was originally enacted. Further the object behind Section 13 appears to be that court-fee should be levied only once in the progress of a suit from the lower court to the appellate court even though the case is remanded for retrial and the movement to the appellate court repeated. It appears to be intended that the litigant should be relieved of the burden of court-fee in obtaining the removal of an erro-

neous decision of the lower court and a retrial of the case. That is also demonstrated by the terms of the proviso to Section 13, which limit the refund of the court-fee to that part of the subject matter in respect of which the suit is remanded. If a refund of the court-fee is available when the case is remanded because the appellate court disagrees with the disposal of the suit by the lower court on the preliminary point, there is no reason why the same right should not be recognised in an appellant if the appellate court finds it necessary to remand the case on any other ground. The remand of the case for retrial is the material event entitling the appellant to a refund of the court-fee. It is immaterial that the remand has been ordered for one reason or another. Language of Section 13 is uniform in its meaning throughout the territories of India. It must be taken as referring to Order 41, Rule 23. The reference to Order 41, Rule 23 does not make that rule an integral part of Section 13 as if it were incorporated in it. All that it means is that when Section 13 is applied it must be read with Order 41, Rule 23 to discover the grounds for remand contemplated by it. The benefit of Section 13 will vary from State to State according to the terms of Order 41, Rule 23 in each State. That variance arises not because of any different meaning assigned to the provisions of Section 13. It follows from the language of Order 41, Rule 23. The difference turns not on what Section 13 says but on how Order 41, R. 23 reads: AIR 1963 All 433 (FB), Ref. (Paras 51 & 52)

Per Jagdish Sahai, J. :—

The rule contemplated by Section 158 of the present Code is the rule as framed by the Legislature and not the one as framed or amended by the delegatee the High Court. This becomes apparent by the use of the words "be taken to be made to this Code or to its corresponding Part, Order, Section or Rule". "Its" obviously refers to the "Code". Therefore, the words in quotation would read "be taken to be made to this Code or to the corresponding part, Order, Section or Rule of this Code". Order XLI, Rule 23, is of "this Code" but the amended Order XLI, Rule 23, is not of 'this Code'. It is by a legal fiction to be treated of the Code and would have effect as if it was of the Code. Combined effect of Sections 122 and 127 of the Code (1908), or any of those provisions separately is not to result in the repeal of Order XLI, Rule 23, as passed by the Central Legislature. The amended rule, therefore, does not obliterate the original rule, but permits its eclipse only for the State where it has been amended. Section 127 only introduces a legal fiction, that is, that the amended rule will be deemed a rule con-

tained in the Code though in fact it is not. This is apparent from the use of the words "as if they had been contained in the first Schedule." Section 158 does not refer to rules which in fact are not rules, but by legal fiction are treated to be rules. The rules framed by the High Court will, by virtue of Section 127 of the present Code "have the same force and effect" as the original rules contained in the Code, but they do not for that reason repeal the original rules and themselves become rules, to have a similar effect as another provision is not to make the two provisions the same or one.
 (Paras 21 & 23)

(C) Civil P. C. (1908), Preamble — Interpretation of Statutes — Statute dealing with a subject is exhaustive on the subject — No relief not contemplated thereby can be given. AIR 1952 SC 9, Rel. on.
 (Para 28)

Cases Referred: Chronological Paras
 (1964) 1964 All LJ 868=ILR (1964)
 2 All 989, Raja Virendra Shah Ju Deo v. State of Uttar Pradesh, 2, 27, 32, 53

(1963) AIR 1963 All 433 (V 50)=
 1963 (2) Cri LJ 244 (FB), Municipal Board, Kanpur v. Janki Prasad, 14, 52

(1963) AIR 1963 All 459 (V 50)=
 ILR (1961) 1 All 382 (FB), Official Receiver, Jhansi v. Jugal Kishore, 28
 (1959) AIR 1959 SC 135 (V 46)=
 1959 SCR 1350, Sales Tax Officer v. Kanhaiya Lal Mukundlal Saraf, 29

(1958) AIR 1958 All 766 (V 45)=
 ILR (1960) 1 All 1 (FB), Munna Lal v. Abir Chand, 30

(1957) AIR 1957 All 734 (V 41)=
 1957 All LJ 650, Tej Bahadur v. Pearcey Lal, 30

(1957) AIR 1957 Andh Pra 172 (V 44)=
 ILR (1957) Andh 1 (FB), Satyanarayana v. Venkata Subbiah, 30

(1956) AIR 1956 Punj 215 (V 43)=
 58 Pun LR 355, Sohan Singh v. Oriental Bank of Commerce, 30

(1954) AIR 1954 Madh B. 156 (V 41). Laxmikumar Srinivas Das v. Krishnaram Baldev Bank Lashkar, 47

(1952) AIR 1952 SC 9 (V 39)=1952 SCR 36, Ganga Saran v. Firm Ram Charan Ram Gopal, 47

(1946) AIR 1946 Bom 361 (V 33)=
 48 Bom LR 252, Sheshgiridas Shambhag v. Sunderrao, 47

(1945) AIR 1945 Nag 83 (V 32)=
 ILR (1944) Nag 561, Trimbak Bhikaji v. Dhomappa Narayanappa, 47

(1942) AIR 1942 All 387 (V 29)=
 ILR (1942) All 862, Karam Singh v. Kunwar Sen, 47

(1942) AIR 1942 Mad 464 (V 29)=
 1942-1 Mad LJ 451, In re Vedavyaswami Devasthanam, 30

(1938) AIR 1938 Mad 438 (V 25)= ILR (1938) Mad 734 (FB), Bademian Saheb v. Jankan Saheb, 47
(1936) AIR 1936 Rang 352 (V 23)= 164 Ind Cas 639, U Po Toke v. U Lu Gyi, 30
(1920) AIR 1920 All 54 (V 7)=57 Ind Cas 26, Lalta Prasad v. Sheoraj Singh, 30
(1917) AIR 1917 Cal 44 (V 4)=ILR 44 Cal 929 (FB), Abdul Karim Abu Ahmad Khan v. Allahabad Bank Ltd, 47
(1917) AIR 1917 Cal 657 (V 4)= ILR 43 Cal 148, Mani Mohan Mandal v. Ramtaran Mandal, 47
(1886) 31 Ch. D 607-55 LJ Ch. 488, In re Wood's Estate Ex parte Commrs. of Works and Buildings (1885) 10 AC 364=54 LJQB 473, Mayor & C. of Portsmouth v. Smith, 17

C. P. Srivastava, for Appellant; Sripat Narain Singh, for Respondent.

JAGDISH SAHAI, J.:— I have had the advantage of reading the opinion prepared by my brother Pathak. I regret, for reasons given in this opinion, I am unable to agree with the conclusion drawn by him.

2. Being doubtful of the correctness of the decision of this Court in Raja Virendra Shah Ju Deo v. State of Uttar Pradesh, 1964 All LJ 868 our brother G. C. Mathur has referred this case to a Full Bench. This is how the matter has come before us.

3. This case arises out of an application made by the appellant in second appeal no. 3105 of 1963 under Section 13 of the Court-fees Act, 1870 (hereinafter referred to as the Act).

4. This Court allowed the second appeal aforesaid on 2nd of January 1967 and set aside the decree passed by the first appellate court. It further remanded the case to the first appellate court with the direction to rehear the appeal.

5. The prayer contained on the instant application reads:—

"It is, therefore, most respectfully prayed that this Hon'ble Court be pleased to grant the applicant a certificate authorising him to receive back the full amount of court-fee of Rs. 717.50 paid in the above noted second appeal from the Collector of Varanasi or pass any other and further order which may be deemed fit and proper in the ends of justice."

Section 13 of the Act reads:—

"If an appeal or plaint, which has been rejected by the lower court on any of the grounds mentioned in the Code of Civil Procedure, is ordered to be received, or if a suit is remanded in appeal on any of the grounds mentioned in Section 351 of the same Code for a second decision by the lower court, the appellate

who under the old Section 13 C. P. C. claim under the parties to the former suit. The learned Judge says that in the language of English Law they are privies to those parties and such privies according to Lord Coke are of three kinds:—(1) privies in blood, (2) privies in estate and (3) privies in law. Learned Judge refers to a six-fold division according to Wharton's Law Lexicon, page 764. He however expresses that he was unable to discover any original authority for such division. Therein he refers also to privies in representation such as the executor or administrator to his testator or intestate. The second main division is of persons who though not claiming under the parties to the former suit were represented by them. Such persons are the persons interested in the estate of a testator and share-holders in a company etc. In India members of a joint undivided family also are such persons as held in *Jogendro Deb Roy v. Funindro Deb*, (1873) 14 Moo Ind App 367 at p. 376 (PC). The third category is of strangers who are neither privies to nor represented by the parties to the former suit. Whereas category Nos. 1 and 2 may be bound by the judgments in the former suit, category No. 3 will not be affected by judgment inter partes which is not a judgment in rem. There is nothing in the statement of the learned Judge (based mostly as it is on English law) which can support the contention of the learned counsel. It cannot be accepted on the basis of the said decision that the plaintiff was a privy to or was represented by any party to the former suit. We are not concerned, for the purposes of this suit with the general principles of res judicata which are much wider than Section 11 C. P. C.

9. Evidently the plaintiff neither literally speaking nor otherwise by any stretch of imagination, can be deemed to claim under the 5th defendant, who was a party to the former suit. Much as the learned Counsel would like to regard her as a privy in estate, she is not within the meaning of that term stretched to its fullest extent. A privy to a party in English law is but a person claiming under that party and he stands in the shoes of the party under whom he claims. Plaintiff is not certainly any of such privies. The learned author of Bigelow on *Estoppel* in 5th edition has stated that the ground of privity is the property and not personal relation and this view has been accepted by Mahmood, J., in *Sita Ram v. Amir Begum*, (1886) ILR 8 All 324 at p. 327 and cited with approval by the Madras High Court in *Seshappayya v. Venkat Ramana Upadya*, (1910) ILR 33 Mad 459 at p. 461-2. The learned author at page 143 of the said edition has stated thus:—

"To make a man privy to an action he must have acquired an interest in the subject-matter of the action either by inheritance or succession or by purchase from a party subsequently to the action or he must hold property subordinately." As an instance of subordinate holding, the learned author takes the case of a landlord and tenant and says:

"A lawful judgment which deprives the landlord of the estate deprives the tenant of necessity of his subordinate right."

It is thus clear that it is the successor-in-interest or a purchaser from a party who becomes a privy and that only in respect of the interest and rights in property to which he has succeeded or which he has purchased. As the learned Judges of the Madras High Court have observed at page 462-3 of the above decision, "the rule that the interest to be bound must be acquired after the action is supported by English and American cases." In *Kali Dayal v. Umesh Pershad*, ILR 1 Pat 174=(AIR 1922 Pat 63), it was observed that a person claims through or under another when he derives title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other, and except in cases specially provided for by statute or common law, he can have no better title than the person through or under whom he claims.

10. Judged in any manner the plaintiff in this case is in no sense a party claiming under defendant 5. She does not claim any right acquired from the 5th defendant. She, indeed, claims in her own right. She cannot be deemed to be the person interested within the meaning of Explanation VI as the said explanation has no application where what the party to the former suit had claimed is a right for himself and not a right in common for both of them. He cannot be said to have represented her in litigation in the absence of a right common to both. The explanation VI cannot therefore be attracted in the absence of representative character of the claim and litigation. It is only in case both these characteristics exist that a person interested though not *eo nomine* a party to the former suit is bound by the decision in that suit. If the defendant 5 had set up only the right of plaintiff a decision on such a plea cannot bind the plaintiff. It was so held in *M. Jagannadham v. M. Venkata Subbarao*, AIR 1927 Mad 844 where a plea of *jus tertii* was raised. On the other hand, where under a settlement properties were given to a husband and his wife and other issues, and in a suit to which the husband and wife were parties it was decided that the settlement was invalid and plaintiff was not bound by it, a subsequent suit

brought by the child on the basis of the same settlement was held by the Madras High Court in Narayananashami v. Parvatibai, AIR 1949 Mad 379 to be barred by res judicata as the husband and wife had not only represented their own interest but of the children. It is unnecessary to multiply citations. Suffice it to say that the case of the plaintiff is not hit by the principle of res judicata as the requisite conditions prescribed by S. 11, C.P.C. to attract that principle have not been satisfied. In our opinion the Court below erred in holding that the suit was barred by res judicata. The appeal therefore must be allowed.

11. It is no doubt next argued that where once the plaintiff has parted with her rights she cannot maintain the present suit. To our mind this is not a matter so obviously simple as to be decided apart from the facts alleged, cause of action pleaded and relief claimed in the plaint. As we have already said this aspect of the case which has to be considered and decided on the facts of the case has not been considered by both the Courts. In our opinion the case has to go back to the Trial Court so that the case may be tried and disposed of in accordance with law. The appeal is allowed. The judgment and decree of the Court below are set aside. The case will go back to the Trial Court so that it may dispose of the case in accordance with law. Plaintiff will get her costs of all Courts. There will be a certificate of refund of court-fee.

GGM/D.V.C.

Appeal allowed.

**AIR 1969 ANDHRA PRADESH 82
(V 56 C 27)**

KONDAIAH, J.

Illapu Nookalamma, Petitioner v. Illapu Simhachalam, Respondent.

Civil Revn. Petn. No. 672 of 1967, D/-16-2-1968 from order of Sub. J., Visakhapatnam, D/- 2-3-1967.

Civil P. C. (1908), O. 18, R. 3 — Burden of proof regarding certain issues lying on defendant — Plaintiff willing to adduce evidence by way of rebuttal — Option can be exercised before commencement of defendant's evidence.

The plaintiff is entitled to express his reservation to adduce evidence by way of rebuttal after the completion of the evidence on the side of the plaintiff and before the commencement of the evidence for the defendant under O. 18, R. 3, in respect of issues of which onus lies on the defendant. The option given to the party, contemplated under O. 18, R. 3, is to be exercised only at or before the

time when the other party that has got right to lead evidence, begins, and not afterwards. AIR 1956 Sau 52 and AIR 1953 Vindh Pra 34 and AIR 1957 Pat 224, Rel. on. (Para 6)

Cases Referred: Chronological Paras (1957) AIR 1957 Pat 224 (V 44). Ramchander Singh v. Bibi Asghari Begam

(1956) AIR 1956 Sau 52 (V 43). Motibhai Prabhubhai v. Umedchand Ku-salchand

(1953) AIR 1953 Vindh Pra 34 (V 40). Nanhey Raja Saheb v. Kedar Nath

A. S. Prakasam for P. Ramachandra Rao, for Petitioner; M. Venkat Rao, for Respondent.

ORDER:— This Civil Revision petition gives rise to an interesting question of law relating to the interpretation of the scope and application of the provisions of Order 18, Rule 3, Civil Procedure Code.

2. The plaintiff-petitioner filed O. S. No. 12 of 65 on the file of the Court of the Subordinate Judge, Visakhapatnam, for declaration of her title and for possession of the suit properties, which is resisted by the sole defendant on several grounds.

3. The Trial Court has framed several issues. The burden is on the plaintiff with regard to all the issues except issues Nos. 8 and 9 with regard to which the burden is on the defendant. After the completion of the examination of the plaintiff's witnesses, a memo by her Counsel reserving her right to adduce rebuttal evidence for the evidence that will be adduced by the defendant on issues Nos. 8 and 9, was filed on 24-11-66. The defendant resisted the claim of the plaintiff to reserve her right to adduce rebuttal evidence at that stage, as being belated, as she should have, according to him, made that claim before she began to let in evidence in the beginning. The lower Court, upholding the objection raised by the defendant, rejected the plaintiff's memo as unacceptable. Aggrieved by that order, the plaintiff preferred this revision petition.

4. Mr. A. S. Prakasam, for the plaintiff, contends that the provisions of Order 18, Rule 3, Civil Procedure Code do not bar the plaintiff's claim to reserve her right to adduce evidence by way of rebuttal before the commencement of the evidence for the defendant and after the completion of the evidence for the plaintiff. Mr. Mangu Venkata Rao, for the respondent contended contra.

5. The point for determination is whether the plaintiff is entitled to reserve her right to adduce evidence by way of rebuttal after the completion of the evidence on her side and before the commencement of the evidence for the defendant.

6. For a proper appreciation of the point at issue, it is necessary and relevant at this stage to consider the provisions of Order 18, Rule 3, Civil Procedure Code, which read thus:—

"Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case."

Order 18, Rule 3, Civil Procedure Code entitled the party beginning to adduce evidence, either to adduce his evidence or reserve it by way of rebuttal to the evidence adduced by the other side on the issues, where the burden lies on the other party, and the party beginning will then be entitled to reply generally on the whole case. In other words, the expression "party beginning" will have to be read with the words "party having the right to begin" in Rule 2. In this case, admittedly it is the plaintiff that has to begin her evidence on the issues where the burden admittedly lies on her. As regards issues Nos. 8 and 9, where admittedly the burden is on the defendant, it is the defendant that has to lead evidence in so far as those issues are concerned, and the plaintiff will certainly have a right to adduce evidence by way of the rebuttal, but to acquire that right of adducing evidence by way of rebuttal, the plaintiff should conform strictly with the provisions of Order 18, Rule 3, Civil Procedure Code. She had to express her reservation to adduce evidence by way of rebuttal, but the pertinent question that arises in this case is as to at what stage or when exactly the plaintiff has option given to her under Order 18, Rule 3, Civil Procedure Code whether it is before the commencement of the plaintiff's evidence as contended by the defendant's Counsel, or after the completion of the evidence on the side of the plaintiff and before the commencement of the evidence for the defendant. A close reading of the provisions of Order 18, Rule 3, Civil Procedure Code makes it clear that the plaintiff is entitled to produce her evidence on those issues (issues Nos. 8 and 9) after the other party has produced all his evidence. That stage would come only when the defendant would complete the evidence of his witnesses. The question of adducing evidence by way of rebuttal would arise only after the evidence for the defendant

is produced before the Court on the issue where the burden is admittedly on the defendant. The option given to the party contemplated under Order 18, Rule 3, Civil Procedure Code will have to be exercised only at or before the time when the other party that has got the right to lead evidence on issues Nos. 8 and 9 actually begins, and not afterwards. Admittedly, the defendant has no right to adduce evidence on issues where the burden lies on him, before the completion of the evidence of the plaintiff's witnesses on the issues where the burden lies on the plaintiff. Hence, at that stage, the plaintiff can certainly claim the reservation contemplated under Order 18, Rule 3, Civil Procedure Code and request the Court that that right would be exercised by the plaintiff after the completion of the evidence of the defendant's witnesses, and a memo, in fact, has been filed before the defendant, who has a right to lead evidence on those issues Nos. 8 and 9, has actually commenced. Hence, on a close and careful reading of the provisions of Order 18, Rule 3, Civil Procedure Code, the plaintiff must be held to be within her limits in filing the memo, after the close of her evidence and before the commencement of the defendant's evidence, exercising the option contemplated in Order 18, Rule 3, Civil Procedure Code.

7. I shall now consider the case law on the subject. In Motibhai Prabhuhhai v. Umedchand Kusalchand, AIR 1956 Sau 52, a Division Bench of the Saurashtra High Court, held that the option is to be exercised at the time the party (having the right to begin) begins and states his case and not at any earlier moment and that there is nothing in Rule 3, to show that the option is to be exercised beforehand, nor that a regular application has to be made to the Court.

8. In Nanhey Raja Saheb v. Kedar Nath, AIR 1953 Vindh Pra 34, Krishnan, J. C., of Vindhya Pradesh Judicial Commissioner's Court held that the plaintiff was entitled to adduce evidence of rebuttal of the evidence adduced by the defence, before the other party begins his evidence.

9. In Ramchander Singh v. Bibi Asghari Begam, AIR 1957 Pat 224, the plaintiff filed a suit for specific performance against the 1st defendant the vendor, and the 2nd defendant, the subsequent vendee, who claims to have purchased the property from the 1st defendant, without notice of the prior agreement in favour of the plaintiff. The plaintiff has let in evidence on his side in support of his claim for specific performance of the suit contract and the 1st defendant also had completed her evidence with regard to the suit agreement. At that stage, the

plaintiff filed an application under Order 18, Rule 3, Civil Procedure Code reserving his right to adduce evidence by way of rebuttal to the evidence that would be produced by the 2nd defendant on issues relating to his subsequent purchase from the 1st defendant bona fide and without notice of the prior agreement in favour of the plaintiff. In those circumstances, it was observed by Raj Kishore Prasad, J., at page 226 thus:—

"It is only when the plaintiff has adduced evidence regarding the contract set up in the plaint between himself and the defendant 1, and after defendant 1 has adduced her evidence in rebuttal of the evidence adduced by the plaintiff regarding the contract between the plaintiff and defendant 1, that the turn of defendant 2 to adduce her evidence in support of her subsequent purchase will come, and, after that is done, the plaintiff will be at liberty to adduce his evidence in rebuttal of the same on issue No. 4 only."

I respectfully agree with the observations of the learned Judge.

10. On the facts and in the circumstances and for the reasons stated above, I have no hesitation to hold that the plaintiff in the instant case is entitled either to adduce evidence after completion of the evidence on her side on other issues and before the defendant commences his evidence, straightway even on issues Nos. 8 and 9, or exercises her option to reserve her right to adduce evidence by way of rebuttal on those issues, after the evidence of the defendant is produced before the Court. Hence, the order of the Court below in rejecting the claim of the plaintiff cannot be sustained.

11. In the result, the order of the lower Court is set aside and the revision petition is allowed permitting the plaintiff to reserve her right to adduce evidence by way of rebuttal on issues Nos. 8 and 9 and other issues where the burden lies on the defendant, after completing the evidence by the defendant. In the circumstances, there will be no order as to costs.

DVT/D.V.C.

Revision allowed.

**AIR 1969 ANDHRA PRADESH 84
(V 56 C 28)**

P. JAGANMOHAN REDDY, C. J.
AND VENKATESAM, J.

Taj Mahal Hotel, Secunderabad, Applicant v. Commissioner of Income-tax, Hyderabad, Respondent.
Case Referred No. 68 of 1964, D/- 1-8-1967.

(A) Civil P. C. (1908), Pre. — Interpretation of Statutes — Definitions — Use

JK/HL/D288/67

of word "includes" in interpretation clause, enlarges the nature and import — It also adds to the natural significance of the word defined — Use of word "means" is to exhaust the significance of the word defined.

The term "include" is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending, not only such things as they signify according to their nature and import, but also those things which the interpretation clause declares that they shall include. The word 'include' is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the word or expressions defined. When it is mentioned that a particular definition 'includes' certain things, it should be taken that the Legislature intended to settle a difference of opinion on the point or wanted to bring in other matters that would not properly come within the ordinary connotation of the word or expression or phrase in question. (Para 5)

The Legislature uses the word 'means' where it wants to exhaust the significance of the term defined and the word 'includes' where it intends that while the term defined should retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive. (1899) AC 99 (195-106), and AIR 1946 Cal 217 and AIR 1932 Mad 474, Rel. on.

(B) Civil P. C. (1908), Pre. — Interpretation of Statutes — Intention and meaning must be found in words used from their natural meaning — Use of dictionaries and standard authors is permissible — Giving of plain and natural meaning is especially important in interpreting statutes of taxation. (Para 5)

The dominant purpose in construing a statute is to ascertain the intention of the legislature as so expressed. This intention and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament. If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning. It is therefore permissible in ascertaining the ordinary sense of parti-

cular words to refer to dictionaries and the works of standard authors which show what that sense was when the statute was passed. The rule that the literal construction of a statute must be adhered to, unless the context renders it plain that such a construction cannot be put on the words, is especially important in cases of statutes which impose taxation. Halsbury's Laws of England 3rd Edn. Para 578, pp. 387-88, Para 585, P. 391, Para 633, P. 417, Rel. on. (Para 6)

(C) Income Tax Act (1922), Ss. 10 (2) (vi-b), (5) — Plants and fixtures — "Sanitary fittings and pipe line fittings" are fixtures in a Hotel — Being used as fixtures they are also "plant" within S. 10 (2) (vi-b).

Since the definition of the word "plant" in S. 10 (5) uses the word "includes", it is obvious that the word "plant" retains its ordinary meaning. According to dictionary meaning (Webster's International) "fixtures" are plant. (Paras 7, 9)

"Sanitary fittings and pipe-line fittings" are, undoubtedly, fixtures employed in carrying on hotel business of boarding and lodging. Since there is nothing in the context or the grouping of the words in which the word 'plant' is used in Section 10 (2) (vi-b), to convey a contrary meaning, the sanitary fittings and pipe-line fittings being fixtures employed in carrying on trade or business by the assessee, come within the meaning of the word 'plant'. (Webster's 3rd new International Dictionary, pages 1731, 861 and Chambers's Twentieth Century Dictionary referred). (Para 11)

(D) Income Tax Act (1922), S. 10 (2) (vi-b) — Development rebate can be granted on moveable as well as immovable fittings.

Sanitary fittings which are removable as well as those that cannot be removed together enable the drainage system to function, or water supply to be made, and enable the assessee to earn the income and hence the totality of the fittings must be taken into account for the purpose of development rebate. There is no reason to confine the rebate only to the sanitary fittings and pipe-line fittings which can be removed, but not those which have been fixed or imbedded in the building and are fixtures. (Para 12)

(E) Income Tax Act (1922), S. 10 (2) (vi-b) — Income Tax Rules (1922), R. 8 (2) — Depreciation — Assessee treating "Sanitary and pipe-line fittings" as "furniture and fittings in boarding house" and claiming depreciation under R. 8 (2) — For development rebate the same classed as 'plant' under S. 10 (2) (vi-b) — Rules made cannot take away what the Act gives — Held assessee's both claims were legal.

An assessee who had fixed up sanitary fittings and pipe lines in his Hotel claimed depreciation allowance on these items treating them as "furniture and fittings in Cinema and boarding house" under Rule 8 (2) and he claimed development rebate on the same items as "plant" under S. 10 (2) (vi-b). It was contended that an assessee once having chosen to treat the items under one class for one purpose cannot treat it differently for another class.

Held, that the reason for the assessee claiming depreciation allowance under Rule 8 (2) was that pipe-line fittings constituted 'plant' within the meaning of Section 10 (2) (vi-b), read with Section 10 (5) of the Act. Further, even granting for the sake of argument that sanitary fittings and pipe-line fittings also fell within the meaning of "furniture and fittings" in Rule 8 (2), that would not warrant the contention of the Department, that they are not "plant" under Section 10 (2) (vi-b). The rules were made under Section 59 of the Act, and, as Rules were meant only for the purpose of carrying out of the provisions of the Act, they could not take away what was conferred by the Act or whittle down its effect. Therefore anything done by the assessee with a view to claim higher depreciation allowance would not detract from the meaning of the word 'plant' in the Act. (Para 13)

Cases Referred: Chronological Paras (1946) AIR 1946 Cal 217 (V 33)=

50 Cal WN 184, Province of Bengal v. Hingul Kumari 5

(1932) AIR 1932 Mad 474 (V 19)=

62 Mad LJ 720, Madras Central Urban Bank Ltd. v. Corporation of Madras 5

(1899) 1899 AC 99=79 LT 473, Dilworth v. Commr. of Stamps 5

T. Ramachandra Rao and J. V. G. Ramoji Bhamo, for Applicant; C. Kondaiah, Standing Counsel, for Respondent (Income Tax Department).

VENKATESAM, J.:— The question referred to us for decision under Section 66 (1) of the Indian Income-tax Act, 1922, is as follows:

"Whether the sanitary fittings and pipe-lines installed in the King Kothi Branch of the Hotel constituted "Plant" within the meaning of Section 10 (5) of the Act, and whether the assessee is entitled to development rebate in respect thereof under Section 10 (2) (vi-b) of the Act."

2. The facts as mentioned in the statement of the case are as follows:— The assessee, the Taj Mahal Hotel, Secunderabad, is a registered firm running a hotel at Secunderabad, with branches in Hyderabad. The assessment-year under reference is 1960-61, for which the previous

is the year ending on 30-9-1959. In the previous year, the assessee incurred an expenditure of Rs. 57,154/- for installing sanitary fittings, and a further sum of Rs. 1,370/- for pipe-line fittings. On both these items, the assessee claimed development rebate before the Income-tax Officer under Section 10 (2) (vi-b) of the Indian Income-tax Act, 1922, (hereinafter referred to as the Act). The Income-tax Officer held that they did not come within the definition of 'Plant' and 'machinery' and disallowed the same. The Appellate Assistant Commissioner, in appeal, affirmed that order. On second appeal, the Appellate Tribunal took the view that the sanitary fittings and pipe-line fittings did not constitute 'machinery' and the only point to be decided was, whether they would come under the heading 'plant'. The assessee claimed depreciation allowance on those items under Sec. 10 (2) (vi) as 'furniture and fittings' at the rate of 9 per cent, instead of 7 per cent which would be allowed in the case of plant. Holding that the word 'plant' must receive the same meaning in both the cases and also having regard to the dictionary meaning, the Tribunal held that the assets in question did not constitute 'plant', and upheld the disallowance of the claim by the Tribunals.

3. The only question that is argued before us, and which arises for consideration is, what is the meaning of the word 'plant' in Section 10 (2) (vi-b) of the Act.

4. Section 10 of the Act provides that tax shall be payable on profits and gains of an assessee under the head 'Profits and gains of business, profession or vocation'. In the computation of taxable profits, sub-section (2) permits certain allowances. The first paragraph of clause (vi) recognises the right to normal depreciation or initial allowance of a percentage on the prescribed value of buildings, machinery, plant or furniture, which are the property of the assessee, and the second part deals with the allowance on buildings newly erected or machinery or plant, not being machinery or plant entitled to development rebate under clause (vi-b). Clause (vi-b), which was added in 1955 omitting unnecessary words, reads as follows:

"(2) such profits or gains shall be computed after making the following allowances, namely:—

x x x x x

(vi-b) in respect of machinery or plant being new, which has been installed after the 31st day of March, 1954, and which is wholly used for the purposes of the business carried on by the assessee, a sum by way of development rebate in respect of the year of installation equivalent to twenty-five per cent of the actual

cost of such machinery or plant to the assessee.

Provided that no allowance under this clause shall be made unless the particulars prescribed for the purpose of Clause (vi) have been furnished by the assessee in respect of such machinery or plant;"

Section 10 (5) is in the following terms: "In sub-sec. (2), 'Plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purposes of the business, profession or vocation;"

This section grants development rebate in respect of machinery or plant provided (1) the machinery or plant is new and has been installed after the 31st day of March, 1954; (2) it is used wholly for the purpose of assessee's business and (3) the particulars prescribed for the purpose of clause (vi) (depreciation allowance) have been furnished. The development rebate that is allowed is 25 per cent of the actual cost of the machinery or plant, and it is allowed in respect of the year of installation. It is not a part of the depreciation allowance, and is granted over and above the full recoupment of the total cost by way of depreciation allowance under Clauses (vi) and (vi-a) and balancing allowance under Clause (vii). In the instant case it is not disputed that all other conditions have been satisfied, and the only question for consideration is whether the sanitary fittings and pipe-line fittings answer the definition of 'plant' in Section 10 (2) (vi-b).

5. The definition of 'plant' extracted above does not throw any light on the meaning of that word, but it only shows that it is of wide import, intended to include even vehicles, books, scientific apparatus and surgical equipment purchased for the purpose of business, occupation or vocation. As observed by Lord Watson in Dilwarh v. Commissioner of Stamps, 1899 AC 99 (105-6), "Include" is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute." When it is so used, these words and phrases must be construed as comprehending, not only such things as they signify according to their nature and import, but also those things which the interpretation clause declares that they shall include. The word 'include' is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the word or expressions defined. When it is mentioned that a particular definition 'includes' certain things, it should be taken that the Legislature intended to settle a difference of opinion on the point.

or wanted to bring in other matters that would not properly come within the ordinary connotation of the word or expression or phrase in question. (vide: Madras Central Urban Bank Ltd. v. Corporation of Madras, AIR 1932 Mad 474.) The Legislature uses the word 'means' where it wants to exhaust the significance of the term 'defined' and the word 'includes' where it intends that while the term defined should retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative but not exhaustive: vide Province of Bengal v. Hingul Kumari, AIR 1946 Cal 217.

6. The dominant purpose in construing a statute is to ascertain the intention of the legislature as so expressed. This intention and therefore the meaning of the statute, is primarily to be sought in the words used in the statute itself which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament. (vide: Halsbury's Laws of England, Third Edition, paragraph 578, pp. 387-88). If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning: (Ibid., paragraph 585, p. 391). It is therefore permissible in ascertaining the ordinary sense of particular words to refer to dictionaries and the words of standard authors which show what that sense was when the statute was passed: (Ibid., paragraph 590, p. 393). The rule that the literal construction of a statute must be adhered to, unless the context renders it plain that such a construction cannot be put on the words, is especially important in cases of statutes which impose taxation: (Ibid., paragraph 633, p. 417).

7. Bearing these principles in mind, we shall construe the word 'plant'. Since the definition uses the word 'includes', it is obvious that the word 'plant' retains its ordinary meaning, and is also used as a word of enlargement rather than of restriction.

8. It is, therefore, necessary to ascertain its ordinary or popular sense, and for that purpose refer to the dictionaries. Before doing so, it may be noted that the word 'plant' in English Finance Act did not include solicitor's books which he consults for professional purposes, while the Indian Act includes them in the definition of that word in Section 10 (5) of the Act. The decisions under the Income-tax Act or the Finance Act of England will not, therefore, be of any assistance, and the answer must be found only by

adopting the ordinary canons of interpretation.

9. In Webster's Third New International Dictionary, at page 731, the meaning of the word 'plant' is given as:

"Land, buildings, machinery, apparatus and fixtures employed in carrying on trade or other industrial business. ... A piece of equipment or a set of machine parts functioning together for the performance of a particular operation." 'Fixture' is defined at page 861 of the same dictionary thus:

"Something that is fixed or attached as a permanent appendage or a structural part (hanging glass) — a plumbing — an electric lighting device a chattel that has been so wrought into or annexed to realty that it may be regarded as legally a part of it use depending upon such considerations as whether it may be removed without irreparable damage, whether the parties (as landlord and tenant) regarded or are presumed by law to have regarded it as removable, whether its annexation was intended to be permanent and to further the purposes for which the structure is designed, or whether its annexation is really necessary to the contemplated use of the structure or only ornamental or convenient — called also immovable fixture;"

10. In Chambers's Twentieth Century Dictionary, the meaning of the word 'plant' is given as, "equipment, machinery, apparatus for industrial activity."

11. "Sanitary fittings and pipe-line fittings" are, undoubtedly fixtures employed in carrying on hotel business of boarding and lodging. It is inconceivable that without sanitary fittings and pipe-line fittings, the business of a hotelier, like the assessee, can be carried on today. Since there is nothing in the context or the grouping of the words in which the word 'plant' is used in Section 10 (2) (vi-b), to convey a contrary meaning we hold that the sanitary fittings and pipe-line fittings being fixtures employed in carrying on trade or business by the assessee, come within the meaning of the word 'plant'.

12. Sri Kondaiah, the learned Counsel for revenue, then contended that even granting that the sanitary fittings and the pipe-line fittings can be called 'plant', the development rebate can be granted only in respect of those sanitary fittings like wash-basins or flush-out tanks, which can be removed, but not the rest of the sanitary fittings. We are unable to accept this contention, because Sanitary fittings which are removable as well as those that cannot be removed together enable the drainage system to function, or water supply to be made, and enable the assessee to earn the income, and hence the totality of the fittings must be

taken into account for the purpose of development rebate. We see no reason to confine the rebate only to the sanitary fittings and pipe-line fittings which can be removed, but not those which have been fixed or imbedded in the building and are fixtures.

13. The next contention is that the assessee claimed depreciation allowance at 9 per cent. On the cost of sanitary fittings and the pipe-line fittings, treating them as "furniture and fittings in cinema houses and boarding houses", under Rule 8 (2) of the Income-tax Rules. The argument on behalf of the revenue is that though depreciation allowance on machinery and plant is provided for as Item 3 under Rule 8, the assessee chose to claim depreciation for sanitary fittings and pipe-line fittings only as furniture and fittings, and hence cannot treat it as plant for purposes of Section 10 (2) (vi-b). The reason for the assessee claiming depreciation allowance under Rule 8 (2) is quite obvious as he could thereby claim 9 per cent depreciation, instead of 7 per cent by treating it as plant. But that is not decisive of the question whether the sanitary fittings and pipe-line fittings constitute 'plant' within the meaning of Section 10 (2) (vi-b), read with Section 10 (5) of the Act. Further, even granting for the sake of argument that sanitary fittings and pipe-line fittings also fall within the meaning of 'furniture and fittings' in Rule 8 (2), that would not warrant the contention of the Department, that they are not plant under Section 10(2)(vi-b). The rules are made under Section 59 of the Act, and, as rules are meant only for the purpose of carrying out of the provisions of the Act, they cannot take away what is conferred by the Act or whittle down its effect. We cannot, therefore, hold that anything done by the assessee with a view to claim higher depreciation allowance would detract from the meaning of the word 'plant' in the Act. In the result, this contention also cannot be accepted.

14. We, therefore, answer the question referred in the affirmative and in favour of the assessee. Advocate's fee, Rs. 100/- BDB/D.V.C.

Reference answered.

AIR 1969 ANDHRA PRADESH 88
(V 56 C 29)

P. JAGANMOHAN REDDY, C. J.
AND VENKATESAM, J.

Miryala Venkateswarlu and Co. and others, Appellants v. Battula Venkata Peraiyah and Venkateswarlu and Co., and another, Respondents.

Second Appeal No. 291 of 1962, D/- 12-7-1967, against decree of Sub. J., Narasaraopet, in A. S. No. 95 of 1960.

Forward Contracts (Regulation) Act (1952), Ss. 15, 2 (c) and 2 (i) — Forward Contract — 'Ready delivery contract' — Agreement to sell certain bales of cotton 'before' 25-11-1955 entered into on 10-11-1955 — Payment to be made after weighing of bales — Construction of — Parties carrying on business of buying and selling ginned cotton but not members of any recognised association — Contract, held, was not a ready delivery contract and was hit by S. 15 read with S. 2 (c) — Terms of agreement being clear and unambiguous, no oral evidence could be permitted — Contract Act (1872), Ss. 10 and 72 — Evidence Act (1872), S. 92.

Under an agreement entered into, on 10-11-1955, between the two merchants A and B whose business consisted of buying and selling ginned cotton but who were not members of any recognised association within the meaning of S. 15 of the Forward Contracts (Regulation) Act, A agreed to sell certain bales of cotton at a certain rate, before 25-11-1955 the payment to be made after the weighing of the bales. In a suit filed by B to claim damages for the non-performance and breach of the contract, the trial Court permitted oral evidence to be adduced and came to the conclusion that since A had available at the time of the contract ready goods and could have delivered them, it was a ready delivery contract and, therefore the transaction was not illegal, nor was it hit by any of the provisions of the Act.

Held on construction of the agreement that it was not a ready delivery contract and that the transaction was illegal and it was hit by S. 15 read with S. 2 (c) of the Act. The buyer could not have compelled the seller to deliver the goods before 25-11-1955, though nothing prevented the seller from delivering the goods before that date. There was no specific stipulation nor did the terms of the contract indicated otherwise. (Para 11)

Where the terms of the written contract are clear and unambiguous no oral evidence can be permitted to explain, vary or contradict the terms thereof. Court can only allow oral evidence if the conditions set out in Section 92 of the Evidence Act are satisfied. (Para 7)

A reading of the contract did not throw any doubt or ambiguity as to the terms relating to the date of delivery. As the date of the delivery was any time before 25-11-1955 and the payment was to be made immediately after the weighing, the seller undertook to deliver those goods any day before that period and if he offered them the buyer must take them by that period. The buyer however, could not compel the seller to deliver the goods on any date before 25-11-1955. In other words while the

seller had an option of delivery before the period specified the buyer had no right to compel him to do so within that period. The term was similar to that generally incorporated in mortgages with regard to redemption and was designed for the benefit of the mortgagor. As under the terms of the contract the delivery of goods was to take place beyond eleven days, it was not a ready delivery contract and the parties not being members of any recognised association it was illegal and void. Case law discussed.

(Paras 6, 8)

Cases Referred: Chronological Paras (1957) AIR 1957 Andh Pra 30 (V 44)

=1956 Andh LT 478, Satyavatamma

v. Padmavatamma 7, 8

(1955) AIR 1955 Andh Pra 79 (V 42)

=1954 Andh LT (Civil) 41, Chinna

Konda Reddy v. East Asiatic Co.,

(India) Ltd. 10

(1914) AIR 1914 PC 36 (V 1)=26

Mad LJ 474, Bakhtawar Begam

v. Husain Khanum 8

Venkata Subbarao, for Appellants; G.

V. L. Narasimharao, for 1st Respondent.

JAGANMOHAN REDDY, C. J.:— This second appeal has been referred to the bench by our learned brother Ekbote, J., in view of the important question raised as it is likely that more than one case is affected and also because there is no direct authority available.

2. The question that falls for determination is a simple one, whether the contract in question is hit by Section 15 read with Section 2 (c) of the Forward Contracts (Regulation) Act, 74 of 1952 (hereinafter called the Forward Contracts Act).

3. The appellant and the respondents are merchants whose business consists of buying and selling ginned cotton. The appellant agreed to sell 60 bales of Narasaraopet Bale Cotton at the rate of Rs. 332/- per putti of 784 lbs., before 25-11-1955 the payment to be made after the weighment of bales and to be delivered at the site of Raleigh Company or Valcot Company. This agreement was entered into on 10-11-1955. When the goods were not delivered, the respondent filed a suit to claim damages for the non-performance and breach of the contract.

4. The appellant raised several contentions, one of them being that the transaction is hit by the Forward Contracts Act. In view of that plea, an issue was framed as to whether the suit contract was a forward contract, and so not valid and enforceable. Since this is the only point which we are called upon to consider it is not necessary to refer to the other contentions which were urged before the Trial Court, and were the subject-matter of other issues. The Trial Judge on this issue permitted oral evidence to be adduced by either side and

came to the conclusion that since the appellant had available at the time of the contract ready goods and could have delivered them, it was a ready delivery contract and, therefore, the transaction was not illegal, nor was it hit by any of the provisions of the Forward Contracts Act. The Subordinate Judge Narasaraopet affirmed the decision of the Trial Court and dismissed the appeal.

5. Inasmuch as the validity of the contentions urged before us depends upon a proper interpretation of Section 15 read with Section 2 (c) (f) (i) (m) and (n) of the Forward Contracts Act, it is necessary to extract those provisions.

Section 2 (c): "'Forward contract' means a contract for the delivery of goods at a future date and which is not a ready delivery contract."

Section 2 (f): "'non-transferable specific delivery contract' means a specific delivery contract, the rights or liabilities under which or under any delivery order, railway receipt, bill of lading, ware-house receipt or any other document of title relating thereto are not transferable;"

Section 2 (i): "'ready delivery contract' means a contract which provides for the delivery of goods and the payment of price therefor, either immediately or within such period not exceeding eleven days after the date of the contract and subject to such conditions as the Central Government may, by notification in the Official Gazette, specify in respect of any goods, the period, under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise."

Section 2 (m): "'specific delivery contract' means a Forward Contract which provides for the actual delivery of specific qualities or types of goods during a specified future period at a price fixed thereby or to be fixed in the manner thereby agreed and in which the names of both the buyer and the seller are mentioned."

Section 2 (n): "'transferable specific delivery contract' means a specific delivery contract which is not non-transferable specific delivery contract and which is subject to such conditions relating to its transferability as the Central Government may, by notification in the official Gazette specify in this behalf."

Section 15: "(1) The Central Government may by notification in the Official Gazette, declare this section to apply to such goods or class of goods and in such areas as may be specified in the notification, and thereupon subject to the provision contained in Section 18, every Forward Contract for the sale or purchase of any goods specified in the notification which is entered into in the area specified therein otherwise than between members of a recognised association or

through or with any such member shall be illegal."

(2) Any Forward Contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the bye-laws specified in this behalf under clause (a) of sub-section (3) of Section 11 shall be void—

(i) as respects the rights of any member of the recognised association who has entered into such contract in contravention of any such bye-law and also

(ii) as respects the rights of any other person who has knowingly participated in the transaction entailing such contravention.

(3) Nothing in sub-section (2) shall affect the right of any person other than a member of the recognised association to enforce any such contract or to recover any sum under or in respect of such contract:

Provided that such person had no knowledge that such transaction was in contravention of any of the bye-laws specified under clause (a) of sub-section (3) of Section 11.

(3A) Any forward contract in goods entered into in pursuance of sub-section (1) which at the date of the contract is in contravention of any of the bye-laws specified in this behalf under clause (aa) of sub-section (3) of Section 11 shall be illegal.

(4) No member of a recognised association shall, in respect of any goods specified in the notification under sub-sec. (1) enter into any contract on his own account with any person other than a member of the recognised association unless he has secured the consent or authority of such person and discloses in the note, memorandum or agreement of sale or purchase that he has bought or sold the goods as the case may be on his own account;

Provided that x x x x
Provided further that x x x

6. It is not disputed that both the appellant and the respondent are not members of any recognised association within the meaning of Section 15, and consequently any contract entered into between them under which the delivery of goods is to take place beyond eleven days is not a ready delivery contract, nor is it a non-transferable specific delivery contract, as such is illegal and void under the provisions of the Forward Contracts Act. This proposition is not denied. The only contention is one relating to the interpretation of the contract as to whether the contract is a ready delivery contract or a non-transferable specific delivery contract. It will be observed from the definition that for a contract to be a ready delivery contract, the delivery of the goods and the payment of a price therefor must be either immediate or within

such period not exceeding eleven days after the date of the contract, and subject to such conditions as the Central Government may, by notification in the Official Gazette specify in respect of any goods the period under such contract not being capable of extension by the mutual consent of the parties thereto or otherwise. It is not contended that the Central Government has imposed any conditions as contemplated in the definition, so that if the payment of the price or the delivery of the goods under the terms of the contract is not to take place immediately or within eleven days from the date of the contract, it will be a forward contract. It is not the case of the parties that the contract is a non-transferable specific delivery contract. So it is unnecessary to consider that aspect of the case. We will, therefore, confine ourselves to the question whether under the terms of the contract it is a ready delivery contract or not.

7. We have already given the terms of the contract, viz., that the contract has been entered into on 10-11-1955 and the delivery is to be before "25-11-1955" and the price also is to be paid immediately after the weighment of the bales. The appellate Court thought that the words (in Telugu) (Loga) which covered the meaning of 'within' or 'before' were ambiguous and therefore relying upon the decision in Satyavatamma v. Padmavatamma, 1958 Andh LT 478=(AIR 1957 Andh Pra 30) held that under the contract there was an obligation to deliver the goods immediately and, therefore, it was not a forward contract. Apart from this the evidence which has been permitted to be led in view of the ambiguity said to have been given rise by the use of the word 'within' would establish that the seller had ready goods which he could deliver and that it was the intention of the parties that the goods should be delivered immediately on the completion of the contract. We may say at once that where, the terms of the written contract are clear and unambiguous no oral evidence can be permitted to explain, vary or contradict the terms thereof. Court can only allow oral evidence if the conditions set out in Section 92 of the Evidence Act are satisfied. The relevant provisos which permit the adducing of oral evidence in so far as they relate to the matter in issue before us are provisos 1 and 2 the other provisos not being applicable even remotely. Section 92 with these two provisos is as under:

"When the terms of any such contract grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the

parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:

Provisos: (1) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party want or failure of consideration or mistake in fact or law.

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms may be proved. In considering whether or not this proviso applies the Court shall have regard to the degree of formality of the document."

8. Before these provisos are made applicable it must be ascertained whether the terms of the contract in respect of the date of delivery, the payment of price etc., have been specifically stated or whether there is any ambiguity therein. We do not think that a reading of the contract would throw any doubt or ambiguity as to the terms relating to the date of delivery. As has been said earlier, the date of delivery is any time before 25-11-1955 and the payment is to be made immediately after the weighment. The seller, it may be stated, undertakes to deliver these goods any day before that period and if he offers them the buyer must take them within that period. The buyer, however, cannot compel the seller to deliver the goods on any date before 25-11-1955. In other words while the seller has an option of delivery before the period specified the buyer has no right to compel him to do so within that period. The term is similar to that generally incorporated in mortgages with regard to redemption and is designed for the benefit of the mortgagor. It was so held by their Lordships of the Privy Council in Bakhtawar Begam v. Husaini Khanum, 26 Mad LJ 474=(AIR 1914 PC 36) where they said that ordinarily in the absence of a special condition entitling the mortgagor to redeem during the period for which the mortgage is agreed the right of redemption can only arise on the expiration of the specific period; but that there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property, such a provision being usually to the advantage of the mortgagor. This was followed by Subbarao, C. J., (as he then was) in 1956 Andh LT 478 (481)=(AIR 1957 Andh Pra 30 at p. 31). After referring to the passage of Ameer Ali, J., who delivered the judgment of the Court in 26 Mad LJ 474=(AIR 1914 PC 36)

cited above, the learned Chief Justice observed thus:—

"The well-established principle therefore, is that ordinarily the right to redeem cannot be exercised till the mortgage amount becomes due unless there is specific term conferring such a right on the mortgagor to redeem it earlier."

At p. 482 (of Andh LT)=(at p. 32 of AIR) after discussing the several decisions his Lordship summed up the position thus:

"All the aforesaid decisions give the plain meaning of the word 'within' and its corresponding Telugu words indicate without any ambiguity that payment can be made on or before the date fixed.

..... This term pre-supposes the existence of a right in the mortgagors to redeem earlier than the time fixed in the document. This imposes a condition that in case that right was exercised the mortgagee should be allowed to continue in possession".

9. It may be stated that clauses of this nature are enabling and intended for the benefit of the party who is under an obligation to do a particular act. It is far from saying that it imposes an obligation on the part of the person in whose favour it has been incorporated to perform the act on the date when the stipulation has been agreed to or any time thereafter within the period fixed.

10. We may point out that under the terms of the contract the goods are not deliverable on the date of the contract or any time thereafter as was the case in Chinna Konda Reddi v. East Asiatic Co., (India) Ltd., 1954 Andh LT (Civil) 41=(AIR 1955 Andh 79) upon which great reliance has been placed by the learned Counsel for the respondents. There Subbarao, C. J., (as he then was) was dealing with a case where the parties had agreed to sell groundnut under two contracts one dated 14-5-1945 and another dated 19-5-1945. Under the first contract, it was agreed that delivery was to commence on the 14th May and completed before 30th June, 1945 and under the second contract delivery was agreed to commence on the 19th May, and completed before 30th June, 1945. It may be observed that under both those agreements the specific term was to commence delivery from the date on which each of the agreements was entered into. So that there can be no doubt that it was a ready delivery contract and fell outside the pale of Section 2 (ii) of the Oilseeds Forward Contract Prohibition Order the terms of which are in pari materia with those in the Forward Contracts Act. The learned Chief Justice emphasised the importance of the stipulation that the delivery was to take place from the date of the contract itself. This is what his Lordship observed at page 42:—

"Under the contracts the parties clearly contemplated delivery on the dates of the contracts. If the defendants insisted upon delivering the groundnut on 14-5-1945 and on 18-5-1945 the plaintiff could not have legally refused them. Reasonable time was given to complete delivery of the entire goods only because of the transport difficulties."

11. Applying the same reasoning, the buyer in the instant case could not have compelled the seller to deliver the goods before 25-11-1955, though nothing prevented the seller from delivering the goods before that date. There is no specific stipulation nor do the terms of the contract indicate otherwise. In this view we must hold that the Courts below were wrong in coming to the conclusion that the transaction is a valid contract not being hit by Forward Contracts Act and we hold otherwise.

12. As no other point has been argued and the contract has not been sought to be saved by any other provision of the Forward Contracts Act, we allow the appeal. The judgments and decrees of the Courts below are reversed and the suit is dismissed with costs in the Trial Court only.

LGC/D.V.C.

Appeal allowed.

**AIR 1969 ANDHRA PRADESH 92
(V 56 C 30)**

P. JAGANMOHAN REDDY, C. J. AND
SAMBASIVA RAO, J.

Evuru Venkata Subbayya, Appellant
v. Srishti Veerayya and others, Respondents.

Letters Patent Appeal No. 25 of 1965 D/- 28-4-1967 against decree of High Court Andhra (Hyderabad) in A. A. A. O. No. 33 of 1961, D/- 30-9-1964.

(A) Civil P. C. (1908), O. 22 (General) and O. 22, R. 12 — Scope and applicability — Principle of abatement of decree does not apply to execution proceedings, AIR 1962 SC 89 & AIR 1963 SC 553 & AIR 1965 SC 1531, Distingu. AIR 1932 Mad 73 (FB), Rel. on. (Para 4)

(B) Letters Patent (Cal) Clause 15 — Points on which appeal may be heard — Point not raised before Court from whose judgment appeal preferred — Point cannot be allowed to be urged in appeal under this clause. (Para 4)

(C) Civil P. C. (1908), S. 47 and O. 21, Rr. 10 and 17 — Whether decree could be executed — Held on facts that decree was not executable.

One of the clauses of the decree in question directed the defendants by means of a mandatory injunction to remove the earthen bunds put up by them at certain place. On the question whe-

ther the decree would entitle the decree-holder to execute it against bund which subsequently came into existence:

Held that the bund, for the removal of which the suit was filed was not in existence at the time of the passing of the decree in that suit, and the mandatory direction contained in Cl. 2 of the decree was otiose and could not be given effect to, in that no bund existed on the date of the decree which could be removed. Even if the bund had existed on the date of the decree, the voluntary removal of the bund without execution also would disentitle the decree-holder to execute the decree for removal of a fresh bund which is not the same bund for which the mandatory injunction was issued. On this analogy, if the bund was not in existence at all at the time of the mandatory injunction which by mistake was incorporated in the decree, it would not entitle the decree-holder to execute it against a bund which was not in existence then but which came into existence subsequently to the decree. (1908) ILR 29 Mad 314, Ref. A. A. A. O. No. 33 of 1961, D/- 30-9-1964 (AP). Affirmed.

(Para 6)

(D) Civil P. C. (1908), O. 21, R. 32 (5) — Scope and applicability — Sub-rule (5), applies only to mandatory injunctions — Sub-rule (1) applies to both mandatory and prohibitory injunctions. AIR 1919 Cal 674, Held no longer good law.

Sub-rule (1) would apply both to mandatory as well as prohibitory injunctions.

Sub-rule (5), on the language used applies to mandatory injunctions. The word "injunction" in sub-rule (5) has been qualified by the words "has not been obeyed" and the rule says that in the event of disobedience of the injunction the Court may direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court. This could only be a mandatory direction. A prohibitory direction would be not to do an act. A mandatory direction is a command to do a positive act; a prohibitory injunction is a negative one restraining him from doing a particular act. The difference between the two is obvious and Rule 32 (5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions. AIR 1938 All 416 & AIR 1953 All 326 & AIR 1934 Cal 402 & AIR 1954 Nag 245 & AIR 1961 Punj 547 & AIR 1938 Pat 522 & AIR 1957 Andh Pra 44 & AIR 1950 Mad 237, Rel. on. (1872) 18 Suth WR 282 & (1877) 25 Suth WR 306 & (1871) 16 Suth WR 140 & (1882) ILR 8 Cal 174, Ref. AIR 1919 Cal 674, Held no longer good law. (1911) 21 Mad LJ 465 & 1930 Mad WN 809, Distingu. A. A. A. O. No. 33 of 1961 D/- 30-9-1964 (AP), Affirmed.

(Para 9)

(E) Civil P. C. (1908), Ss. 151 and 51 (e)
 — Scope — Under Section 51 (e) decree cannot be executed in circumstances which give fresh cause of action to decree-holder.

Under S. 51 whether by itself or read with Section 151, C. P. C. a decree cannot be executed in circumstances which give a fresh cause of action to the decree-holder. Section 51 (e) cannot enable the Court to give a fresh mandatory direction to remove something which was not in existence at the time of the decree. AIR 1955 Mad 281 (FB), Rel. on A. A. A. O. No. 33 of 1961 D/- 30-9-1964 (AP), Affirmed. (Para 14)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1531 (V 52)=	3
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(1963) AIR 1963 SC 553 (V 50)=	3
(1963) 3 SCR 858, Ram Sarup v. Munshi	
(1962) AIR 1962 SC 89 (V 49)=	3
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(1882) ILR 8 Cal 174=9 Cal LR 453, Protap Chunder Doss v. Peary Choudhury	12
(1877) 25 Suth WR 306, Doorga Lall v. Lalla Hulwant Sahoy	12
(1872) 18 Suth WR 282=10 Beng LR App 12, Bhoobun Mohun Mundul v. Nobin Chunder	12
(1871) 16 Suth WR 140, F. H. Holloway v. Mahomed Ali	12
Y. Suryanarayana, for Appellant; C. Venkatrama Sastry, for Respondent No. 3.	

P. JAGANMOHAN REDDY, C. J.:—
 This Letters Patent Appeal, filed on the grant of leave by our learned brother Kumarayya, J., involves the determination of the true scope and ambit of clause (5) of Rule 32 of Order 21 and Section 51 (e), Civil Procedure Code.

2. The brief facts which give rise to the question posed before us are as follows: The tank in the shrotriem village of Annasamudram, of which the respondents are the shrotriemars, was in a state of disrepair and disuse for several years past. The bund had breaches and the source of the tank, "Gadi Vagu" would empty itself through two wide sluices. Because of these breaches water could not be trapped and it was not possible to have wet cultivation. The appellant who was the 1st plaintiff, and 4 others, plaintiffs 2 to 5, took on lease from the respondents the tank bed area and cultivated virginia tobacco, which does not require much water. In the lease deed it was stated that the "lessees would be at liberty to let out water in tank bed area through sluices marked A and B in the plan attached to the plaint, which are no other than the two sluices through which the Gadi Vagu used to empty itself. Thereafter the plaintiffs expended moneys and prepared the land fit for cultivation. But the villagers started interfering with its cultivation by raising large earthen bunds at the sluices A and B and trapping water, which made it impossible for the plaintiffs to cultivate tobacco. The plaintiffs took proceedings under Section 144, Criminal Procedure Code and though they were successful to a certain extent, they could not get a permanent remedy, inasmuch as the two sluices had already been blocked by the earthen bunds. The plaintiffs thereafter filed a suit, O. S. No. 79/55, for the issue of a perpetual and a mandatory injunction, in the Court of the Subordinate Judge, Kurnool, against the respondents herein in a representative capacity, under Order 1, Rule 8, C. P. C. as representing the entire body of villagers both of Patha Annasamudram and Kotha Anna-samudram. The suit was eventually decreed on 16-1-1957. It may be stated that from Paragraph 4 of the Judgment

of the Subordinate Judge, it would appear that as a consequence of injunction orders passed in I. A. No. 675/55 Respondents 1 to 3 i.e. defendants 1 to 3 in the suit who are the elders of the two villages, had removed the bund which they had put up in the lands. But notwithstanding the fact that there was no bund at the time of the passing of the decree in O. S. No. 79/55 on 16-1-1957, there were mandatory directions given under that decree, the executability of which is now the subject matter of this appeal. The terms of the decree passed on 16-1-1957 are as below:

"1. That the defendants and other villagers of Patha and Kotha Annasamudram be and hereby are restricted by means of a permanent injunction from interfering with the plaintiff's enjoyment of the schedule mentioned properties;

2. That the defendants and the villagers of Patha and Kotha Annasamudram be and hereby are directed by means of a mandatory injunction to remove the earthen bunds put up by them in the north and southern sluices marked A and B in the plaint plan attached hereto;

3. That in default of the defendants and others (set out in clause (2) supra) removing the sluices directed as per clause (2) above, the plaintiffs shall be entitled to get the said sluices removed through Court at the expense of the defendants and the said villagers."

After the passing of the decree, no steps were taken to execute it, but later, as some disputes arose between the respondents and the plaintiffs in respect of the lease, the respondents filed a suit, O. S. No. 68/60 in the Court of the District Munsif, Markapur, for an injunction against the appellant herein and 4 others (plaintiffs in O. S. 79/55). By a separate application, they prayed for a temporary injunction restraining the appellant and others (plaintiffs in O. S. 79/55) from interfering with the rights of the respondents to fill up a 15 yards-long channel at the points R. S. in the plan filed by them along with the plaint. The appellant contended that the respondents in the guise of closing the channel at R S built up a fresh bund 4 feet in height and obstructed a sluice marked A in the plan attached to the decree in O. S. No. 79/55. Then the appellant and others (plaintiff-decree-holders in O. S. 79/55) sought to execute the decree in O. S. No. 79/55, alleging that the Respondents had violated the injunction order in that suit, by raising the bund. They contended that unless the rain water is drained through the sluice A, the tobacco crop raised in the land will be completely spoiled. Accordingly, they filed E. P. 56/60 seeking enforcement of their decree in O. S. No. 79/55 and for detention of the respondents in civil prison, and another

petition, E. A. 94/60 to appoint a Commissioner to remove the bund at R. S. The Respondents raised several objections to the executability of the decree, on the grounds firstly, that they were not parties to the suit nor can they be deemed to be in any way represented by the Defendants in O. S. No. 79/55; secondly, that the judgment in O. S. No. 79/55 was not passed on merits after contest, and so it cannot bind those who have not been expressly impleaded in the suit; and thirdly, that the decree in O. S. No. 79/55 being a decree for injunction, cannot be enforced personally against the respondents who are not *eo nomine* parties to the suit. Both the executing Court as well as the first appellate court rejected the first two objections. But in respect of the third objection, they held, in view of a Full Bench decision of the Madras High Court in Kodia Gounder v. Velandi Goundar, AIR 1955 Mad 281 (FB) that the respondents not being *eo nomine* parties, the decree obtained by the appellant and other plaintiffs could not be personally enforced against them and they could not be committed to civil prison. The executing Court however granted the prayer of the appellant which was upheld in appeal namely that a Commissioner be appointed for removing the bund R. S. under the terms of sub-clause (5) of Order 21, Rule 32, C. P. C. which provision, according to them, is wide enough to cover both a mandatory and a prohibitory injunction. Our learned brother Kumarayya J., reversed that finding, holding that sub-clause (5) of Rule 32 of Order 21, will not apply to cases of prohibitory injunction, and though sub-rules (1) and (2) of Rule 32 of Order 21 apply to both classes of injunction, the decree could not be personally enforced against the respondents and consequently the only remedy of the appellant is by way of a suit on a fresh cause of action for a mandatory injunction. Our learned brother further considered the applicability of Section 51 (c) C. P. C. and came to the conclusion that the provision also does not assist the appellant, inasmuch as when a prohibitory injunction was disobeyed, it is not within the competence of the executing Court to substitute therefor a mandatory injunction of a suitable character even under his inherent powers and to give effect thereto. In this view, he reversed the judgment of the Courts below and allowed the appeal.

3. Mr. Suryanarayana for the appellant contends that Order 21, Rule 32 (5) applies both to prohibitory as well as mandatory injunctions and could be enforced personally against persons who are not *eo nomine* parties in a representative suit. It is further urged that the appeal before Kumarayya, J., was not competent

inasmuch as the decree being a joint decree and respondents 2 and 4 before him not having been served, the appeal was dismissed as against them on 18-9-1962, as such no appeal can be maintained against the rest of the respondents, which would result in a conflict of decrees. In support of this last contention, he has cited the decisions in State of Punjab v. Nathu Ram, AIR 1962 SC 89; Ram Sarup v. Munshi, AIR 1963 SC 553 and Union of India v. Shree Ram, AIR 1965 SC 1531. Mr. Venkatarama Sastry, on the other hand, contends that before Kumarayya, J., objection was not taken and that the decisions of the Supreme Court relied upon are inapplicable to appeals against decrees in execution where the principles of abatement do not apply. If any of the judgment-debtors die or not served, he contends, the execution petition will be dismissed and there would be no bar to a fresh execution petition. In any case a reading of Order 22, Rules 11 and 12 would show that the provisions of that order do not apply to execution proceedings and are only confined to suits and appeals against decrees in those suits. Rule 3 of Order 22 which deals with the procedure where one of several plaintiffs or defendants dies and Rule 4 which deals with the procedure in case of death of one of several defendants or of sole defendant, and Rule 8 which says that plaintiff's insolvency bars the suit, have been specifically excluded by Rule 12 from their application to proceedings in execution of a decree or order. When Rule 11 states that in the application of Order 22 to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal, it also necessarily excludes the operation of the order to execution proceedings.

4. We do not think there is any force in the contention of the learned advocate for the appellant that having regard to the facts in this case where it is not a question of abatement due to death, Rule 12 of Order 22 has no application. The basis of the Supreme Court decisions for abatement of decrees is that there will be conflict of decrees, but that principle will not apply to execution proceedings because as held in Venkatachalam v. Ramaswamy, AIR 1932 Mad 73 by a Full Bench of the Madras High Court, even prior to O. 22, R. 12 it was a fairly well established doctrine under the old Code that the provisions of the Chapter relating to substitution upon the death, marriage or insolvency of parties, do not apply to proceedings in execution between the decree-holder and the judgment-debtor. It will be observed that the principles underlying Order 22, Rule 12 are applicable not only in case of

death of parties, but also in cases of insolvency, marriage etc., as such, the principle of abatement of decree does not apply to execution proceedings. Apart from the question that this point was not urged before our learned brother and therefore cannot be allowed to be urged here, the decisions of the Supreme Court cited by the learned advocate are confined to cases envisaged by Order 22, Rules 3, 4 and 8 and are not authorities for the proposition that the principles adumbrated by their Lordships are applicable to execution proceedings.

5. The only two questions that have been argued before us are that Kumarayya, J., was wrong in holding that clause 2 of the decree giving a mandatory direction could not be executed, inasmuch as the bund had already been removed even before the passing of the decree. Mr. Suryanarayana contends on the authority of Venkatachalam Chetty v. Veerappa Pillai, (1906) ILR 29 Mad 314 that the Court cannot go behind the decree but must give effect to the decree. Secondly, he contends, that even assuming that the construction placed by Kumarayya, J., is correct, the question arises as to whether resort can be had to Order 22, Rule 32 (5) in cases of violation of the terms of the prohibitory injunction. It is contended that the above provision is capable of a construction which would cover both prohibitory as well as mandatory injunctions.

6. On the first question, we may say that it is an admitted fact that it was the specific contention of the appellant that the respondents under the guise of closing the channel at R. S., had built up a bund more than 4 feet in height and obstructed the sluice marked A in the plan attached to the decree in O. S. No. 79/55. It is also their case that the sluice marked R. S. in the plan attached to the plaint in O. S. No. 68/60 is the very same sluice marked A in the plan attached to the decree in O. S. No. 79/55. This makes it clear that the bund which was in existence at the time when O. S. No. 79/55 was filed was not in existence either at the time of the filing of O. S. No. 68/60 or when E. P. No. 56/60 was filed in execution of the decree in O. S. No. 79/55 alleging that the respondents had violated the injunction order passed in O. S. No. 79/55 by constructing the bund shown as R. S. in the plan attached to the plaint in O. S. No. 68/60. The whole basis of the proceedings between the parties after the decree in O. S. No. 79/55 was that there was no bund and that the same had been constructed by the respondents under the guise of closing the channel. The bund, for the removal of which O. S. No. 79/55 was filed, was not in existence at the time of the passing of the decree in that suit.

and the mandatory direction contained in clause 2 of the decree was futile and could not be given effect to, in that no bund at A B existed on the date of the decree which could be removed. Even if the bund had existed on the date of the decree, as pointed out by us during the course of the arguments, on the passing of the decree if the defendants had voluntarily removed the bund and some other persons who are not parties to the suit had reconstructed it, could the decree be executed for removal of this fresh bund? Mr. Suryanarayana frankly conceded that if the bund at A B had existed at the time of the decree and if that was removed in execution of that decree, a subsequent construction of the bund would not entitle the decree-holder to have that removed in execution of that decree, as the decree had been satisfied by execution thereof. If this is so, then the voluntary removal of the bund without execution also would disentitle the decree-holder to execute the decree for removal of a fresh bund which is not the same bund for which the mandatory injunction was issued. On this analogy, if the bund was not in existence at all at the time of the mandatory injunction which by mistake was incorporated in the decree, it would not entitle the decree-holder to execute it against a bund which was not in existence then but which came into existence subsequently to the decree. We do not think that there is anything in the Bench decision in (1906) ILR 29 Mad 314 (Supra) which would assist him. That was a case where a perpetual injunction had been granted, which entitled the decree-holder on each successive breach of it to enforce the decree under Section 260 of the Civil Procedure Code, 1882 by an application made within 3 years of such breach under Article 178 Schedule II of the Limitation Act, 1877. It may be stated that the decree in that suit was passed on 20th December, 1890 in terms of the prayers in the plaint, which were for a declaration of the plaintiffs' right, and an injunction against the defendant. The injunction order which was publicly notified to the defendants was in the following terms:—

"Whereas it has been decreed that the disputed jungle belongs to plaintiff's village and to the plaintiffs, that the defendants have no sort of right in it and that the defendants should not enter or offer obstruction to plaintiff's enjoyment, the defendants are hereby ordered not to hereafter in any manner enter the aforesaid jungle."

The executing Court held that where a decree awards a perpetual injunction, application for execution of the decree under Article 178 must be made within three years from the time when the de-

fendant first acts contrary to such decree, and that in any case, the acts complained of by the decree-holder could not be considered as constituting disobedience of the injunction issued in the suit. It accordingly dismissed the petition, and this order was confirmed in appeal. The Bench consisting of Renson and Moore, JJ., set aside that order, on the grounds already stated. In allowing the appeal, it was observed at page 317:

"In the present case the decree-holder in his application referred to the channel being newly cut, and the Commissioner regarded the new cuttings as having been made about one and a half years prior to the application. The District Judge did not refer to the date of these, but finding that there had been some infringement so far back as 1897 held that the execution of the decree was barred by Article 178. This view, as we have said, cannot be sustained. We must also point out that the Subordinate Judge was wrong in going behind the terms of the decree. Its terms are perfectly clear, and that being so, it was the duty of the Subordinate Judge as an executing Court to give effect to the terms of the decree without attempting to read into it limitations gathered from a reference to the records of the suit in which the decree was passed."

We have given the actual injunction order passed in that case, from which it will be seen that it was a perpetual prohibitory injunction giving a right to execute it on every successive breach, and there was no justification for going behind the decree when the terms of that decree were clear. If a prohibitory injunction is disobeyed, the decree-holder will have a right to execute it every time there is a breach. There is no scope for raising such a contention before us in execution of the decree in the present case. We do not think there is any substance in the contention of the learned advocate for the appellant that our learned brother erred in going behind the decree, where the decree on the face of it and on the allegations in the subsequent proceedings and even in the execution proceedings, could not have been executed for removal of a bund, the demolition of which was ordered and which was in fact not in existence at the time of the passing of the decree.

7. The next question for considering is whether the word "injunction" in Or. 21, R. 32 (5) must be interpreted as covering both a mandatory as well as a prohibitory injunction. The learned advocate for the appellant frankly conceded that the views of the Allahabad, Calcutta, Patna, Nagpur, Punjab and the Andhra Pradesh High Courts are against the proposition for which he is contend-

ing, namely, that it applies to prohibitory injunctions also. These cases are Angad v. Madhao Ram, AIR 1938 All 416; Chiranji Lal v. Behari, AIR 1958 All 326, 329; Hem Chandra v. Narendra Nath, AIR 1934 Cal 402; Ajab Rao Domajee v. Atmaram Sadashiv Rao, AIR 1954 Nag 245; Murari Lal v. Nawal Kishore, AIR 1961 Punj 547; Toon Lal v. Sonoo Lall, AIR 1938 Pat 522 and Ramabrahma Sastry v. Lakshminarasimham, 1956 Andh LT 492=(AIR 1957 Andh Pra 44). In all these decisions it has been held that Order 21, Rule 32 (5) applies only to mandatory injunctions. To these cases must be added a decision of the Madras High Court in Chinnabba v. Chengalroya, AIR 1950 Mad 237 which also took a similar view.

8. Sri Suryanarayana relies on two decisions, Kelu Manikaram v. Parayanan, (1911) 21 Mad LJ 465 and Sampath Chetty v. Sankara Iyer, 1930 Mad WN 809. But before we deal with these cases, it is necessary to examine the relevant provisions of Order 21, Rule 32, C. P. C.:—

Order 21, Rule 32 (1) "Where the party against whom a decree for specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both."

(2)	xx	xx	xx
(3)	xx	xx	xx
(4)	xx	xx	xx

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration:—A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequate-

ly compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings."

9. A perusal of the above provisions would show that sub-rule (1) would apply both to mandatory as well as prohibitory injunctions. It is not denied that the respondents not being 'eo nomine' parties to O. S. No. 79/55, no injunction could be enforced against them and they cannot, therefore, be committed to civil prison. This relief has been refused by both the Courts and there has been no appeal against it. Sub-rule (5) is the only pertinent provision; but that again, on the language used, applies to mandatory injunctions. The word "injunction" in sub-rule (5) has been qualified by the words "has not been obeyed" and the rule says that in the event of disobedience of the injunction the Court may direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court. This could only be a mandatory direction. A prohibitory direction would be not to do an act. A mandatory direction is a command to do a positive act; a prohibitory injunction is a negative one restraining him from doing a particular act. The difference between the two is obvious and Rule 32 (5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions.

10. In Sachi Prasad v. Amar Nath, AIR 1919 Cal 674 no doubt Richardson, J., expressed a view that clause (5) of Order 21, Rule 32 applies to prohibitory as well as mandatory injunctions. But this view was dissented from by a Bench of the same High Court in AIR 1934 Cal 402. Mukerji, J., speaking for the Bench observed at page 403:

"With all deference to the learned Judge I am of opinion that notwithstanding that the word "injunction" is used in clause 5 without any qualification or restriction, that clause cannot be read as embracing prohibitory injunctions. The clause as well as the illustration appended to it make it, to my mind, perfectly clear that it is the act required to be done by the mandatory injunction that is "the act required to be done" within the meaning of the clause. Illustrations no doubt are no part of the section, but they have been expressed by the Legislature as helpful in the working and application of the statute and their usefulness in that respect should not be impaired." In that decision, the Bench followed Gordhan Lalji v. Maksudan Ballabh, ILR 40 All 648=(AIR 1918 All 152).

11. We have gone through the several decisions referred to by us and find that each one of those cases support the view

taken by us. Panchapakesa Ayyar, J., in AIR 1950 Mad 237 and Viswanatha Sastry, J., in 1956 Andh LT 492=(AIR 1957 Andh Pra 44) also took a similar view that Clause (5) of Rule 32 has no application to a prohibitory injunction but applies only to mandatory injunctions. In AIR 1950 Mad 237 the several cases referred to were examined and relied upon. Viswanatha Sastry, J., in Ramabrahma Sastry's case, 1956 Andh LT 492=(AIR 1957 Andh Pra 44) relied on the case of Chinnappa's case, AIR 1950 Mad 237 and AIR 1938 All 416.

12. (1911) 21 Mad LJ 465 referred to by the learned advocate for the appellant is a case under Section 260 of the Civil Procedure Code of 1882. It may be noted that there was no provision similar to clause (5) of Rule 32 in the C. P. C. of 1882. It was held in that case that Section 260 applied to cases where the judgment-debtor is restrained from doing an act (from taking water which the decree-holders were carrying through a 'thoud'). The passage in that case relied by the learned advocate for the appellant is as follows:

"It is conceded that if Section 260 applied this appeal fails but it is contended that the section does not apply, as the 2nd clause shows that it contemplates only cases where the judgment-debtor may carry out the terms of the decree within the period of one year the property is to remain under attachment before it is sold and does not therefore apply to this and similar cases where the judgment-debtor is restrained from doing an act, and he has already violated the terms of the decree."

It may however be noted that the above observations were made on a concession and cannot really be effective as an interpretation of Section 260 of the C. P. C. of 1882. Section 260 has provisions analogous to Order 21, Rule 32 sub-rules (1), (3) and (4) and is as follows:-

"Where the party against whom a decree for the specific performance of a contract or for restitution of conjugal rights or for the performance or abstention from any other particular act, has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment or by the attachment of his property, or by both."

In Bhoobun Mohun Mundul v. Nobin Chunder, (1872) 18 Suth WR 282; Doorga Lall v. Lalla Hulwant Sahoy, (1877) 25 Suth WR 306; F. H. Holloway v. Mohammed Ali, (1871) 16 Suth WR 140 and Protap Chander Das v. Peary Chowdhurain, (1832) ILR 8 Cal 174 it has been consistently held that the execution is enforceable only in the manner prescribed

by Section 260. In the first of these cases, an order from the Court directing the Ameen to execute a decree, which directed that 'the defendants do, within six weeks after service on them of this decree, remove the obstruction and re-open the pathway etc., was held to be contrary to law.

13. In the other case relied upon by the appellant viz, 1930 Mad WN 809 the decree which was sought to be executed was a consent decree in which the plaintiff's right to easement to light and air was declared and certain directions with regard to the erection of a building by the defendant so as not to contravene that right, were given. The terms of the decree were that such and such a thing shall be done or shall not be done. This decree, it was stated, could be enforced under Order 21, Rule 32 as being a decree for injunction. At page 810 Curgiven, J., said;

"It seems scarcely necessary to refer to any case law upon the matter and we need only observe that the circumstances dealt with. We think that a decree of this nature can clearly be enforced under the terms of Order 21, Rule 32, C. P. C. as being a decree for an injunction, and accordingly that either under sub-rule (1) the defaulting party may be detained in civil prison or his property attached, or under sub-rule (5) the act required to be done may be done either by the decree-holder or by some other person appointed by the Court, and the expense recovered from the judgment-debtor."

We fail to understand how this case can help the appellant, because there are both mandatory and prohibitory directions in the decree. In our considered view, therefore, there is little doubt that Order 21, Rule 32 (5) applies only to mandatory injunctions and not to prohibitory injunctions.

14. The next question is whether the Court has power under Section 51 (e) read with Section 151, C. P. C. to direct the respondents to remove the bund. Section 51 (e) says that subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree in such other manner as the nature of the relief granted may require. Under this section whether by itself or read with Section 151, C. P. C. a decree cannot be executed in circumstances which give a fresh cause of action to the decree-holder. As observed by our learned brother Kumarayya, J.

"When a prohibitory injunction is disobeyed, certainly it is not within the competence of the executing Court to substitute therefor a mandatory injunction of a suitable character, even under

the inherent powers and give effect thereto."

AIR 1955 Mad 281 (FB) is a case where the question was whether the decree for injunction could be enforced against the respondents who are not eo nomine parties to the suit or to the decree; Krishnaswamy Nayudu, J., speaking for the Full Bench observed at page 283:

"A 'party' to such a suit is therefore one who is impleaded as a party or one who on an application under Order 1, Rule 8 sub-rule (2), C. P. C. is brought on record, that is, one who is eo nomine made a party. The others who are not brought on record can be only deemed to be parties and will not be parties as such. Section 47, C. P. C. cannot therefore be a bar to a fresh suit against the present respondents since the question for determination is not one that arises as between the parties to the suit. Since the respondents could not be held to be parties, there can be no doubt that any question arising between a party to the suit and persons who are not parties is not a matter which can be determined only in execution and could therefore be decided by a separate suit. On a consideration therefore of the relevant provisions of the Code it appears to be clear that there can be no execution of a decree against persons who are not impleaded as defendants even though they were sought to be represented by the defendants on record by reason of the procedure in Order 1, Rule 8 having been followed."

Again at page 285 after examining the several decisions he observed:

"If no execution of such a decree could be maintained against those persons who are not impleaded as defendants on the ground that they are not bound to obey the decree personally it is obvious that they cannot be held liable for any wilful disobedience of such a decree. The result is that not only could there be no execution but there could be no application under Order 39, Rule 2 or under any other provision of law, for proceeding against those persons for such disobedience. We are of opinion that the decrees for injunction in these cases are neither executable nor enforceable against the contesting respondents."

Section 51 (e) can therefore be of little assistance to the appellant and it cannot enable the Court to give a fresh mandatory direction to remove something which was not in existence at the time of the decree.

15. In the view we have taken, we confirm the decision of Kumarayya, J., and dismiss the appeal with costs.

V.G.W/D.V.C.

Appeal dismissed

AIR 1969 ANDHRA PRADESH 99
(V 56 C 31)

GOPALRAO EKBOTE, J.
Public Prosecutor, Appellant v. Hatam Bhai and others, Respondents.

Criminal Appeal No. 565 of 1965, D/31-8-1967.

(A) Drugs and Cosmetics Act (1940), S. 21 — A appointed as Inspector for Hyderabad District — B appointed as Inspector for twin cities of Hyderabad and Secunderabad — Held, given a plain meaning to the term, Hyderabad District, it would include twin cities of Hyderabad and Secunderabad — Merely because B was appointed for twin cities, it cannot be held that A was appointed for Hyderabad District excluding twin cities of Hyderabad and Secunderabad. (Para 11)

(B) Drugs and Cosmetics Act (1940), Ss. 21, 22, 32 (1) — Criminal P. C. (1898), Ss. 156 (2), 190 (1), 537 — Complaint lodged by Inspector under S. 32 (1) — Investigation, however, made by another Inspector not authorised to investigate in the area — Power of Court to take cognizance — Trial, if bad.

Section 156 (2), Cr. P. C. makes it abundantly plain that failure to properly conduct the investigation into an offence cannot vitiate a trial of a case started on the report of an Inspector under S. 32 (1) of the Drugs and Cosmetics Act. The defect or illegality in investigation however serious it may be, has really no direct bearing on the procedure of trial. It is not possible to contend in view of clauses (a) to (c) of S. 190 (1), Cr. P. C. that if the investigation is illegal or the report is invalid, the Court cannot take cognizance of such a case. Even the invalid report of a police-officer may fall either under clause (a) or (b) of S. 190 (1), Cr. P. C. It must be remembered that in any case cognizance taken on the basis of an invalid report is in the nature of an error in a proceeding antecedent to the trial and to such a case, S. 537, Cr. P. C. would be attracted. What must follow is that if cognizance is in fact taken by a Court on a report of the Inspector who was not competent to either investigate or institute criminal proceedings by way of report, there is very little doubt that the trial which followed cannot be set aside unless the Court is satisfied that the illegality committed in the course of an investigation or institution of the report is shown to have brought about a miscarriage of justice. Any investigation, therefore, carried on by an inferior officer where a superior officer alone was authorised to investigate or it was carried on by an Inspector outside his area of jurisdiction or a complaint filed by an Inspector who

was not competent to conduct the investigation can at best be only an irregularity which is curable under S. 537, Cr. P. C. It would not be right to regard the entire proceedings based on the report of an Inspector who was not competent to investigate as bad if the evidence which was tendered before the Court had been found to be uninfluenced by the irregularities and which independently leads to a particular conclusion. It is, therefore, clear that the conviction or acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That has to be determined wholly by the evidence that is given at the trial. (Para 12)

Held, that, the lower Court was not dissatisfied from trying this case which was brought before it on a report made in that behalf by P. W. 4, who was the Inspector for Hyderabad and Secunderabad cities. He may not have conducted the investigation himself but he was competent to lodge the complaint. Merely because P. W. 1, who was also an Inspector, was not authorised to investigate in the area of Hyderabad city, the report filed by P. W. 4 does not suffer from any infirmity nor the cognizance taken on the basis of such report by the lower Court can be said to be bad in law. Case law Ref. (Para 12)

(C) Drugs and Cosmetics Act (1940), Ss. 23, 25 — Sample taken by person who is not authorised Inspector — Report of Government Analyst on such sample, if substantive evidence. AIR 1960 All 460. Dissent. from.

It would not be correct to argue that Ss. 23 comes into operation only when a sample is taken by an authorised Inspector. If it is taken by a person who is not an authorised Inspector, it cannot be validly contended that in such a case Ss. 23 to 25 would not apply. Even if an authorised Inspector, of course, after following strictly the procedure laid down, gets the sample analysed from a Government Analyst and the Government Analyst sends the report signed by him, such a report can certainly be substantive evidence of the facts mentioned therein and it is not necessary to examine the Government Analyst as a witness to prove his opinion. AIR 1934 Cal 858 & AIR 1937 Cal 60, Foll AIR 1960 All 460. Dissent. from. (Para 20)

(D) Drugs and Cosmetics Act (1940), S. 22 — Criminal P. C. (1898), S. 156 (2) — Objections regarding irregularity in investigation must be raised at the earliest stage of trial. AIR 1959 SC 831, Foll. (Para 19)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 221 (V 51)= 1964 (1) Cri LJ 140, State of U. P. v. Bhagwant Kishore

(1960) AIR 1960 All 460 (V 47)= 1960 Cri LJ 1046, Raj Kishan v. State	24
(1959) AIR 1959 SC 831 (V 46)= 1959 Cri LJ 1120, Din Dayal v. State of U. P.	19
(1955) AIR 1955 SC 196 (V 42)= 1955 Cri LJ 526, H. N. Rishbud v. State of Delhi	15
(1955) 1955 AC 197=(1955) 2 WLR 223, Kuruma v. The Queen	16
(1955) AIR 1955 Nag 204 (V 42)= 1955 Cri LJ 1201, State Govt. M. P. v. Bhagirathl	14
(1955) AIR 1955 Punj 151 (V 42)= 1955 Cri LJ 1101 (FB), Krishen Kumar v. The State	14
(1937) AIR 1937 Cal 60 (V 24)= 38 Cri LJ 745, Manindra Nath v. Jyotish Chandra	23
(1934) AIR 1934 Cal 858 (V 21)= 36 Cri LJ 372, Sawai Ram v. Emperor	22
(1928) AIR 1928 Bom 162 (V 15)= ILR 52 Bom 238, Shivbhat v. Emperor	13

P. Innayya Reddy for Public Prosecutor, for Appellant; B. Madhava Reddy for Sharif Mohammed, for Respondents.

JUDGMENT:— This is an appeal from the judgment of the 4th City Magistrate, Hyderabad given on 16th March, 1965, whereby the learned Magistrate acquitted the accused.

2. The essential facts are that the accused are the partners of the shop named and styled as "Fida Hussain Ali Hussain" Medical and General Stores, Begum Bazar, Hyderabad. The accused held Licence No. 117/62 in Form 20-A and 148/62 in Form 20-B issued on 1-1-1962 by the Drugs Controller, Andhra Pradesh. The accused deal in medicines manufactured by various firms.

3. On 3-7-1963, on getting information that the accused have been selling misbranded and spurious drugs like Tincture Iodine, Eucalyptus Oil, Glucose Powder and Woodwards Celebrated Gripe Water etc., the Drugs Inspector (P. W. 1), accompanied by P. W. 2, Drugs Inspector Nanded, and a Police Officer and Panchayatdars went to the shop of the accused at about 3 p.m. They sent one Suryakanth (P. W. 3) to purchase specimens of drugs. Accused 1 was at the counter and was selling medicines. P. W. 3 purchased Tincture Iodine, Eucalyptus oil, Woodwards Celebrated Gripe Water, Glucose Powder along with some other general goods and paid three currency notes of ten rupees denomination, each of which were initialled as M. V. R. by the Drugs Inspector P. W. 1.

4. After having purchased the above said drugs from the accused's shop, P. W. 3 signalled to P. W. 1 and the party who were waiting outside the shop at a

distance. P. W. and the Party came and seized the goods which were purchased by P. W. 3. They seized also the three currency notes from the possession of the 1st accused and also bottles of the above mentioned medicines from the shop of the accused.

5. Samples of these medicines which were seized from the accused's shop were sent to the Government Analyst for analysis and report. The Woodwards Gripe Water sample was also sent to the concerned company in order to find out whether the drug was prepared by that company. The report of the Public Analyst showed that the drugs sold by the accused were misbranded and were not of standard quality and were not in conformity with the schedule to the Indian Drugs and Cosmetics Act (XXIII of 1940) hereinafter referred to as "the Act". The accused therefore were charge-sheeted by P. W. 4, the Drugs Inspector under Sections 18 (a) (i), 18 (a) (ii) and 18 (b) read with Section 27 of the Act. The charge-sheet was filed under the signature of P. W. 4 on 18-4-1964.

6. The accused denied the charges. They contended that no medicine was seized from their shop nor the 1st accused sold any medicine to P. W. 3.

7. In support of the prosecution, eight witnesses were examined and several documents were marked. The accused did not produce any evidence nor did they mark any documents. Upon this material, the learned Magistrate found that the three accused are the partners of the firm of Messrs. Fida Hussain Ali Hussain, General Merchants, that the drugs were sold by accused 1 on behalf of the firm to P. W. 3 on the date when the occurrence took place, that the drugs were seized and samples were sent to the Government Analyst and that the Government Analyst's report is that the Tincture Iodine, Woodwards Celebrated Gripe Water and Glucose Powder were not genuine, that they were of sub-standard quality, that the Gripe Water was not of the real Company and that the Company, Messrs. C. N. & Co., under whose name the bottles were labelled and sold was not in existence nor was it registered. The learned Magistrate however acquitted the accused solely on the ground that P. W. 1 was not the Drugs Inspector for Hyderabad City and the investigation which he carried on was illegal and therefore the proceedings before the Magistrate were not proper and valid. It is this view of the learned Magistrate that is now challenged in this appeal by the State.

8. The principal question to be answered in the appeal is whether the investigation conducted by P. W. 1 and the search and seizure which he carried on

of the drugs and the samples which he sent to the Government Analyst for analysis are proper and legal, and if not, how does it affect the validity of the trial before the learned Magistrate.

9. In order to understand the implications of this question it is necessary to read some of the provisions of the Drugs and Cosmetics Act. Section 2 (e) defines the "Inspector" to mean "(i) in relation to Ayurvedic (including Sidha) or Unani drug, an Inspector appointed by the Central Government or a State Government under Section 33 G; and (ii) in relation to any other drug or cosmetic, an Inspector appointed by the Central Government or a State Government under Section 21." Section 21 authorises the Central or the State Government to appoint such persons as it thinks fit having the prescribed qualifications by a notification in the Official Gazette, to be Inspectors for such areas as may be assigned to them by the Central Government or the State Government, as the case may be. Every Inspector according to that Section is a public servant within the meaning of Section 21 of the Indian Penal Code. His powers and duties would be those which may be prescribed. Section 22 lays down the powers of Inspectors. These Inspectors would enjoy the powers mentioned in the Section within the local limits of the area for which they are appointed. The Inspector can inspect any premises, take samples of any drug, enter and search, examine any record etc. or exercise, such powers as may be necessary, for carrying out the purposes of the said Chapter or the rules made thereunder. Section 23 lays down the procedure to be followed by the Inspectors when they take samples and send the same to Government Analyst. Section 25 relates to the report of the Government Analyst. Sub-section (3) of that Section which is more relevant for the purpose of this inquiry, reads as follows:

"(3) Any document purporting to be a report signed by a Government Analyst under this chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the person whose name, address and other particulars have been disclosed under Section 18-A has within twenty days of the receipt of a copy of the report, notified in writing to the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversy of the report."

The next relevant Section is Section 32. Under that Section, no prosecution under Chapter IV of the Act can be instituted except by an Inspector and no Court inferior to that of a Presidency Magistrate or of a Magistrate of the first

class shall try an offence punishable under the said Chapter.

10. A careful and close reading of these provisions undoubtedly indicates that an Inspector has to be appointed by the State Government by a notification if he fulfils the required qualifications. He has certain powers and duties under the Act and the Rules which include the power to inspect, carry on the search and seize goods and send the samples to Government Analyst apart from other powers and duties. The samples that are thus submitted to the Government Analyst are analysed by the Government Analyst and the report submitted by him would subject to certain things be conclusive proof of the facts mentioned therein. The Inspector has to follow certain procedure at the time of seizing the property, obtaining and sending the samples to the Government Analyst. Lastly, no prosecution can be initiated except by the Inspector.

11. In this case, the contention has been that P. W. 1 was appointed as Drugs Inspector for Hyderabad District which does not include the cities of Hyderabad and Secunderabad as a separate person was appointed for the twin cities. My attention was drawn to the Government notification issued in reference to their appointment, Exhibit P. 36 dated 30-5-1963. According to the notification, one Sri B. V. Ramanarao was appointed as the Inspector for the twin cities of Hyderabad and Secunderabad, and P. W. 1 was appointed for Hyderabad District, Medak District and Mahaboobnagar District. Now, it is not seriously disputed that the revenue District of Hyderabad includes the twin cities of Hyderabad and Secunderabad. In appointing P. W. 1 for the area of Hyderabad District no specific mention is made excluding the area of the twin cities of Hyderabad and Secunderabad. Merely because Mr. Ramanarao, was appointed as Inspector for the twin cities of Hyderabad and Secunderabad, it would not be reasonable to exclude that area from the area of Hyderabad District for which area P. W. 1 was appointed. There is no justification for such construction. At least it is not clear from the notification. Given a plain meaning to the term, Hyderabad District, in my view it would include the twin cities of Hyderabad and Secunderabad. It may be that for the twin cities of Hyderabad and Secunderabad, there would be two Inspectors. The Act does not prohibit the appointment of more than one Inspector for the same area. I therefore do not agree with the contention that merely because Mr. Ramanarao was appointed for twin cities, I should hold that although P. W. 1 was appointed for the whole of Hyderabad District, it excludes the area of twin cities of Hyder-

abad and Secunderabad. From that point of view, the search and seizure made by P. W. 1 who also had obtained samples and sent them to Government Analyst would in no manner be called as illegal.

He was a person rightly appointed under Section 21 of the Act for the Hyderabad District which included the two cities. He therefore had power to carry on the search, seize the drugs from the shop of the accused, obtain samples and send the same to the Government Analyst. Any report submitted by the Government Analyst on the basis of these samples cannot be said to be suffering from any infirmity. In any case, the prosecution itself cannot be bad because it is not P. W. 1 who instituted the complaint but it is P. W. 4 who admittedly had been appointed for the twin cities of Hyderabad and Secunderabad at the time when the complaint was lodged with the trial Court. The lower Court therefore in my view, went wrong in treating P. W. 1 as the Inspector of Drugs for the Hyderabad District excluding the twin cities of Hyderabad and Secunderabad and in characterising his investigation as illegal.

12. Assuming that P. W. 1, the Inspector who was not appointed for Hyderabad City, had carried on the investigation in an area where he was not competent to investigate, I do not think because of that, the trial before the Court below could in any manner, be vitiated. Section 156 (2), Cr. P. C. enjoins:

"No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate".

This provision of law makes it abundantly plain that failure to properly conduct the investigation into an offence cannot vitiate a trial of a case started on the report of an Inspector under Section 32(1) of the Act. The defect or illegality in investigation however serious it may be, has really no direct bearing on the competence to take cognizance by the Court or on the procedure of trial. It is not possible to contend in view of clauses (a) to (c) of Section 190 (1), Cr. P. C. that if the investigation is illegal or the report is invalid, the Court cannot take cognizance of such a case. Even the invalid report of a police officer may fall either under clause (a) or (b) of Section 190 (1), Cr. P. C. It must be remembered that in any case cognizance taken on the basis of an invalid report is in the nature of an error in a proceeding antecedent to the trial and to such a case, Section 537, Cr. P. C. would be attracted. What must follow is that if cognizance is in fact

taken by a Court on a report of the Inspector who was not competent to either investigate or institute criminal proceedings by way of report, there is very little doubt that the trial which followed cannot be set aside unless the Court is satisfied that the illegality committed in the course of an investigation or institution of the report is shown to have brought about a miscarriage of justice. Any investigation, therefore, carried on by an inferior officer where a superior officer alone was authorised to investigate or it was carried on by an Inspector outside his area of jurisdiction or a complaint filed by an Inspector who was not competent to conduct the investigation can at best be only an irregularity which is curable under Section 537, Cr. P. C.

It would not be right to regard the entire proceedings based on the report of an Inspector who was not competent to investigate as bad if the evidence which as tendered before the Court had been found to be uninfluenced by the irregularities and which independently leads to a particular conclusion. It is therefore, clear that the conviction or acquittal does not depend upon the question as to which particular officer actually conducted the investigation which resulted in the trial. That has to be determined wholly by the evidence that is given at the trial. I am therefore clearly of the view that the lower Court was not disentitled from trying this case which was brought before it on a report made in that behalf by P. W. 4, who was the Inspector for Hyderabad and Secunderabad cities. He may not have conducted the investigation himself but he was competent to lodge the complaint. Merely because P. W. 1 was not authorised to investigate in the area of Hyderabad city, the report filed by P. W. 4 does not suffer from any infirmity nor the cognizance taken on the basis of such report by the lower Court can be said to be bad in law.

13. That this view is correct is seen from the following decisions. In *Shivbhat v. Emperor*, AIR 1928 Bom 162, Fawcett, J., who spoke for the Bench said:

"I think the main thing to bear in mind is that a conviction or acquittal does not depend upon the question what particular officer actually conducts the investigation which results in his trial. That is determined mainly by the evidence that is given at the trial and considered; and the question whether that evidence has, in the first place, been elicited by an Inspector or by a Sub-Inspector is of very minor importance and does not really affect the result of a trial, except to this extent: that the theory is that the higher the rank of the police officer investigating, the more careful

and unimpeachable his enquiry is likely to be. I certainly can see, in a case of this kind, no sufficient reason why the irregularity should not be held to fall under Section 537 Criminal P. C."

14. In *State Government M. P. v. Bhagirathi*, AIR 1955 Nag 204 the learned Judges observed at page 206.

"The question in each case depends upon whether prejudice has been occasioned or is likely to have been occasioned due to the non-compliance. The question whether the evidence has been elicited by an officer not authorised to investigate does not appear to have much bearing on the merits of the case, the decision of which rests entirely on the evidence appearing against the accused at the trial. It is, therefore, not right to regard the entire proceedings based on the charge-sheet reported by an officer who was not competent to investigate to be bad if the evidence tendered has been found to be uninfluenced by the investigation and independently leads to a particular conclusion."

Krishen Kumar v. The State, AIR 1955 Punj 151 (FB), is to the same effect.

14A. Subba Rao, J., (as he then was) in *State of U. P. v. Bhagwant Kishore*, AIR 1964 SC 221 said at page 226:

"The question is not whether in investigating an offence the Police have disregarded the provisions of the Act, but whether the accused has been prejudiced by such disregard in the matter of his defence at the trial. It is therefore necessary for the accused to throw a reasonable doubt that the prosecution evidence is such that it must have been manipulated or shaped by reason of the irregularity in the matter of investigation, or that he was prevented by reason of such irregularity from putting forward his defence or adducing evidence in support thereof. But where the prosecution evidence has been held to be true and where the accused has full say in the matter, the conviction cannot obviously be set aside on the ground of some irregularity or illegality in the matter of investigation: there must be sufficient nexus either established or probabilized between the conviction and the irregularity in the investigation."

15. *H. N. Rishbud v. State of Delhi*, AIR 1955 SC 196 provides a complete answer to the contention that illegality in the investigation vitiated the trial. The said decision holds:

"..... where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the preceding investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

16. In *Kuruma v. The Queen*, 1955 AC 197 their Lordships held:

"The test to be applied, both in civil and criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained."

17. What emerges from the above said discussion is that the validity of the trial does not depend upon the validity of the investigation conducted unless of course any irregularity or illegality in the matter of investigation results or is likely to result in miscarriage of justice. The evidence collected during an illegal investigation does not necessarily become inadmissible on that account if it is otherwise relevant. The Court can always scrutinise it by the same method as any other evidence is scrutinised. If on the evidence adduced at the trial, it can satisfactorily be made out that the accused has committed the offence the Court, in spite of irregularities in the matter of investigation would be justified in convicting the accused. On the other hand if the evidence given at the trial cannot independently make out the case and if the evidence is influenced by the improper investigation, the Court would naturally not convict the accused on such evidence. What was to be seen in cases of improper investigation is whether it has occasioned miscarriage of justice, or is it likely to cause prejudice to the accused. If the objection in regard to irregularity in investigation is taken at the earliest stage, it has to be of course set right.

18. Viewed in this background, the fact that the investigation was conducted by P. W. 1 outside the area of his jurisdiction as Inspector or the fact that it is he who took the samples of the medicines from the accused's shop and sent the same to the Government Analyst does not, in my view, in any manner, vitiate the trial, nor does it make the report of the Government Analyst nonetheless a report under Section 25 of the Act. No fault therefore can be found with the report submitted by the Government Analyst nor can it be validly contended that the report filed by P. W. 4 because of the investigation carried on by P. W. 1 could not validly form the basis for taking cognizance by the Court. The Court was right in taking cognizance of the case on the report submitted by P. W. 4. Nothing particular was brought to my notice on the basis of which it could be said that miscarriage of justice was occasioned or there was likelihood of any prejudice being caused to the accused in the matter of their defence or leading evidence.

19. It is in this connection pertinent to note that no objection in regard to any irregularity in the conduct of investi-

tigation was brought to the notice of the trial Court at a sufficient early stage. In *Din Dayal v. State of U. P.*, AIR 1953 SC 831 it was held that all objections regarding the irregularity in an investigation ought to be raised at the earliest stage of the trial. I am therefore satisfied that since no objection was raised at a sufficiently early stage of the trial nor it was shown that the irregularity caused by the investigation by P. W. 1 has in fact caused any prejudice to the accused in the matter of their defence or adducing evidence, the trial conducted by the learned Magistrate did not suffer from any infirmity. The lower Court, therefore in my view was entirely wrong in acquitting the accused only on the ground that

"P. W. 1 had no jurisdiction over the area where the shop of the accused is situated. Hence there is no compliance of the strict provisions of law. The proceedings are not proper and valid."

20. In this connection, I have also to consider whether the samples taken and sent by an unauthorised Inspector, assuming P. W. 1 to be so, could have been analysed by the Government Analyst under Section 25 of the Act and if he so analyses and submits a report what is the evidentiary value of such a report. It would not be, in my view, correct to argue that Section 23 comes into operation only when a sample is taken by an authorised Inspector. If it is taken by a person who is not an authorised Inspector, it cannot be validly contended that in such a case Sections 23 to 25 would not apply. Even if an unauthorised Inspector, of course, after following strictly the procedure laid down, gets the sample analysed from a Government Analyst and the Government Analyst sends the report signed by him, such a report, in my opinion, can certainly be substantive evidence of the facts mentioned therein and it is not necessary to examine the Government Analyst as a witness to prove his opinion.

21. Even if P. W. 1, who although following the procedure strictly had submitted the sample to the Government Analyst, was not authorised to exercise those powers in Hyderabad City, the sample submitted by him nevertheless would be deemed to have been submitted for analysis under Section 23 and the special rule of evidence contained in Section 25 (3) of the Act would apply to the report. The report would be conclusive evidence of the facts mentioned therein without any formal proof of the same. It is immaterial whether the Inspector is regarded as an officer or a private individual. What is important to bear in mind is that the safeguards which Section 23 of the Act provides, if complied with, then there can be little doubt that the

report submitted by the Government Analyst would be conclusive evidence of the facts mentioned therein.

22. I am fortified in my opinion by the following decisions. In *Sawal Ram v. Emperor*, AIR 1934 Cal 858 a Bench of the Calcutta High Court held:

"Even if the Sanitary Inspector who submits the samples to the Analyst is not authorised to exercise those powers in that particular place, samples submitted must be deemed to have been submitted for analysis under the Act, and the special rules of evidence contained in Section 14 under which the Public Analyst's certificate is made admissible in evidence without formal proof will apply. It is immaterial whether the Sanitary Inspector, be he regarded as an official or as a private individual obtained possession of the samples in strict accordance with the provisions of the Act or not. What is important is that the safeguards which the Act lays down in Section 11 should be complied with."

23. In *Manindra Nath v. Jyotish Chandra*, AIR 1937 Cal 60 a Bench of the Calcutta High Court held that the Sanitary Inspector could take samples and send them to public analyst for examination by the provision of the Act, as a private individual under Section 9.

24. In this connection *Raj Kishan v. State*, AIR 1960 All 460 must also be noticed. In that case, M. C. Desai, J., observed:

"If it is taken by a person who is an Inspector for a certain purpose but not for the purpose of taking a sample, Sections 23, 24, 25 etc., will not apply and even if he gets the sample analysed by a Government Analyst and the Government Analyst sends his report signed by him, the report cannot be evidence of the facts stated therein. The Government Analyst may in that case be examined as a witness to prove his opinion by oral testimony but his report itself would not be evidence."

For the reasons which I have already stated, with due respect to the learned Judge, I find it difficult to agree with this view. When the safeguards provided in Section 23 of the Act are rigidly followed and the samples taken are sent to the Public Analyst, I fail to see why the report signed by the Public Analyst cannot fall within the purview of Section 25 and why the rule of evidence mentioned in sub-sec. (3) of S. 25 cannot be attracted to such a case. I would with due respect prefer to follow the two Calcutta Bench decisions referred to by me above. Since the accused as is required under sub-section (3) of Section 25 did not notify in writing to the Inspector or the Court that he intended to adduce evidence in controversion of the report, the

lower Court was right in admitting the report in evidence and treating it as conclusive piece of evidence in regard to the facts mentioned in the said report. No arguments even before me, were advanced showing any violation of the procedure laid down in Section 23 while obtaining and sending the samples by P. W. 1.

25-37. (After considering the evidence the judgment proceeded.)

38. It was contended before me that accused 2 and 3 cannot be held responsible as they did not sell any drug to P. W. 3 nor they could be deemed to have had any knowledge that any spurious drugs were made available for sale in their shop. It is not possible to accept this contention. They admitted that they are the partners in the said medical shop. It may be that they do not actually sit in the shop but being partners they are supposed to be aware of the medicines sold in the shop. It was not their case that in spite of their diligence, the 1st accused was carrying on trade in spurious drugs or that the trade was carried on without their knowledge. Section 34 enjoins that where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. It was for the accused to specifically plead under the proviso to that section that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. That plea was not taken nor there is any proof in that behalf. According to the explanation attached to that section, "Company" includes a firm. Accused 2 and 3 being partners are therefore guilty of the offence by virtue of Section 34 of the Act.

39. No defence under the sub-section (3) of Section 19 also was taken. It was not the contention of the accused that they not being the manufacturers of the drugs they had acquired the drugs from a duly licensed manufacturer, distributor or dealer thereof or that they did not know and could not, with reasonable diligence, have ascertained that the drugs in any way contravened the provisions of the Act, and that the drugs while in their possession were properly stored and remained in the same state as when they acquired it. In all such cases, all that the prosecution is required to prove in order to establish the contravention of Section 18 is the fact that the accused had sold or exhibited for sale the drug which was not of standard quality or

which was a misbranded drug. If the accused want to get rid of the effect of the prosecution evidence, then it is for them to establish the defences which are available to them under sub-section (3) of Section 19 of the Act. No such defence was taken. I do not therefore find any strength in the contention that accused 2 and 3 were not liable.

40. I do not find any substance in the contention that the medicines seized by P. W. 1 were with the police on the 3rd of July and since they were deposited in the Court only on 4th there was possibility of the medicines being substituted. No such suggestion was put to any of the witnesses. It was not argued before the Court below. The evidence of P. Ws. 1, 3 and 4 rules out the possibility of any such substitution. The seized medicines were properly sealed is evident from the evidence led in that behalf. The reports of the Government Analyst do not throw any doubt in regard to the seals of the material sent to him for analysis.

41. For the reasons already given, I would allow the appeal, set aside the acquittal of the accused and find them guilty under Section 18 (a) (i) (ii) and 18 (b) read with Section 27 of the Act and sentence each of them to pay a fine of Rs. 1000/- (one thousand) and in default to undergo rigorous imprisonment for two months.

JHS/D.V.C.

Appeal allowed.

**AIR 1969 ANDHRA PRADESH 106
(V 56 C 32)**

NARASIMHAM AND
KUPPUSWAMY, JJ.

Nawab Mir Behbood Ali Khan and another, Appellants v. Secretary to Govt. Ministry of Home Affairs, Govt. of India, New Delhi and another, Respondents.

Writ Appeal No. 102 of 1967 and W. P. No. 290 of 1966, D/- 26-9-1967 against order of Krishna Rao, J., in C. M. P. No. 2189 of 1967, D/- 3-7-1967.

(A) Civil P. C. (1908), S. 87B — Validity — Provision not ultra vires Arts. 14 and 19 (1) (f) of the Constitution. AIR 1962 SC 73 & AIR 1964 SC 1590 & AIR 1964 SC 1663, Foll. (Constitution of India, Arts. 366 (22), 14 and 19 (1) (f)).
(Para 7)

(B) Civil P. C. (1908), Ss. 86 and 87B — Scope and applicability — Government's consent to sue a former Ruler is no consent to sue his successor — The plaintiff has to obtain the consent afresh — The successor recognised by the President under Article 366 (22) has, in his

own independent right, the personal immunity from civil action — Order in C. M. P. No. 2189 of 1967, D/- 3-7-1967 (AP) by Krishna Rao, J., Affirmed. AIR 1964 SC 1663, Rel. on. (Constitution of India, Art. 366 (22)). (Paras 11 and 12)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1590 (V 51)= W. P. No. 87 of 1962, D/- 6-3-1964, Narottam Kishore Deb Varma v. Union of India 8. 9 (1954) AIR 1964 SC 1663 (V 51)= (1965) 1 SCR 273, Tokendra Bir Singh v. Govt of India 8. 13 (1962) AIR 1962 SC 73 (V 49)= (1962) 1 SCR 702, Mohanlal v. Swami Man Singhji 8

V. B. Sahgal, for Appellants (in W. A. No. 102 of 67) and Petitioners (in W. P. No. 290 of 66); K. Ramachandra Rao, for Respondent 1, D. Narasaraju and Anwarulla Pasha, for 1st Respondent.

NARASIMHAM, J.:— The Writ Appeal is preferred against an interlocutory order in the writ petition by Krishna Rao, J., dismissing C. M. P. No. 2189 of 1967 for bringing on record Prince Mukarram Jah Bahadur alias Nawab Mir Barkat Ali Khan, H. E. H. Nizam the VIII as the legal representative of late Nawab Mir Osman Ali Khan, H. E. H. Nizam the VII, who died on 24th February, 1967 and who was the 2nd respondent in the writ petition. The writ petition itself is filed by Nawab Mir Bahbood Ali Khan and Nazni Begum (hereinafter referred to as the petitioners) questioning the orders of the Central Government refusing to give consent to sue Nawab Mir Osman Ali Khan, H. E. H. Nizam the VII, ex-Ruler of Hyderabad under Section 86 read with Section 87-B of the C. P. C. The Respondents in the Writ Petition are: (1) The Secretary to Govt. Ministry of Home Affairs, Government of India, New Delhi; and Nawab Mir Osman Ali Khan, H. E. H. the Nizam the VII, the ex-Ruler of Hyderabad, who has since died.

2. The petitioners prayed for the quashing of the orders of the Central Government refusing to give consent to sue the then ex-Ruler and for declaring Section 87-B, C. P. C. as invalid and for the issuance of a Writ in the nature of Mandamus directing the Ministry of Home Affairs, Government of India, to accord such consent as was sought by the petitioners and for any other order as the Court may deem fit and proper in the circumstances of the case.

3. On the death of the 2nd respondent, his successor, H. E. H. the Nizam the VIII, who was recognised as such by the President under Article 366 (22) of the Constitution was sought to be impleaded.

4. The Writ appeal and the writ petition raise a common question as to whether H. E. H. Nizam the VIII, the successor of H. E. H. Nizam the VII (2nd respondent in the writ petition) could be brought on record as his legal representative and the writ proceedings continued as against him.

5. The relevant facts are these: Sardar Begum Sahiba died on 11th August, 1950 issueless leaving her sister, Zainab Begum Sahiba, as her heir. Zainab Begum Sahiba died in February, 1956. The petitioner, as the heirs of Zainab Begum Sahiba, alleged that they are the lawful claimants of the 'Matruka' of Sardar Begum Sahiba, which, according to the petitioners, was under the supervision of H. E. H. Nizam the VII through the Saraf-e-Khas Estate Committee. The petitioners, therefore, made an application to the Secretary to the Government, Ministry of Home Affairs, Government of India, New Delhi, to give them consent for filing a suit against Nawab Mir Osman Ali Khan, H. E. H. Nizam the VII, ex-Ruler of Hyderabad.

The Government of India would appear to have called for certain information from the petitioners and the Nizam the VII and refused to give consent, as sought, by their letter No. F.20/6/57-Poll.III dated 1-4-1958. It would appear that further representations were made to the Government of India and the petitioners were referred to the refusal of consent in their letter dated 1-4-1958. The petitioners have filed the writ petition on 25th February, 1966 challenging the refusal of consent by the Central Government referring to the letters affirming their decision already communicated in their letter dated 1-4-1958.

6. The 1st respondent, the Secretary to the Government, Ministry of Home Affairs, Government of India, filed a counter stating inter alia in paragraph 4 thus:

"The Government of India in the Ministry of Home Affairs by its letter No F.20/6/57-Poll.III dated 24-4-1957 requested the petitioners to furnish documentary evidence to prove their claims. Certain documents were produced by the petitioners in November, 1957. After a careful consideration of all the aspects of the case, the Government of India came to the conclusion that there were no valid grounds for granting consent to the petitioners to sue the Ruler of former Hyderabad State and the petitioners were accordingly informed in the Ministry of Home Affairs letter No. F.20/6/57-Poll.III dated 1-4-1958 that the consent asked for cannot be granted. Similar requests made by the petitioners' Advocates were also considered by the Government of India, and they were informed in Ministry of Home Affairs Letters No. F.20/51/

62-Poll.III dated 17-9-1962 and F.20/18/64-Poll.III dated 16-3-64 and 31-8-1965, regretting the inability of the Government of India to revise their earlier decision in refusing consent."

It was further pleaded that Sec. 87-B C. P. C. was not repugnant to Articles 14 and 19 (1) (f) of the Constitution of India as impugned by the petitioners and that the adequacy or otherwise of the reasons that weighed with the Central Government in withholding the consent are not justiciable in a Court of law. The petition was also opposed on ground of delay and laches. It was at this stage that H. E. H. the Nizam, the VII (2nd respondent in the writ petition) died and an application made to implead his successor, H. E. H. Nizam the VIII, was rejected by Krishna Rao, J.

7. The first contention raised by Sri Sahgal was that Section 87-B of the Civil Procedure Code infringes Articles 14 and 19 (1) (f) of the Constitution of India. We cannot possibly entertain this challenge as the Supreme Court has held consistently that Section 87-B is not violative of these Articles of the Constitution.

8. In Mohanlal v. Sawai Man Singhji, AIR 1962 SC 73, the Supreme Court rejected the contention that Section 87-B, C. P. C. was ultra vires of Article 14 of the Constitution. In Narottam Kishore v. Union of India, AIR 1964 SC 1590, the same view was reiterated by the Supreme Court. The earlier decision in AIR 1962 SC 73 was recalled and affirmed and further the challenge that Section 87-B, C. P. C. offended Article 19 (1) (f) of the Constitution was considered and rejected. In Tokendra Bir Singh v. Govt. of India, AIR 1964 SC 1663, the earlier decisions of the Supreme Court were recalled and it was held that the provisions of Sections 86 and 87-B, C. P. C. were constitutional and valid.

9. The learned Counsel, Sri Sahgal, however, relies on the observations in the judgment of the Supreme Court while discussing the partial or conditional consent to the institution of the suit in respect of some properties. The particular observations on which he lays accent are these:

"It is plain that Section 87-B is intended substantially to save the Rulers of former Indian States from harassment which would be caused by the institution of frivolous suits; excepting cases where the claim appears to be frivolous *prima facie*, the Central Government should normally accord consent to the litigants who want to file suits against Rulers of former Indian States whenever it appears that the claims disclosed justifiable and triable issues between them and the Rulers sought to be sued. Nor-

mally, it is not the function of the Central Government to attempt to adjudicate upon the merits of the claim intended to be made by the litigants in their proposed suits; that is the function of Civil Courts of competent jurisdiction.

xx xx xx"

and further thus:

"The authority conferred on the Central Government under Section 87-B is, as we have observed in the case of Nrottam Kishore Deb Verma, W. P. No. 87 of 1962 dated 6-3-1964, AIR 1964 SC 1590 out of tune with the equality before law which is guaranteed by Art. 14; and it may even affect the litigants' fundamental rights under Article 19 (1) (f) and (g), and so, it would be necessary for the Courts to examine the validity of the orders passed under Section 87-B whereby consent has been refused in part only, with meticulous care."

These observations are plainly relevant to the case of according partial consent on an appraisal of the merits of the claim. These observations cannot, therefore, be understood as in any way detracting from the repeated pronouncements of the Court affirming the validity of Section 87-B, C. P. C. and that Section 87-B has not infringed Articles 14 and 19 (1) (f) of the Constitution as is sought to be contended now. Further discussion on this point is, therefore, unnecessary.

10. The second question, which is vital to the determination of these matters is whether H. E. H. Nizam the VIII, the successor of late H. E. H. Nizam the VII, could be brought on record as his legal representative and writ proceedings continued.

11. The proposed legal representative, Nawab Mir Barkat Ali Khan, H. E. H. Nizam the VIII, filed a counter raising the following objections. We prefer to extract here the pertinent parts of his counter-affidavit:

"xx" x xx
I wish to raise two fundamental objections of a preliminary nature about the maintainability of the present petition:

(a) The main writ petition itself is to quash letters of the Government of India or to issue a writ in the nature of Mandamus directing the respondent No. 1 Government of India to accord sanction to the petitioners to sue respondent No. 2 in a Court of competent jurisdiction. The relief namely a direction to accord sanction to sue the deceased Nizam is purely personal and the cause of action in the writ petition does not and cannot in law survive. The writ petition automatically comes to an end and lapses and there is no proceeding to be continued. No question, therefore, of bringing me on record as a legal representative can arise.

(b) Without prejudice to the contention raised in paragraph (a) it is alternatively submitted that if this Hon'ble Court were to hold that the cause of action in the writ petition in law can survive, in that event in view of the fact that I have been recognised as the Ruler and successor as admitted in the affidavit of the petitioners, de novo permission of the Government of India under Section 87-B, Civil Procedure Code, is necessary in order to take proceedings against me. The petitioners have to approach the Government for the requisite sanction and await a decision of the Government of India. In the absence of such sanction, no proceedings can be taken against me."

We are convinced that these objections are substantial and are to prevail.

12. H. E. H. Nizam the VIII is the ex-Ruler of Hyderabad State. By virtue of the Presidential declaration issued under Article 366 (22), he is entitled to personal privileges one of which is an immunity from civil action. That the consent of the Central Government under Section 87-B, C. P. C. is necessary to take proceedings against Rulers of former Indian States is settled law. We, therefore, hold that, in his own independent right by virtue of the declaration of the President under Article 366 (22) of the Constitution, he (Nizam the VIII) is entitled to the personal privilege of immunity from civil action. The application made to sue the former H. E. H. Nizam the VII cannot be proceeded with against H. E. H. Nizam the VIII, who has the same personal immunity as the former H. E. H. Nizam the VII had. We do not consider that a request made to sue H. E. H. Nizam the VII could, after his death, be transformed to a request to sue H. E. H. Nizam the VIII. The present application to implead H. E. H. Nizam the VIII as the legal representative of late H. E. H. Nizam the VII and continue the writ proceedings is wholly inconsistent with the request made to sue H. E. H. Nizam the VII. Krishna Rao, J., has observed in rejecting the petition to implead H. E. H. Nizam the VIII as the legal representative of late H. E. H. Nizam the VII thus:

"xx" xx xx
the prayer in the writ petition is specifically for permission to sue the late Nizam VII by name and there is no other prayer indicating that the suit is intended against the estate of the late Nizam. Under these circumstances, the relief sought was purely personal against the second respondent and hence the petitioners are not entitled to continue the proceedings against his successor. The only remedy of the petitioners is to apply for a fresh sanction to sue the present Nizam under Section 87-B of the

Code of Civil Procedure. For these reasons, I dismiss this petition."

These observations of Krishna Rao, J., express the same view as we have taken.

13. Our attention has been drawn particularly to the counter-affidavit filed by H. E. H. Nizam the VIII in the writ petition, wherein it was stated that a letter had been received from the Ministry of Home Affairs informing him that the petitioners had filed an application to the Government of India for permission to sue him under Section 87-B of the Civil Procedure Code. This is confirmed in the reply-affidavit. We are inclined to say that the petitioners have taken appropriate steps to seek the consent of the Central Government, which, in our view, is the right step to take. The matter is said to be under consideration of the Central Government. We have no doubt that the Central Government will consider the application of the petitioners in the light of the judgment of the Supreme Court in AIR 1964 SC 1663.

14. Mr. Sahgal has addressed a particular request to us that the matter may be disposed of expeditiously. We are sure that the matter will be attended to as early as possible. For these reasons, we dismiss the writ appeal. We also dismiss the writ petition as infructuous. In the circumstances, there will be no order as to costs.

TVN/D.V.C.

Writ Petition and
Appeal dismissed.

AIR 1969 ANDHRA PRADESH 109 (V 56 C 33)

P. JAGANMOHAN REDDY, C. J. AND
KUPPUSWAMI, J.

K. Vishwanatham, Petitioner v. State of Andhra Pradesh and another, Respondents.

Writ Petn. No. 1148 of 1965, D/- 26-10-1967.

Constitution of India, Art. 309, Proviso — Power under, whether sovereign legislative power — Special Rules for Andhra General Service Class IX, R. 8 — General Rules for the State and Subordinate Services Rules, R. 22 — Deletion of R. 8 of Special Rules in 1965 with retrospective effect from 1-1-1961 — Validity — Governor or any person nominated by him has no power to make rules with retrospective effect under Art. 309 — Observations of Dwivedi, J., in AIR 1962 All 328, Dissented from.

The State Government in preparing a panel of names from among the Section Officers of the Secretariat for appoint-

ment to the posts of Assistant Secretaries for the year 1964-65 in the year 1964, did not include the name of the petitioner though he was the senior-most among the scheduled caste employees eligible for appointment to the 9th, 16th and 22nd vacancies in a cycle of 25 vacancies in accordance with R. 8 of the Special Rules for Andhra General Service Class IX read with R. 22 of the General Rules for the State and Subordinate Service Rules. When the selection of the panel was made by the Public Service Commission, the Chief Secretary to Government, while sending a panel of names and indicating his own inclination did not send a separate panel of Scheduled Castes candidates qualified for being considered by P. S. C. and indicated by a letter dated 13-7-1964 that it has been decided by the Government not to apply the rule of special representation while making such appointments and that necessary amendments to the special Rules will be issued separately. Later on the Government deleted R. 8 of the Special Rules by G. O. M. S. dated 15-11-1965 with retrospective effect to come into force on 1-1-1961.

Held that the Governor or any person nominated by him had no power to make rules with retrospective effect under Article 309 of the Constitution. Hence it was directed that the State Government should refer the names of the Scheduled Caste candidates who were eligible for appointment in question, to the Public Service Commission to consider the suitability or otherwise of the petitioner for including his name in the panel for the places reserved in cycle of 25 vacancies.

(Paras 22, 23)
The Constitution did not intend to confer upon the executive authority, namely, the President or his nominee, or the Governor or his nominee, sovereign legislative power; and particularly having regard to the power the President or the Governor, could confer on their respective nominees, it cannot be so presumed. In these circumstances, the Governor has no power to make ex post facto or retroactive rules. Case law discussed. Observations of Dwivedi, J., in AIR 1962 All 328, Dissented from. (Para 22)

The proposition that all law is prospective unless it is given retrospective effect by an authority vested with a power to give retrospective force, admits of no doubt. The power to enact retrospective legislation is inherent in a sovereign legislature acting within the ambit of its legislative power. The power conferred on the Governor or his nominee under the proviso to Article 309 is not a sovereign legislative power, though it may be a power to make a law, if a rule made by him has that effect. This power is not co-extensive with or

coeval or similar to, the power conferred on the legislature. Rules made in exercise of the powers conferred under Art. 309 certainly have statutory force just in the same way as rules made in exercise of the powers conferred under any statute. But it is far from saying that sovereign powers to legislate have been conferred on the President or the Governor.

(Paras 11, 12, 18)

The proviso to Article 309 itself has made a distinction between the powers to be exercised by a sovereign authority, i.e., the legislature, and those to be exercised by the Governor or his nominee, as the rules made by the Governor or his nominee are subject to any enactments that may be made by the legislature. This clearly evinces an intention not to confer sovereign legislative powers on the Governor. The Constitution makers could not have intended to confer an unfettered legislative power on the President or the Governor under the proviso to Art. 309, similar to that conferred on the Parliament or the Legislature of a State. They have particularly taken care to use the word "Act" with reference to the legislature while they used "rule" with reference to the Governor or his nominee and this is further emphasised under the proviso to Art. 309 by the fact that the rules made by the Governor or his nominee are to have effect only subject to the provisions of any Act of the appropriate Legislature. The circumstance that the power to make a rule is conferred not only on the President or the Governor but on any nominee of his is a strong indication that the power was not intended to be co-extensive with or of the same nature as the legislative power of sovereign legislatures. (Para 13)

Cases Referred: Chronological Paras
(1967) W. A. No. 29 of 1965 etc.

- D/- 6-4-1967 (AP), Sriharinaidu v. Govt of Andhra Pradesh 8
- (1966) AIR 1966 SC 1942 (V 53)=
(1963) 1 SCR 64. B. N. Nagarajan v. State of Mysore 9, 21
- (1965) AIR 1965 SC 136 (V 52)=
(1964) 7 SCR 549. Raghavendra Rao v. Deputy Commr. South Kanara 18
- (1965) AIR 1965 Guj 23 (V 52)=
ILR (1963) Guj 1204 (FB), A. J. Patel v. State of Gujarat 18
- (1965) AIR 1965 Mys 65 (V 52). Siddappa v. Venkatesh 20
- (1964) AIR 1964 All 356 (V 51). Vidya Sagar v. Board of Revenue 19
- (1963) AIR 1963 Mys 265 (V 50). Govindaraju v. State of Mysore 20
- (1963) AIR 1963 Punjab 298 (V 50)=
=ILR (1962) 2 Punj 642. Dr. Pratap Singh v. State of Punjab 17
- (1963) AIR 1963 Punjab 345 (V 50)=
ILR (1963) 1 Punjab 621. State of Punjab v. Ram Prashad 15

- (1962) AIR 1962 All 328 (V 49)=
ILR (1962) 1 All 793 (FB), Ram Autar v. State of U. P. 19
- (1961) AIR 1961 SC 751 (V 48)=
(1961) 2 SCR 679, State of U. P. v. Babu Ram 13
- (1961) 1961 AC 297, Smith v. Callender 11
- (1870) 40 LJQB 28=6 QB 1, Phillips v. Eyre 14

D. Narasaraju and A. Subbarao, for Petitioner; Advocate General, for Respondents.

P. JAGANMOHAN REDDY, C. J.:—The petitioner is an Adi Andhra belonging to a scheduled caste. He is in the service of the Government of Andhra Pradesh, having entered it as a Lower Division clerk in the Revenue Department of East Godavari District on 15-4-1940. He was subsequently promoted as an Upper Division Clerk in 1950 and thereafter transferred to the Development Department in the Secretariat Service in a similar post in 1954. On 31-12-1955, he was promoted as a Section Officer. It is the petitioner's case that the Government of Andhra Pradesh, in preparing a panel of names from among the Section Officers of the Secretariat for appointment to the Posts of Assistant Secretaries for the year 1964-65 in the year 1964, did not include the petitioner's name, though he is the seniormost among the Scheduled Caste employees eligible for appointment to the 9th, 16th and 22nd vacancies in a cycle of 25 vacancies of the posts of Assistant Secretaries, in accordance with Rule 8 of the Special Rules for Andhra General Service Class IX, (hereinafter referred to as the "Special Rules") read with Rule 22 of the General Rules for the State and Subordinate Services Rules (hereinafter referred to as the "General Rules").

Even when the Government made temporary appointments pending selection by the Andhra Pradesh Public Service Commission, it made appointments in contravention of the statutory rules and executive instructions contained in their Memoranda Nos. 2273/62-8 (General Administration (Services-D) Department dated 19-7-1963 and No. 3743/63-1 General Administration (Services-D) Department dated 13-9-1963 in the last of which, it stated that the rules of reservation must be followed when making appointments even on a temporary basis. In spite of several representations, no notice was taken of the claim of the petitioner, and the Government gave an endorsement to the petitioner stating that his case for selection to the post of an Assistant Secretary would be considered in due course, and ignoring his rights, a panel was finally approved and appointments were made in pursuance thereof.

on 1-3-1965. It is therefore prayed that a direction be given to the Government to follow Rule 8 of the Special Rules read with Rule 22 of the General Rules in preparing a panel for appointment of Assistant Secretaries from among the Section Officers for the year 1964-65 by including the petitioner's name for selection by the Andhra Pradesh Public Service Commission to a post in the 9th vacancy in the cycle of 25 vacancies and that pending disposal of the writ petition, to direct the Government not to make further appointments to the posts of Assistant Secretary.

2. According to the petitioner in his reply affidavit to the counter of the 1st respondent, Government of Andhra Pradesh, his writ petition having been admitted, two weeks time was taken by the Government for filing a counter, and in the meanwhile the Government deleted Rule 8 of the special Rules by G. O. Ms. No. 2066 General Administration (Services-B) Department dated 15-11-1965 with retrospective effect to come into force on 1-1-1961.

3. The Government's attitude was that there were only two Section Officers belonging to the scheduled castes in the Departments other than Law and Finance viz., (1) the petitioner and (2) K. Lakshmana Rao, that their ranking was 183 and 212 respectively in the common seniority list of all the Departments except Law and Finance, that in view of the heavy responsibilities attached to the post of Assistant Secretary to the Government, a policy decision was taken by the Government not to apply the rule of special representation for purposes of appointment to the category of Assistant Secretaries to Government, even though the Special Rules provide for the same. In furtherance of that policy, Rule 8 of the Special Rules was deleted from 1-1-1961. It was stated that the name of the petitioner was included in the list of eligible Section Officers, i.e., those who have put in more than 5 years service as Section Officers, and that the same was sent to the Andhra Pradesh Public Service Commission, that the Public Service Commission was also informed of the Government's decision not to apply the rule of special representation in respect of appointments to the category of Assistant Secretaries to Government and that necessary action will be taken to amend the Special Rules suitably, that eligibility by itself does not entitle the Section Officers automatically to the appointment, and that the Public Service Commission will have to consider the suitability of the candidates from a list of eligible candidates.

4. We give below Rule 22 of the General Rules and Rule 8 of the Special Rules:

Rule 22: Where the Special Rules lay down that the principle of reservation of appointment shall apply to any service, class or category, appointments thereto shall be made on the following basis.

(a) The unit of appointment for the purposes of this rule shall be hundred of which fourteen shall be reserved for the Scheduled Castes, three shall be reserved for Scheduled Tribes and the remaining eighty-three shall be filled on the basis of merit.

(b) The claims of members of the Scheduled Castes and the Scheduled Tribes shall also be considered for the eighty-three appointments which shall be filled on the basis of merit; and where a candidate belonging to a Scheduled Caste, or Scheduled Tribe is selected on the basis of merit, the number of posts reserved for Scheduled Castes or Scheduled Tribes as the case may be, shall in no way be affected.

(c) Appointments under this rule shall be made in the order of rotation specified below in every cycle of twenty-five vacancies:-

- 1 Open Competition.
- 2 Scheduled Tribes.
- 3 to 8 Open Competition.
- 9 Scheduled Castes.
- 10 to 15 Open Competition.
- 16 Scheduled Castes.
- 17 to 21 Open Competition.
- 22 Scheduled Castes.
- 23 to 25 Open Competition.

(d) If a qualified and suitable candidate belonging to any of the Scheduled Castes or the Scheduled Tribes is not available for appointment in the turn allotted for them in the cycle, the turn will lapse and the vacancy shall be filled by a candidate of the next turn in the order of rotation. No account shall be taken of any lapsed turns of the Scheduled Castes or of the Scheduled Tribes."

Rule 8: "The rule of reservation of appointments (General Rule 22) shall apply separately to recruitment by transfer or promotion, as the case may be, to each of the following two categories; namely:-

(1) Deputy Secretaries to Government, not borne on the Indian Administrative Service Cadre, and

(2) Assistant Secretaries to Government in all the Departments of the Secretariat taken together as one unit other than Law and Finance Departments where the rule shall apply separately to each of the above two categories, each of the said two Departments taken as a separate unit."

5. It will be observed that the claims of the candidates belonging to the Scheduled Castes and Scheduled Tribes, though reserved in accordance with Rule 22, would be considered in a unit of 100 in every cycle of 25 vacancies in accord-

ance with Rule (c); nonetheless, under clause (b) of Rule 22, for the remaining 83 appointments, i.e., after deducting the reservations for the Scheduled Castes and Scheduled Tribes from 100, if a candidate belonging to the Scheduled Caste or Scheduled Tribe is selected on the basis of merit, they have to be appointed without in any way affecting the reservation for the Scheduled Castes or Scheduled Tribes. In so far as appointments to the reserved posts are concerned candidates qualified and suitable will be appointed. Under cl. (d) of R. 22, if qualified and suitable candidates are not available for promotion in the turn allotted for them in the cycle, their turn will lapse and the vacancy will be filled by candidates in the next turn in order of rotation.

6. The question now for consideration is whether a Scheduled Caste candidate can be said to be available for appointment, only if he is in the first 100 qualified candidates, or whether any person qualified irrespective of what his seniority is, can be considered as being suitable for the reserved post. We do not think it was seriously contended that the persons to be considered for reserved posts should fall within any particular unit, because when the rule specified a unit of 100, it only refers to the unit of appointment and not to the availability of the candidates. The 25 appointments or the 100 appointments can be made from any number of candidates who are qualified, depending upon their suitability for filling posts whether by open competition or by virtue of the reservation. In this view, under Rule 22 of the General Rules read with Rule 8 of the Special Rules, the petitioner would be qualified for being considered by the Public Service Commission, which would have to determine whether he is suitable for appointment.

7. But it may be stated that the Government had taken a policy decision even earlier, i.e., from December 1962, not to enforce the reservation, and were giving effect to it each year by executive instructions. When the selection of the panel was made by the Public Service Commission, the Chief Secretary to Government, while sending a panel of names and indicating his own inclination did not send a separate panel of Scheduled Castes candidates qualified for being considered by the Public Service Commission, because, as he said in his letter No. 3390/63 dated 13-7-1964 it has been decided by the Government not to apply the rule of special representation while making appointments to the category of Assistant Secretaries to Government and that necessary amendments to the Special Rules for the Andhra General Service CL IX will be issued separately," and "the present panel may therefore be prepared without following the rule of reserva-

tion as was done previously." In view of this categorical direction by the Chief Secretary on behalf of the Government, the Public Service Commission could not have considered and in fact we are certain that it did not consider, case of the petitioner or any other Scheduled Castes candidate for 9th or 16th vacancy.

8. If this was the only point to be considered in this writ petition, we would have had no difficulty but it is contend on behalf of the Government that since the rule has been amended with retrospective effect, the petitioner has no right to be considered for a reserved post. Mr. Narasaraju, on the other hand submits firstly, that at the time when the Public Service Commission was considering the panel, the rule was in existence and it was bound to consider the suitability of the petitioner for being included in the panel, and since it has not done so, the panel as now approved is bad; secondly, that the Governor has no power to delete the rule with retrospective effect. In other words, the question which we are called upon to consider is whether the Governor or any person nominated by him has power to make rules with retrospective effect under Article 309 of the Constitution. It is contended by the learned Advocate General, keeping in view the decision of a Bench of this Court in a batch of Writ Appeals Nos. 29 of 1965 etc. D/- 6-4-1967 (AP), Srihari-naidu etc. v. Government of Andhra Pradesh, that the power of the Governor as the executive head and a delegate or donee under a statute of the legislature of a State is different from the power of the Governor as a direct recipient of the power to make rules, under the Constitution. According to the learned Advocate-General, the power of Governor or any other person whom he may direct, to make rules, is coequal, co-extensive and similar to the power of the legislature to make a law and, therefore, he contends that the rules made by the Governor with retrospective effect are valid.

Sri Narasaraju, however, submits that the very language of the Article 309 shows that the Rule is not treated as on par with the Act of a Legislature and the Governor or any person directed by him is therefore, not conferred with a power to give retrospective effect to the rules made by him. In the unreported judgment, to which reference has already been made, the question that fell for consideration was whether the executive can withdraw a notification giving exemption from tax retrospectively. The learned Advocate General had contended in that case that a rule or notification made in exercise of the powers conferred by a Statute when made, has the force of law and is as if enacted by the

Annexure P refers to Annexure VI dated 22-10-55 and insists that there can be no relaxation in the matter of qualifications and the source of recruitment. Annexure Q makes only a query whether the Government sanction referred to the post of the Secretary to the Chief Justice-cum-Stenographer or a separate post in the Selection Grade of Stenographers. Government replied as per Annexure R, that Government sanction for the Selection Grade Stenographer was for the post of Secretary to the Chief Justice-cum-Stenographer only and not an additional Selection Grade post. Annexure R seeks to explain that any Stenographer whether of Selection Grade, Grade I (Senior or Junior) or Grade II, when attached to the Chief Justice as Private Secretary may be given the Gazetted status as in the case of their counterparts in the Secretariat attached to the Ministers. It is clear that the substantive post is that of the Selection Grade Stenographer and that grade has been introduced (vide Annexure P dated 6-8-58) in the High Court while the total strength remained seven as before. This improvement in the Stenographers' service was in pursuance of the demand for giving incentive to the Stenographers in the High Court. When this notification with the various improved grades was made applicable by the Governor's order, the Stenographers in the Cadre of the High Court would naturally look forward to the boons available therein. It will defeat the very purpose of the notification registering an improvement in their grades if someone from outside the cadre bears away the bell and steals a march over those for whom the battle has been won. Annexure R cannot be interpreted to mean and substitute for a sanction of an eighth post in the Stenographers' Cadre. All that is meant was that whoever was appointed to the Selection Grade would not fill an extra post. One of the posts in Grade I (Senior or Junior) in terms of the notification dated 22-10-55 would be upgraded to the Selection Grade. It further indicated that if the High Court desired, the Selection Grade Stenographer attached to the Chief Justice might be also the Secretary. It was not possible to pick up the new grade from the notification and treat it in an isolated way discarding the conditions for the revised grade. Under Article 229 of the Constitution the Governor has to approve this revision relating to salaries etc., and those rules prescribing the conditions cannot be given a go-by. The orders dated 7-5-59 somehow lost sight of the notification dated 22-10-55, specifically referred to in Annexure P which was the new charter of salaries for the employees of the High Court subject to the conditions set out therein. This would not have

happened if proper rules were framed in terms of the Government notifications so far as relating to salaries; then one would not require to hunt up for the actual position by perusal of several notifications and correspondence. This controversy would have died a natural death, if such rules as laid down under Article 229 of the Constitution were even later framed and published. It was, therefore, open to the High Court to submit a proposal to the Government for the post of the Secretary to the Chief Justice giving him the pay scale of Selection Grade, if it so desired, but instead it allowed the temporary post to lapse with effect from 24-8-59 and the order dated 7-5-59 resulted in adding one more post to the strength of the Stenographers' Cadre, which the Government rightly pointed out as being without the approval of the Governor.

21. I am, therefore, clearly of the opinion that there was no sanction for the post in which the petitioner was appointed as per order made by Sinha, C. J., on 7-5-59 and consequently, the two orders dated 7-5-59 (Annexures S and T) have no legal force being not in conformity with the provisions of Article 229 of the Constitution. That being the position, Mehrotra, C. J.'s order dated 27-9-61 restoring these void orders has no effect in law and must be held to be non est. I am further of the opinion that Deka, C. J., was competent to review the order of Sinha, C. J., and his order vacating Sinha, C. J.'s order is not open to question as being without jurisdiction.

22. In the result, I agree with the order passed by Nayudu, J., as he then was, and order that the Rule be discharged without costs.

23. It may, however, be hoped that the Government of Assam may consider about the hardship caused to the petitioner on account of the financial implications consequent on the reversal of the orders of Sinha, C. J. and Mehrotra, C. J., for which the petitioner was not at all to blame.

KSB

Rule discharged.

AIR 1969 ASSAM AND NAGALAND 33 (V 56 C 8)

P. K. GOSWAMI AND M. C.
PATHAK, JJ.

Bijoy Krishna Paul, Petitioner v. State of Assam and others, Opposite Parties.

Civil Rule No. 458 of 1966, D/- 1-4-1968.

Minimum Wages Act (1948), Ss. 5(1)(b) and 5(2) — Prescribing Minimum Wages for Bidi Manufactory — Notification dated 6-6-1966 about proposed minimum

IL/IL/D850/68

rates published on 22-6-1966 in Assam Gazette — Objection invited to be received by Government for consideration on or before 20-8-1966 — Requirement of S. 5(1)(b) not fulfilled — Final notification dated 12-10-1966 under S. 5 (2) silent about consideration by Government of any representation — Procedure laid down under Ss. 5(1)(b) and 5(2) not followed — All procedure laid down in Act must be strictly complied with by Government — Notifications held to be invalid and must be quashed under Art. 226 of Constitution — (Constitution of India, Art. 226). (Paras 5, 6)

K. P. Sen, for Petitioner; G. K. Talukdar, Sr. Govt. Advocate, for Opposite Parties.

GOSWAMI, J.:— This is an application under Article 226 of the Constitution of India directed against the two notifications of the State Government promulgated under the Minimum Wages Act

(Act XI of 1948), hereinafter referred to as the Act.

2. The first impugned notification was published in the Assam Gazette on 22nd June, 1966 and it will be useful to quote the same in extenso:

"Shillong, Wednesday, June 22, 1966,
1st Asadha, 1888, S. E.

The 8th June, 1966.

No. GLR. 634/65/15. In exercise of the powers conferred by Section 3 (1) (a) read with Section 5 (1) (b) of the Minimum Wages Act 1948 (Act XI of 1948), as amended, the Governor of Assam is pleased to publish the following proposed minimum rates of wages to be fixed in respect of the employment in Biri Making Industry in the whole State of Assam.

Any objection, comment or criticism in this respect is invited and may be received by the Government for consideration on or before 20th August 1966.

SCHEDULE

Serial No.	Category of employees.	All inclusive minimum rates of wages.
A. 1	1. Bidi Maker 2. Checker 3. Toaster 4. Packer 5. Cleaner 6. Clerk (Non-Matric) 7. Clerk (Matriculate)	Rs. 2.75 per 1000 Bidis.
		75.00 per month.
		100.00 per month.
		125.00 per month.

The 28th September, 1966.

No. GLR 634/65/25. In exercise of the powers conferred by sub-section (2) of Section 5 of the Minimum Wages Act, 1948 (Act XI of 1948), the Governor of Assam is pleased to fix the following rates of Minimum Wages the same having been previously published with Notification No GLR 634/65/15 dated the 8th June 1966, as required under Clause (b) of sub-section (1) of the said section in respect of the employment in Biri Making Industry in the whole State of Assam which shall take effect from the date of publication of this Notification.

SCHEDULE

Serial No.	Category of employees.	All inclusive minimum rates of wages
A	1. Bidi Maker 2. Checker 3. Toaster 4. Packer 5. Cleaner 6. Clerk (Non-Matric)	Rs. 2.75p. (Rupees Two and seventy-five paise) only per 1,000 Bidis. Rs. 75.00 (Rupees Seventy-five) per month.
	Rs. 100.00 (Rupees one hundred) per month. Rs. 125.00, Rupees one hundred twenty-five) per month.

B. The above rates are inclusive of the payment of weekly off day and no separate payment would be necessary on this account.

C. The daily wages of the Workers should be calculated by dividing the monthly wage by twenty-six.

The above daily rates shall be payable without affecting existing tasks and hours of works."

3. Briefly, the facts are that the Government intended to prescribe Minimum Wages for Bidi Manufactory which is a scheduled employment as enumerated in the Act. It is not disputed by Mr. Sen, the learned Counsel for the petitioner that Bidi Manufactory is a scheduled employment. That being the position, it is stated by the petitioner that the Government intended to fix the minimum rates of wages for this industry and with that end in view, wanted to take action under Section 5 (1) (a) of the Act and indeed by letter dated 12th August, 1965, (Annexure D), asked the petitioner Association to send names of their representatives to serve in a committee which will be set up by the Government under Section 5 (1) (a) of the Act. In pursuance of such a notice from the Government, the petitioner also conveyed their willingness to co-operate and submit names of representatives to be included in such a committee, by their letter dated 28th August, 1965 (Annexure E). The petitioner's case is that the Government after some time gave a complete go-by to this intention of theirs and published the first notification (Annexure G) dated 8th June, 1966, whereby they changed their mind and published various proposed minimum rates of wages for this industry in the Assam Gazette and called for representations on or before 20th August, 1966.

The petitioner having seen this notification immediately reacted to the proposal by their letter dated 9th July, 1966, (Annexure H), and raised objection to Government's changing their intention in that behalf. The petitioner claimed that the only reasonable way in the circumstances to fix the minimum rates of wages was to constitute a committee under Section 5 (1) (a) of the Act and to fix the minimum wages thereafter under Section 5 (2) after considering the advice of the committee. Although it would have been expected that the Government would reply to this letter, the same, however, remained unheeded. Instead, the Government came in with the impugned notification dated 28th September, 1966, (Annexure I), published in the Assam Gazette on October 12, 1966, which has already been quoted above. Mr. Sen, the learned Counsel for the petitioner, raises various questions objecting to these notifications and to the wages which are notified in the final notification. It is not

necessary to take all those points into consideration, as will be noticed presently, the controversy may be disposed of by a reference to Section 5 (1) (b) and Section 5 (2) of the Act.

4. Mr. Sen's argument in this context is that the notification dated 8th June, 1966, published on 22nd June, 1966, is not in conformity with Section 5 (1) (b) of the Act. We have, therefore, to read Section 5 of the Act, which is as follows:

"5.(1) In fixing minimum rates of wages in respect of any scheduled employment for the first time under this Act or in revising minimum rates of wages so fixed, the appropriate Government shall either—

(a) appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision, as the case may be, or

(b) by notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date, not less than two months from the date of the notification, on which the proposals will be taken into consideration.

(2) After considering the advice of the committee or committees appointed under Clause (a) of sub-sec. (1), or as the case may be, all representations received by it before the date specified in the notification under Clause (b) of that subsection, the appropriate Government shall, by notification in the Official Gazette, fix, or, as the case may be, revise the minimum rates of wages in respect of each scheduled employment, and unless such notification otherwise provides, it shall come into force on the expiry of three months from the date of its issue

Keeping the provisions of Section 5 in the forefront, Mr. Sen submits that the notification under Section 5 (1) (b) giving the dates for submission of objections on or before 20th August, 1966, is bad in law inasmuch as the requirement, which is mentioned in Section 5 (1) (b), that "not less than two months" from the date of the notification should be given for the purpose, has been flagrantly disobeyed. The learned Senior Government Advocate appearing for the opposite party, submits that although the notice has been published in the Assam Gazette on June 22, 1966, the date of the notification is 8th June, 1966. He relies on the expression "the date of the notification" mentioned in Section 5(1)(b) and submits that all that the law contemplates is that "not less than two months' time" should be counted from the date of the notification and not from the date of the publication of the same in the Assam Gazette.

In order to appreciate the rival submissions in this behalf, it is necessary to remember that the object of the Minimum Wages legislation is to fix minimum rates of wages for the scheduled industry and in that behalf these wage legislations are more or less reasonable restrictions imposed in the way of the employers in conducting their business. In this view of the matter, an elaborate procedure has been prescribed under the Minimum Wages Act, which has got to be strictly complied with before Minimum Wages of this description are fixed. It is noteworthy that if the employer, who is under legal obligation to pay the prescribed Minimum Wages to his employees in accordance with the provisions of the Act, disobeys these directions, he can be prosecuted under the law. It is, therefore, clearly necessary that the Government in making these notifications, for prescribing the wages under the Act, punctiliously follows the letter of the law and strictly complies with all the procedure laid down in the Act.

5. The learned Senior Government Advocate next contends that the two months should be counted in days and the notification being published on the 60th day is not invalid in law. Unfortunately, however, the words used in the notification are "not less than two months" from the date of the notification. "Month" under Section 3 (35) of the General Clauses Act, shall mean a month reckoned according to the British calendar. In that view of the matter, the two months must be calculated from 22nd June, 1966, the date of the publication, which should be reckoned as the date of the notification within the meaning of the expression under Section 5 (1) (b). In the notification, this date is therefore clearly deficient by one day, and it does not fulfil the requirement of not being less than two months from the date of the notification. Serious objections could be made by those people who wanted to represent even on the last day if they so wished. Another striking factor in this case is that apart from the final notification dated October 12, 1965, we do not find anything on records that representations were received by the Government which they had the opportunity to consider.

It is perhaps for this reason that the final notification does not show that the Government had considered the representations received. The notification is absolutely silent on the point and does not speak about consideration being given to any representation in this behalf. Section 5 (2) of the Act as is noticed earlier requires the Government to take into consideration the representations received by them before the date specified in the notification under Section 5(1) (b). Even

in this view of the matter, the notification shows a patent infirmity. We are clearly of the opinion that the notifications of the State Government (Annexures G and I) are invalid in law inasmuch as they have not followed the procedure laid down under Sections 5(1) (b) and 5 (2) of the Act, and in that view of the matter, these notifications are liable to be quashed in exercise of our powers under Article 226 of the Constitution, and which we hereby do. It will be open to the State Government, if they so desire, either to invoke Section 5 (1) (a) or 5 (1) (b), as the case may be, and then take into consideration all relevant matters, as may be applicable, in conformity with section 5 (2) of the Act before they come out with a notification prescribing minimum rates of wages for the scheduled industry.

6. The application is accordingly allowed. The impugned notifications No. GLR.634/65/15 dated 8th June, 1966 and No. GLR.634/65/25 dated 28th September, 1966, are hereby quashed. There will be no order as to costs.

SSG/D.V.C.

Petition allowed.

AIR 1969 ASSAM AND NAGALAND 36
(V 56 C 9)

P. K. GOSWAMI AND M. C.
PATHAK, JJ.

Nireswar Gogoi, Petitioner v. State of Assam, Opposite Party.

Criminal Revn. No. 90 of 1965, D/- 24-5-1968.

Criminal P. C. (1898), Ss. 251, 252, 251-A — Cases instituted on 'Police report' — Expression 'Police Report' — Meaning — Offences under Assam Opium Prohibition Act — Report of excise officer though he is invested with powers of a police officer for purposes of investigation of offences is not a police report — Procedure to be followed is one laid down by S. 251(b) — Criminal Revision 108 of 1963 (Assam) D/- 17-1-1964, Overruled.

Excise officer's report even though he may be invested with the powers of a Police Officer for the purposes of investigation and even though he may have actually investigated the case under Chapter XIV of the Criminal P. C., cannot be equated with a Police report. In order to have the status of a Police report, as contemplated under Sec. 251A of the Criminal P. C., it must not only be made on the conclusion of the investigation under Chapter XIV of the Code but also the investigation concerned must be conducted by a Police Officer and not an Excise Officer exercising the powers of a Police Officer. The above

conclusion will not be disturbed if cognizance is taken of such a report either under Section 190 (1) (a) or under Section 190 (1) (b) of the Criminal P. C. Consequently the Magistrate commits no irregularity in proceeding with the trial of the accused under Section 252 of the Criminal P. C. and succeeding sections. AIR 1962 SC 276 and Cri. Appeal No. 201 of 1963 D/- 11-12-1964 (SC) & AIR 1945 PC 18, Rel. on; Cri. Revn. No. 108 of 1963 D/- 17-1-1964 (Assam), Overruled. AIR 1958 Cal 213 & AIR 1963 Madh Pra 337. Explained. (Paras 9 and 10)

A perusal of Ss. 22, 26 and 5 (a) of the Assam Act indicates that offences under the Assam Opium Prohibition Act will have to be investigated according to the provisions of the Criminal P. C. subject to any exceptions or any modifications of the manner or place of investigation contained in the Assam Act itself. In the absence of any procedure for investigation laid down in the Assam Act, it follows that while investigating offences under the Assam Opium Prohibition Act, the officers must, when so doing, comply with Section 5 (2) of the Criminal P. C. which provides for investigation of offences against other laws. This being the position, provisions of Chapter XIV so far as they are applicable to an investigation of an offence under the Assam Act, must be complied with. Not having made any provision for the mode of investigation, it is left under Sec. 25 (3) of the Assam Act to the officer named therein to take such measures as may be necessary according to law. If this is the only guide under the Assam Act to these officers for the purpose of carrying out investigation of offences under the said Act, the procedure may vary with each officer's understanding of what the law is. The procedure laid down cannot be left so vague as that. In absence of anything to the contrary in the Assam Act, it will be incumbent on the officers investigating offences under the Assam Act to follow the procedure laid down for investigation of cognizable offences under the Code of Criminal Procedure and these provisions are to be found in Chapter XIV of the Code.

(Para 7)

The expression 'Police report', which is not defined in the Criminal P. C. should be given a popular and accepted meaning which is in best accord with the common understanding of people. By long-drawn process of reasoning the expression 'Police report' should not be given a meaning which does not fulfil the first essential, namely that it must be a report of a police officer enrolled or appointed as such and without any veil whatsoever. Besides, refusal to give an ordinary and natural meaning to the expression "Police report" and equating an

Excise officer's report with a Police report will result in drastic consequences affecting the procedure of a criminal trial. If the Excise officer's report is held to be a Police report, the case being instituted on such a report, an accused will be deprived of a right to know what the evidence of the prosecution witnesses on oath will be before framing of the charge and also to cross-examine them at that stage. Attributing such a meaning to an expression in absence of a clear definition in the Code and thereby causing prejudice to an accused in a criminal trial should be always avoided. AIR 1962 SC 276, Referred. (Paras 8, 9)

Cases Referred:	Chronological	Paras
(1964) Cri Appeal No. 201 of 1963, D/- 11-12-1964 (SC), Amal Shah v. State of Madhya Pradesh	12	
(1964) Cri. Revn. No. 108 of 1963, D/- 17-1-1964 (Assam)	11	
(1963) AIR 1963 Madh Pra 337 (V 50)=1963 (2) Cri LJ 629, Sardar Khan Multan Khan v. State	8	
(1962) AIR 1962 SC 276 (V 49)=1962 (1) Cri LJ 217, State of Punjab v. Barkat Ram	8	
(1958) AIR 1958 Cal 213 (V 45)=1958 Cri LJ 622, Premchand Khetry v. The State	8	
(1945) AIR 1945 PC 18 (V 32)=46 Cri LJ 413, Emperor v. Nazir Ahmad	8	

J. P. Bhattacharjee, for Petitioner; D. K. Hazarika, Jr. P. P., for the State.

GOSWAMI, J.:— This Criminal Revision is directed against the judgment of conviction under Section 5 (a) of the Assam Opium Prohibition Act (Assam Act XXII of 1947), hereinafter called the 'Assam Act', and the sentence of rigorous imprisonment for four months and a fine of Rs. 200/-, in default rigorous imprisonment for another two months. This is the modified sentence passed by the learned Sessions Judge in appeal in place of the earlier sentence of rigorous imprisonment for one year and a fine of Rs. 200/-, in default rigorous imprisonment for two months, passed by the Sub-divisional Magistrate, Sibsagar in the original trial.

2. The facts are very brief. The Excise Inspector of Sonari accompanied by the Assistant Excise Inspector and some constables searched the house of the petitioner, hereinafter called the accused, on 13th October, 1963 and recovered from inside his dwelling house one "Tema" containing six tolas of opium. The opium was seized by the Excise Inspector and the accused was arrested. He was produced before a Magistrate on the following day. One witness was examined by the prosecution on that day and on his evidence a charge under Sec-

tion 5 (a) of the Assam Act was framed against the accused to which he pleaded guilty. Even in his statement under Section 342 of the Code of Criminal Procedure, he admitted that the opium was found in his possession and that he had kept it with him for sale. The learned Magistrate accordingly convicted the accused on his plea of guilty under Sec. 5 (a) of the Assam Act and sentenced as above. In appeal, the learned Sessions Judge only considered the question of severity of the sentence and reduced the same as earlier noticed.

3. This revision application came up before me while sitting singly and having regard to the question of law raised regarding the illegality of the whole trial I referred the matter to a Division Bench, and that is how it has come before us now.

4. It is contended on behalf of the accused that the entire trial was vitiated as the learned Magistrate failed to comply with the mandatory provisions of Section 251 (a) of the Code of Criminal Procedure under which it is obligatory for the Magistrate to follow the procedure laid down under Section 251-A of the Code of Criminal Procedure.

5. It is apparent that in this case the learned Magistrate followed the procedure laid down under Section 251 (b) and consequently the procedure in conformity with the provisions of Sec. 252 of the Code of Criminal Procedure. Section 251 of the Code of Criminal Procedure reads as follows:

"251. In the trial of warrant-cases by Magistrates, the Magistrate shall—

(a) in any case instituted on a police report, follow the procedure specified in Section 251-A; and

(b) in any other case, follow the procedure specified in the other provisions of this Chapter."

Section 251-A may also be set out:

"251-A. Procedure to be adopted in cases instituted on police report.

(1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished.

(2) If, upon consideration of all the documents referred to in Section 173, and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him.

(3) If, upon such documents being considered, such examination, if any, being made and the prosecution and the accused being given an opportunity of being heard, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(4) The charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried.

(5) If the accused pleads guilty, the Magistrate shall record the plea and may, in his discretion, convict him thereon.

Section 252 also should be set out:

"252. (1) In any case instituted otherwise than on a police report, when the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

Under Section 254 of the Code of Criminal Procedure, charge is framed when an offence appears to be proved after recording of evidence in accordance with Section 252 of the Code of Criminal Procedure.

6. The offence charged is under Section 5 (a) of the Assam Act and is a cognizable offence. The procedure which is to be followed in a trial of this offence is also that of the warrant procedure. The only point therefore to be considered is whether the offences reported by Excise Officers under various sections of the Assam Act are to be treated as offences instituted on a police report. Chapter VII of the Assam Act describes the procedure, namely, Power to issue warrants (Section 19), Power of entry, search, seizure and arrest without warrant (Section 20) and Power of seizure and arrest in public places (Section 21). Section 22 may be noticed:

"22. Mode of executing warrants and of making searches and arrests. — The provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall, in so far as they are applicable, apply to the execution of warrants and making of searches and arrests under this Act."

Section 24 provides for report of arrest and seizure by the officer making arrest or seizure to his immediate official superior within 24 hours. Section 25 prescribes for the disposal of persons arrest-

ed and articles seized. Section 26 may be quoted:

"26. Power to invest Excise Officers. — The State Government may invest any officer of the Excise Department, not below the rank of Sub-Inspector, with the powers of an officer-in-charge of a Police Station for the investigation of offences under this Act."

Section 27 confers jurisdiction on different Magistrates to try offences and pass appropriate sentences authorised by the Act. While dealing with the provisions for security from habitual offenders to desist from committing offences, certain procedure has been laid down under Section 11, and under Section 11 (6) (ii) it is provided that the enquiry shall be made as nearly as may be practicable according to the procedure prescribed for the trial of warrant cases in the Criminal Procedure Code, 1898, except that no charge need be framed. While dealing with extemment of habitual smugglers under Chapter VI, under Section 17, the provisions in Chapter V of this Act, in so far as they are applicable, have been made to apply to all proceedings under Section 16. It appears, therefore, that in express terms the procedure laid down under the warrant procedure has been provided for only in respect of enquiry regarding the security and extemment proceeding before the Criminal Court. In other cases, the procedure laid down in the Criminal Procedure Code will govern and indeed there is no dispute that the case had to be tried following the warrant procedure. The only controversy raised in this case centres round the point whether Section 251A or Section 252 and the succeeding Sections of the Criminal Procedure Code will apply.

7. For the purpose of applying Section 251-A of the Code of Criminal Procedure, it must be clear that the case was instituted on a police report. What is the meaning of the expression, 'police report'? Does it mean any police report, that is to say, a report given by a police officer or is it a report which is submitted at the conclusion of an investigation under Chapter XIV and hence a report given under Section 173 of the Code of Criminal Procedure? The argument on behalf of the accused is that since under Section 26 of the Assam Act the Excise Officers are invested with the powers of an officer-in-charge of a Police Station for the investigation of offences under the Assam Act, they are Police officers for all purposes and are, therefore, required under the law to carry out investigation in accordance with the provisions laid down under Chapter XIV of the Code of Criminal Procedure.

Chapter XIV opens with Section 154 regarding information in cognizable cases. Under this section it is incum-

bent on the officer-in-charge of a police station to reduce to writing any information relating to the commission of a cognizable offence given orally to him, and inter alia also to note the substance thereof in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. He has also to follow various other procedures as laid down under various other sections in this Chapter. For example, under Section 161 (3) the police officer may reduce into writing any statement made to him in the course of an investigation, and if he does so, it is obligatory on his part to make a separate record of the statement of each such person whose statement he records. Section 162 provides that no statement made by any person to a police officer in the course of investigation, shall, if reduced into writing, be signed by the person making it. The statements recorded under Section 162 can be used only for the purposes mentioned and in conformity with the procedure laid down under this section.

Under Section 172, every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation. Under this section, a case diary has to be maintained by the police officer which may be sent for by the Criminal Court. Section 173 may now be set out:

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer-in-charge of the police station shall

(a) forward to a Magistrate empowered to take cognizance of the offence on a police report a report, in the form prescribed by the State Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

* * * *

(4) After forwarding a report under this section, the officer-in-charge of the police station shall, before the commencement of the inquiry or trial, fur-

nish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any, recorded under Section 164 and the statements recorded under sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

It will, therefore, appear that under Chapter XIV of the Code of Criminal Procedure, an elaborate procedure is laid down for investigation of offences by the police officer and it is to be seen whether all the procedure laid down in this Chapter has to be complied with by the Excise Officers since they have been invested under Section 26 of the Assam Act with the powers of an officer-in-charge of a police station for investigation of the offences under the Assam Opium Prohibition Act.

8. The Assam Opium Prohibition Act is an Act to prohibit consumption (except for medicinal purposes) and smuggling of opium in the State. Although it creates certain offences and also provides for punishments, a detailed procedure for investigation and trial of these offences is not to be found in the four corners of the Act. In this connection it is convenient to set out Section 5 of the Code of Criminal Procedure:

"5. (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

From a perusal of the above provisions it is clear that offences under the Assam Opium Prohibition Act will have to be investigated according to the provisions of the Code of Criminal Procedure subject to any exceptions or any modifications of the manner or place of investigation contained in the Assam Act itself. We do not find any provision in the Assam Act regarding the procedure of investigation. Such a procedure of investigation under the Opium Act, 1878 is to be found under Sections 20 and 20-A to 20-I of the Madhya Pradesh amendment of Section 20 of the Opium Act, and also Sections 20 and 20-A to 20-J of the West Bengal amendment of Section 20 of the Opium Act.

It, therefore, appears that both in West Bengal and Madhya Pradesh, so far as trial of offences under the Opium Act, 1878, is concerned, an elaborate procedure for investigation is laid down and the same has got to be strictly followed. Under the West Bengal amendment, Section 20-J (1) requires a diary to be maintained and under Sec. 20-J (2) the provisions of sub-section (2) of Section 172 of the Code of Criminal Procedure, 1898, are made applicable in the case of every such diary. Section 20-G of the West Bengal Act lays down the jurisdiction of Magistrate on receipt of report from Excise Officer. Section 20-G is as if a substitute for Section 173 of the Code of Criminal Procedure and fulfils the requirements laid down under Sections 170 and 173 of the Code of Criminal Procedure. In view of these provisions in the West Bengal amendment, the Calcutta High Court took the view that the report of an Excise Officer is a Police report, but not so for the purposes of Chapter XIV of the Code of Criminal Procedure. This is the view which was taken by the Calcutta High Court in the case of Premchand Khetry v. The State, AIR 1958 Cal 213, where the following passage occurs:

"Section 20-G, Opium Act, makes clear that although an Excise Officer may not be a Police Officer in fact and in law, the report made by him is to be deemed to be a report by a Police Officer for the purposes of taking cognizance of the offence reported."

Although Section 20-G of the Opium Act makes an Excise Officer's report of an opium offence a report made by a Police Officer, it does not make it a 'police report' in the special and restricted sense of that term as used in the Code with respect to reports of offences made by the Police."

This view was taken in spite of the fact that the West Bengal amendment contained provisions almost approximating the procedure laid down under Chapter XIV of the Code of Criminal Procedure. The same view was taken by the Madhya Pradesh High Court, as will appear from a decision of that Court in the case of Sardar Khan Multan Khan v. State, AIR 1963 Madh Pra 337. The following observations in that decision are apposite:

"Even in view of Section 20-G of the Opium Act, a complaint filed by an Excise Officer under the Opium Act cannot be deemed a case instituted as a case on Police report as contemplated under Section 251-A, Cr. P. C."

This view was taken even though there were provisions in the Madhya Pradesh Act amending Section 20 of the Opium Act prescribing a detailed procedure of investigation similar to the West Bengal

amendment and closely resembling the procedure of investigation laid down under Chapter XIV of the Code of Criminal Procedure.

Both in the Calcutta High Court as well as in the Madhya Pradesh High Court, the question had to be considered in the light of the provisions of the respective State amendments of the Opium Act whereby a special procedure of investigation has been laid down for the two States. In the Assam Act there is no provision for any kind of investigation of an offence under the said Act. It, therefore, follows that while investigating offences under the Assam Opium Prohibition Act, the officers must when so doing comply with Section 5 (2) of the Code of Criminal Procedure which provides for investigation of offences against other laws in accordance with the Code of Criminal Procedure. This being the position, provisions of Chapter XIV so far as they are applicable to an investigation of an offence under the Assam Act, must be complied with. In this context an argument was advanced by the State that Chapter XIV cannot be made applicable as the very basis of investigation under Chapter XIV is an information duly recorded under Section 154 of the Code of Criminal Procedure. In other words, no investigation under this Chapter, according to the learned Counsel for the State, can take place unless an information relating to the commission of a cognizable offence has been reduced to writing by an officer-in-charge of a police station. The submission is that informations regarding offences under Sec. 5 (a) of the Opium Act, as in the instant case, are bound to be secret informations and if these are required to be written down and the man required to sign these informations and other technical procedure as laid down under Chapter XIV is complied with, lot of delay in investigation will occur defeating the very objects of the Act in trying to detect and prevent crimes of this description.

This argument is sought to be met by Mr. Bhattacharjee, the learned Counsel appearing as amicus curiae at the request of the Court, by referring to a decision of the Privy Council in the case of Emperor v. Nazir Ahmad, AIR 1945 PC 18. It is useful to quote the following passage:

"In the case of cognizable offences, receipt and recording of a first information report is not a condition precedent to the setting in motion of a criminal investigation. No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way, but there is no reason why the police, if in possession through their own knowledge or by means

of credible though informal intelligence which genuinely leads them to the belief that a cognizable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged. Section 157 when directing that a Police Officer, who has reason to suspect from information or otherwise that an offence which he is empowered to investigate under Section 156 has been committed shall proceed to investigate the facts and circumstances supports this view."

It is true that there may be other difficulties and embarrassment in the way of the Excise Officers conducting investigation under the Assam Opium Prohibition Act if the provisions laid down under Chapter XIV have to be strictly complied with. The question of embarrassment in investigation, if certain provisions of law are enforced, is a matter of policy which has got to be left to the Legislature and the Courts cannot delve into that region in order to come to a conclusion in law. There is a lacuna in the Assam Opium Prohibition Act making no provisions for investigation of these offences and in absence of any special provisions in that behalf, the procedure laid down in the Code of Criminal Procedure is applicable. On the top of that, S. 26 of the Assam Act provides for investigating officers of the Excise Department not below the rank of Sub-Inspector with powers of an officer-in-charge of a police station for the investigation of the offences under this Act.

Section 25 of the Assam Act also may be read in this connection:

"25. Disposal of persons arrested and articles seized:—

(1) Every person arrested and article seized under a warrant issued under Section 19 shall be produced within 24 hours of such arrest and seizure, exclusive of the time for actual transit, before the authority by whom the warrant was issued.

(2) Every person arrested and article seized under Section 20 or 21 shall be produced within 24 hours of such arrest and seizure, exclusive of the time for actual transit, before the officer-in-charge of the nearest Police station or the nearest officer of the Excise Department empowered under Section 26.

(3) The officer to whom any person or article is forwarded this section shall, with all convenient despatch, take such measures as may be necessary for the disposal, according to law, of such person or article."

Not having made any provision for the mode of investigation, it is left under Section 25 (3) of the Assam Act to the officer named therein to take such measures as may be necessary according to

law. If this is the only guide under the Assam Act to these officers for the purpose of carrying out investigation of offences under the said Act, the procedure may vary with each officer's understanding of what the law is. The procedure laid down cannot be left so vague as that. In absence of anything to the contrary in the Assam Act, it will be incumbent on the officers investigating offences under the Assam Act to follow the procedure laid down for investigation of cognizable offences under the Code of Criminal Procedure and these provisions are to be found in Chapter XIV of the Code. Whatever justification there may be for holding that the report of an Excise Officer under the West Bengal and the Madhya Pradesh Acts is not a police report as contemplated under Section 251-A, as the same has not been submitted under Section 173 of the Code of Criminal Procedure at the conclusion of an investigation under Chapter XIV of the Code but under Section 20-G of the Opium Act the said reasoning per se would not convert an Excise Officer's report of an offence under the Assam Act into a Police report to attract the provisions of Section 251-A of the Criminal Procedure Code.

With respect, the decisions of the Calcutta High Court and the Madhya Pradesh High Court, referred to above, in view of the procedure laid down in the West Bengal and Madhya Pradesh Acts, are correct; but, these decisions are of no assistance in the present case to hold that even under the Assam Act, where there is no trace of a procedure of investigation laid down, the ratio decidendi of these cases will govern. The learned Judges of the Calcutta and Madhya Pradesh High Courts had not to consider a case where there was no particular procedure prescribed for investigation of cases under the Opium Act. A question, therefore, still remains whether an Excise Officer's report of an offence under the Assam Act can be held to be a 'police report' as contemplated under Section 251-A of the Code of Criminal Procedure. The expression 'police report' in Section 251-A must be a report emanating from a police officer as such. The fact that an Excise Officer is invested with the powers of an officer-in-charge of a Police Station does not make his report a Police report. It will still be treated as an offence report submitted by an Excise Officer even though the Excise Officer may be invested with the powers of a Police Officer under Section 26 of the Assam Act and may when required carry on investigation of the case under the provisions of the Code of Criminal Procedure as far as they are applicable. Yet, for this reason alone the report submitted by an Excise Officer cannot be a Police report

under Section 251-A of the Criminal Procedure Code. The expression 'Police report', which is not defined in the Code of Criminal Procedure, should be given a popular and accepted meaning which is in best accord with the common understanding of people. By long-drawn process of reasoning the expression 'Police report' should not be given a meaning which does not fulfil the first essential, namely that it must be a report of a police officer enrolled or appointed as such and without any veil whatsoever. Their Lordships of the Supreme Court had to consider in the case of State of Punjab v. Barkat Ram, AIR 1962 SC 276, whether the Customs Officer is a Police Officer for the purposes of Section 25 of the Evidence Act. Their Lordships at one place observed as follows:

"The words 'police officer' are therefore not to be construed in a narrow way, but have to be construed in a wide and popular sense, as was remarked in Queen v. Hurribo, ILR 1 Cal 207, where a Deputy Commissioner of Police who was actually a police officer and was merely invested with certain magisterial powers was rightly held to be a police officer within the meaning of that expression in Section 25 of the Evidence Act."

9. Besides, refusal to give an ordinary and natural meaning to the expression "police report" and equating an Excise Officer's report with a Police report will result in drastic consequences affecting the procedure of a criminal trial. If the Excise Officer's report is held to be a police report, the case being instituted on such a report, an accused will be deprived of a right to know what the evidence of the prosecution witnesses on oath will be before framing of the charge and also to cross-examine them at that stage. Attributing such a meaning to an expression in absence of a clear definition in the Code and thereby causing prejudice to an accused in a criminal trial should be always avoided. We are, therefore, clearly of the opinion that the Excise Officer's report even though he may be invested with the powers of a police officer for the purposes of investigation and even though he may have actually investigated the case under Chapter XIV of the Code of Criminal Procedure, cannot be equated with a police report. In order to have the status of a police report, as contemplated under Section 251-A of the Criminal Procedure Code, it must not only be made on the conclusion of the investigation under Chapter XIV of the Code of Criminal Procedure but also the investigation concerned must be conducted by a Police Officer and not an Excise Officer exercising the powers of a Police officer. The above conclusion will not be disturbed if cognizance is taken of

such a report either under Section 190 (1) (a) or under Section 190 (1) (b) of the Criminal Procedure Code. Even assuming such a report to be a report of a police officer for the purpose of taking cognizance under Section 190 (1) (b), the legal position is not at all affected if such a report is treated as a complaint and taken cognizance of as such under Section 190 (1) (a) of the Criminal Procedure Code. Even if cognizance is taken under the latter section, there is no difficulty as under Section 200 (aa) the Court is not required to examine the Excise Officer when the complaint is by a public servant. Even treating it as a complaint, there may not be any necessity for issue of process by the Magistrate under Section 204, Criminal Procedure Code as the Excise Officer is empowered to arrest a person (Sections 20, 21 of the Assam Act) and he can also forward such a person under Section 167 or under Section 170 of the Code of Criminal Procedure exercising some of the powers of investigation under Chapter XIV. If the expression 'police report' is interpreted in this manner, it will be in accord with the popular sense of the term, will not result in prejudice to the accused unnecessarily and will also not affect the jurisdiction of the Magistrate in taking cognizance of the offence.

10. From the above discussion and for the reasons indicated, the Magistrate has committed no irregularity in proceeding with the trial of the accused under Section 252 of the Code of Criminal Procedure and succeeding sections. The accused having pleaded guilty to the charge, which was framed on the evidence of a prosecution witness examined in his presence, there was no illegality nor any irregularity in the trial and the conviction based on the plea of guilty is perfectly valid in law.

11. Our attention was drawn on behalf of the accused to a Single Bench decision of this Court in Criminal Revn. No. 108 of 1963 D/- 17-1-1964 (Assam), wherein a contrary view was taken relying on Section 26 of the Assam Act. For the detailed reasons appearing in the foregoing discussion, with respect, we are unable to agree with the aforesaid decision of his Lordship.

12. At the end, we may note that the view we have taken in this case of the procedure of trial to be adopted in an offence under the Assam Act, we understand is also in accord with a consistent practice which has been followed by the Excise Officers in bringing the offenders to book under this Act. It was also the earlier practice under the Opium Act, of course prior to the amendment of the Code of Criminal Procedure in 1955 when the dichotomy of the procedure envisag-

ed under Section 251-A of the Code of Criminal Procedure was absent. We may also note that the Madhya Pradesh High Court and the Calcutta High Court were considering a case reverse of the kind involved in this petition. There the procedure followed by the Magistrate was under S. 251A and the grievance was that the procedure under S. 252 and succeeding sections was applicable, a view which found favour with the learned Judges of those Courts. We may also observe that their Lordships of the Supreme Court in Criminal Appeal No. 201 of 1963, (Amal Shah v. State of Madhya Pradesh) dated 11th December, 1964 (SC), noticed the decisions of the Calcutta and the Madhya Pradesh High Courts, mentioned earlier, but left the matter open as the report in the case before their Lordships was one which was actually submitted by a police officer although relating to an Excise offence.

13. In the result, the conviction and sentence of the petitioner are upheld and the petition is dismissed. The accused-petitioner shall surrender to serve out the sentence.

We would like to place on record our appreciation of the valuable assistance rendered by Mr. J. P. Bhattacharjee, the learned Counsel appearing as amicus curiae at the request of the Court.

GGM/D.V.C. Order accordingly.

AIR 1969 ASSAM AND NAGALAND 43
(V 56 C 10)

S. K. DUTTA, C. J.

Hem Chandra Choudhury, Appellant v. Ajadhya Bala Choudhury and others, Respondents.

Second Appeal No. 24 of 1964, D/- 24-5-68, against order of Dist. J., L. A. D., Gauhati, D/- 26-6-63.

Contract Act (1872), Ss. 2 (h), 10 — Lease deed stipulating sale of land if lessor was ever required to sell and if lessee agreed to purchase at reasonable price — Stipulation no completed contract — No question of specific performance or violation of contract arises — (Specific Relief Act (1963), S. 13).

Where a lease deed stipulates sale of the land if the lessor was ever required to sell and if the lessee agreed to purchase at a reasonable price, the stipulation cannot be a completed contract and hence no question of specific performance or violation of contract arises. (Para 11)

The time at which the option is to be exercised is not a fixed period. The price is also not fixed and there is also no provision as to how the reasonable price will be determined in case of a dispute. Since the lessee is to buy only

if he agreed to do so, he is not bound to buy even if the land was offered. Thus, the stipulation cannot be a completed contract and there can be no question of specific performance or violation of contract. AIR 1928 PC 174 & AIR 1933 Mad 322 (FB) & AIR 1926 Mad 120 & AIR 1931 Mad 799, Foll (Paras 8, 10 and 11)

Cases Referred: Chronological Paras (1933) AIR 1933 Mad 322 (V 20)=

ILR 56 Mad 433 (FB), Venkatachalam Pillai v. Sethuram Rao 7. 8 (1931) AIR 1931 Mad 799 (V 18)=

1931 Mad WN 957, V. Alagarsami Naidu v. Kathia Goundan 5. 6 (1928) AIR 1928 PC 174 (V 15)=

ILR 51 Mad 533, Sakalaguna Nayudu v. Chinna Manuswami Nayakar 7 (1926) AIR 1926 Mad 120 (V 13)=

1925 Mad WN 609, C. Govindaswami Pillai v. Doraiswami Mudali 5

P. Chaudhury and B. Das, for Appellant; Dr. J. C. Medhi, S. K. Goswami, for Respondent No. 1; D. K. Sarma, for Respondent No. 2.

JUDGMENT:— This is a second appeal. The plaintiff's case is as follows: The plaintiff took lease for 8 years of 4 kathas of land of dag No. 399 of K. P. Patta No. 799 at Eharalumukh, Gauhati from defendant No. 1 for the purpose of constructing dwelling houses. The lease was dated 9-6-39 and was duly registered. In pursuance of the terms of the lease the plaintiff spent about Rs. 500/- in filling up the land and he constructed two houses of permanent nature and a pucca latrine at a cost of Rs. 2500/-. Thereafter on 24-4-46 defendant No. 1 executed and registered another lease in continuance of the previous lease. This second lease was for 4 kathas 7 lessas of land of the aforesaid dag and it was for 10 years with effect from 1st Bahag 1353 B. S.

One of the terms of these leases was that if at any time the lessor wanted to sell the demised land she would sell the same to the lessee on payment of a reasonable price thereof. In pursuance of the said terms defendant No. 1 sold 1 katha 8 lessas of the demised land to the plaintiff at Rs. 3500/- per katha by a registered sale deed dated 16-8-54. Defendant No. 1 further assured the plaintiff that if and when found necessary, she would sell the demised land to the plaintiff at a reasonable price. Then on receiving an ejectment notice dated 24-11-56 the plaintiff learnt that the defendant No. 1 purported to sell 1 katha of the demised land to defendant No. 2 by a sale deed dated 1-2-51 at Rs. 4000/-.

The plaintiff was not aware of this sale, nor the defendant No. 1 ever informed the plaintiff of her intention to sell the land in question. The defendant No. 1 by selling the said land to defendant

No. 2 broke the terms of the contract entered into with the plaintiff. The sale of the land by defendant No. 1 to defendant No. 2 was collusive and without consideration and fraudulent. The plaintiff therefore has prayed for specific performance of the contract for sale and in the alternative a decree for Rs. 3000/- as compensation for breach of contract.

2. The trial Court dismissed the suit on contest with cost. The first appellate Court upheld the dismissal of the suit, but relieved the plaintiff of the cost. Hence this appeal by the plaintiff.

3. The first Appellate Court held that the plaintiff had no knowledge of the sale of the suit land by defendant No. 1 to defendant No. 2. It further held that defendant No. 2 was not a bona fide purchaser for value without notice. But the first Appellate Court dismissed the suit on the ground that no contract between the plaintiff and the defendant arose out of the stipulation in the lease that if the lessor wanted to sell the land, she would sell the same to the lessee on payment of a reasonable price thereof.

4. The said stipulation which is contained in paragraph 6 of the lease (Ex. 4) is in Assamese and it runs as follows: (Stipulation in para 6 of the lease was here quoted in Assamese.)

(Be it stated that if I, the first party, am ever required to sell the land described in the schedule and if you, the second party, agree to purchase the same at a reasonable price, I shall sell it to you.)

5. In interpreting the above stipulation the first Appellate Court relied on two cases viz., C. Govindaswami Pillai v. Doraiswami Mudali, AIR 1926 Mad 120 and V. Alagarsami Naidu v. Kathia Goundan, AIR 1931 Mad 799. In AIR 1926 Mad 120 the stipulation was as follows:

"If it so happens that I have to sell it (the property) out of necessity, I will sell it to you for Rs. 60 and I bind myself to take the money from you and convey the land to you. I will give you ten days' time from the date of my proposing to sell it within which time you should pay me the money and take the sale-deed from me. But if you fail to pay the money within 10 days I will overlook your right and claim and I will be at liberty to sell it as I like."

6. The Court held that this stipulation did not amount to a contract at all, but it was only a binding offer and that the document could not be treated as a contract for there was nothing in it to compel the defendant concerned to buy the property on the terms set out in it. In AIR 1931 Mad 799 the document contained the following stipulation:

"As I have taken a sale deed from you of the site and the house mentioned below, I will be residing in the said site

and house. While I so reside neither I nor my heirs shall mortgage or hypothecate or otherwise alienate the property. If myself or my heirs should not like to reside in the said site and house, we shall reconvey the property to you for a price not exceeding the sale price of Rs. 60/-."

7. The Court observed that in this case there was no agreement absolutely binding on the purchaser to sell it within a particular time or at any time at all. He was bound to sell it back whenever he thought of parting with the property. It was, therefore, held that there was no offer but only an undertaking to make an offer and thus there was no case for specific performance of contract. It may be noted that in both the above cases the decisions were of a Single Judge. The matter came up before a Full Bench of the same High Court (Madras High Court), in Venkatachalam Pillai v. Sethuram Rao, AIR 1933 Mad 322 (FB). In this case the Court referred to the decision of the Privy Council in Sakalaguna Nayudu v. Chinna Munuswami Nayakar, AIR 1928 PC 174.

I may, therefore, first discuss the decision of the Privy Council in that case. In that case the counterpart to the sale-deed provided that the vendee should reconvey the property to the vendor after a period of 30 years from that date in case the vendor wished to have the property again and upon his paying a sum of Rs. 10,000/- Their Lordships held that it was not a case of a mere standing offer by the vendee which could ripen into a contract to buy and sell only on the acceptance of that offer by the vendor by tendering of the purchase money. On the other hand, it was a completed contract between the parties.

In this case the defendants were the sons of one Venkatapathi Naidu. By a deed dated 27th January, 1891, Venkata Subrahmanya Ayyar, on behalf of himself and as guardian of his minor son Krishnaswami Ayyar sold the village of Siyatti to the abovementioned Venkatapathi for the consideration of Rs. 10,000/-. On the same day the parties executed what was called a counterpart document by which it was provided that Venkatapathi should reconvey the village to Venkata Subrahmanya after a period of thirty years from that date in case Venkata Subrahmanya wished to have the village again and upon his paying to Venkatapathi the sum of Rs. 10,000/-. The Privy Council came to the conclusion that there was a completed contract made by that counterpart. In this connection the Privy Council observed as follows:

"All the elements necessary to constitute a contract were present. There was

an undertaking on the part of Venkatapathi to reconvey the village to Venkata Subrahmanya and Krishnasami in the event of their calling for conveyance at the time and upon the terms set out in the 'counterpart document'. The time at which the option was to be exercised and the price which was to be paid for the property were specified."

8. It may be noted that in the stipulation in the lease Ex. 4 in the case before me, the time at which the option is to be exercised is not a fixed period. Nor the price which is to be paid for the property is specified. It is said that reasonable price should be paid. But there is no provision as to how the reasonable price will be determined if there is a dispute. In the case of AIR 1933 Mad 322 (FB), the stipulation was as follows:

"If it happens that you or your heirs have to sell the property to others, then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land."

9. The Full Bench decided that this was a completed contract and made the following observation:

"In the absence of any words to signify that the purchase was only optional with the plaintiff or his heirs, it would not be unreasonable to hold that under this contract the vendee was bound to make the offer for resale and the vendor was equally bound to buy it, and we are prepared to hold accordingly."

10. In the stipulation which is under my consideration, it is said that the lessee will buy the land if he agrees to do so. Obviously he is not bound by this stipulation to buy the land even if it is offered to him. So, in brief, in the stipulation in the case before me (1) no time limit is fixed; (2) no price is specified; and (3) it is clearly said that the lessee will buy it if he agrees to do so.

11. In these circumstances, this stipulation cannot be a completed contract. There being no completed contract the question of specific performance or violation of a contract cannot arise. I therefore, find that the conclusion arrived at by the first Appellate Court is correct. There is no force in this appeal which is dismissed. There will, however, be no order as to costs.

JRM/D.V.C.

Appeal dismissed.

AIR 1969 ASSAM AND NAGALAND 46
(V 56 C 11)

S. K. DUTTA, C. J. AND K. C. SEN, J.
Bansi Ram Das, Petitioner v. Secretary to the Govt. of Assam Education (General) Department and others, Opposite Parties.

Civil Rule No. 319 of 1966, D/- 19-8-1968.

(A) Constitution of India, Arts. 226, 309 — Fundamental Rules, Rule 56 (Assam) — Memorandum under R. 56 D/- 21-3-63 — Raising of superannuation age of all employees — Memorandum has force of law — Writ by employee is maintainable.

Memorandum No. AAP 217/62/15 D/- 21-3-1963 issued by the Government of Assam is certainly a general order to the effect that the age-limit for compulsory retirement of all Government employees who were efficient and physically fit was raised upto 58 years. This memorandum being issued under F. R. 56 has the force of law. Therefore it cannot be said that the memorandum is a mere executive instruction, having no force of law and as such, it does not give a legal right to an employee. As such, relief can be sought for by the petitioner by way of a writ petition.

If the Government wanted to extend the superannuation age of a particular employee, it could have acted under F. R. 56 and issued an order in respect of that employee. It was not necessary to issue a memorandum for such a purpose. AIR 1967 SC 1264, Explained. (Para 8)

(B) Constitution of India, Arts. 14, 16 — Memorandum dated 21-3-1963 issued by Govt. of Assam under F. R. 56 — Raising of Superannuation age from 55 to 58 years — Memorandum prescribing efficiency and physical fitness test — Compliance with test by certain employees — Continuation of some of them and compulsory retirement of others — It is discriminatory as offending Art. 14.

Memorandum dated 21-3-1963 issued by Government of Assam under F. R. 56 does not violate Arts. 14 and 16. A procedure is laid down for testing the physical fitness and efficiency of an employee who attains the age of 55 years. If he is found to be physically fit and efficient at this stage, his age of retirement must be 58 years. No arbitrary discretion is given to the Government to pick and sack or to refuse such extension if an employee is certified to have passed the efficiency and physical fitness tests. (Para 9)

Where an employee who is found fit in the efficiency and physical tests as prescribed by the memorandum, is compulsorily retired after the age of 55 years while other employees similarly placed

are continued even after attaining the age of 55 years, the action of the Govt. is discriminatory and violates Article 14. AIR 1968 SC 346 & AIR 1962 SC 630, Distinguished. (Para 12)

(C) Constitution of India, Arts. 310, 13 — Memorandum D/- 21-3-1963 issued by Govt. of Assam under F. R. 56 — Compliance with test under memorandum by employee attaining 55 years — Entitled to continue in service upto 58 years — Abridgment of his right under Art. 310 is illegal.

Once an employee attaining 55 years of age is found fit in efficiency and physical fitness tests, memorandum dated 21-3-1963 issued by the Govt. of Assam under F. R. 56 gives right to such employee to continue in service upto 58 years. Therefore he cannot be compulsorily retired before 58 years on the ground that the pleasure of the Government, the Government may pick and choose any man for hostile treatment. The exercise of the pleasure of the Government under Article 310 is made subject to other express provisions in the Constitution. Therefore, in exercise of its pleasure, the Government cannot deprive a person of his fundamental rights. In view of Art. 13 also Governor's pleasure cannot abridge a fundamental right. AIR 1967 SC 1643, Foll. (Paras 12, 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 346 (V 55)=
(1968) 1 SCR 349, State of Mysore v. Jayaram
(1967) AIR 1967 SC 1264 (V 54)=
(1967) 1 SCWR 665, L. N. Saksena v. State of M. P.
(1967) AIR 1967 SC 1643 (V 54)=
(1967) 2 SCJ 486, L. C. Golak Nath v. State of Punjab
(1962) AIR 1962 SC 630 (V 49)=
1962 Supp (1) SCR 498, Union of India v. P. K. Moore

D. M. Sen, S. M. Lahiri, N. M. Lahiri, B. M. Mahanta and A. S. Bhattacharjee, Advocates, for Petitioner; B. C. Barua, Advocate-General, G. K. Talukdar, Sr. Govt. Advocate, A. M. Mazumdar, Jr. Govt. Advocate, for Opposite Parties.

DUTTA, C. J.:— This is a writ petition filed by one Sri Bansi Ram Das challenging an order of the Government of Assam refusing to allow him to continue in service as Professor of Physics in the Govt. Cotton College, Gauhati beyond the age of 55 years. The petitioner's case is that he joined the Physics Department in the aforesaid college as a Lecturer in the year 1946 and was promoted to the post of Professor and was confirmed in that post with effect from 1-8-60. The petitioner contends that during the time he worked as the Professor and the Head of the Department of Physics, the results of his students at the University exami-

nation were uniformly brilliant. In the year 1965, the results of B.Sc Part II examination were so excellent as to bring commendation from the Secretary to the Government of Assam in the Education Department vide Annexure I to the petition. It is further contended that being satisfied with his work, the Government of Assam allowed the petitioner to cross the efficiency bars in his pay scale. In 1963, the Government of Assam decided to raise the retirement age of Government employees from 55 years to 58 years, and those Government servants who were due to retire on or after the 16th February, 1963, were allowed to continue until further orders. The Government of Assam issued an office memorandum dated the 21st March, 1963, (Annexure II) saying that it had been decided that the age of compulsory retirement of State Government servants should be 58 years. It was further said that this decision would apply to all Government servants who retired or would retire on or after the 1st December, 1962. No Government servant would be entitled to the benefit unless he was permitted to continue in service after the age of 55 years on the appointing authority being satisfied that he was efficient and physically fit for further Government service. It was also laid down in the memorandum that the appointing authority might require a Government servant to retire if he attained the age of 55 years, on three months' notice without assignment of any reason. The Government servant could also after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority. In the annexure to the memorandum the procedure to find out the efficiency and the physical fitness of the employee concerned was laid down. Persons in the pay scale as of the petitioner were to be tested as to their efficiency by a Board consisting of the Chief Secretary, the Secretary and the Head of the Department concerned. As regards physical fitness, such persons were to be examined by the Civil Surgeon of the District in which they were posted.

2. The petitioner was attaining the age of 55 years on 1-1-66 and he applied to the Government to regularise his continuance in service up to the age of 58 years as per provisions laid down in the Government memorandum. Thereafter the petitioner underwent a medical examination by the Civil Surgeon, Kamrup, who declared and certified him to be physically fit. The efficiency of the petitioner was then tested by the Screening Board consisting of the Chief Secretary, Education Secretary and the Director of Public Instruction and he was found to be efficient. But yet the petitioner was

informed by the Principal of the College by his Memo No. 840-41 dated 28-1-66 that the Government had decided not to allow him to continue in service beyond the age of 55 years. Thereafter the petitioner moved the Government and met the Chief Minister personally and prayed for reconsideration of his case. But the Government rejected the petitioner's appeal by an order dated the 7th June, 1966. Hence the petitioner has come before this Court by this writ petition.

3. Both Mr. Sen, the learned Counsel for the petitioner, as well as the learned Advocate-General have relied on the decision of the Supreme Court in the case of I. N. Saksena v. State of M. P., reported in AIR 1967 SC 1264. Hence I may refer to this case in some details. The appellant before the Supreme Court in that case was a District and Sessions Judge in the service of the State of Madhya Pradesh (hereinafter called the appellant). He would have in the normal course retired completing the age of 55 years in August, 1963. But on February 28, 1963 the Government of Madhya Pradesh issued a memorandum to all Collectors in the State. A copy of this memorandum was also sent to the Registrar of the High Court as well as the Finance Department and the Accountant General. The relevant part of this memorandum was as follows:

"The State Government have decided that the age of compulsory retirement of State Government's servants should be raised to 58 years subject to the following exceptions.

2. **	**	**
3. **	**	**
4. **	**	**

5. Notwithstanding anything contained in the foregoing paragraphs, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' notice without assigning any reason the power will normally be exercised to weed out unsuitable employees after they have attained the age of 55 years. A Government servant may also after attaining the age of 55 years voluntarily retire after giving three months' notice to the appointing authority.

6. These orders will have effect from the 1st March, 1963.

7. Necessary amendments to the State Civil Service Regulations will be issued in due course."

On September 11, 1963, the Government sent an order to the appellant on the following terms:-

"In pursuance of the orders contained in General Administration Department memorandum No. 433-258-I(iii)/63 dated the 28th February, 1963, the State Government has decided to retire you with

effect from the afternoon of the 31st December, 1963."

4. The above order was in terms of the 5th paragraph of the memorandum which said that the appointing authority might require a Government servant to retire after he attained the age of 55 years on three months' notice without assigning any reason. On November 29, 1963, another notification was issued amending F. R. 56. But the condition mentioned above viz. the power to retire an employee on three months' notice was dropped from the said amendment. The appellant filed a writ petition before the High Court challenging the Government order retiring him from service. His contention was that as the power to retire an employee on three months' notice was deleted from the Rule, he could not be retired on such a notice. Secondly, he contended that as his retirement cast a stigma on him, his retirement amounted to removal within the meaning of Article 311 of the Constitution. The High Court held that the order cast no stigma on the appellant. It also held that the memorandum itself was a Rule and as such the appellant was bound by it. Thereafter the petitioner appealed to the Supreme Court. The Supreme Court accepted the view of the High Court that the retirement cast no stigma on the appellant. But it rejected the contention that the memorandum itself was a Rule. It held that the memorandum was a mere executive instruction which, however, amounted to a general order issued under F. R. 56. It further held that by this general order the superannuation age of all employees was raised to 58 and hence the appellant continued in service by virtue of the memorandum till the amendment to F. R. 56 replaced the memorandum. Thereafter this amended F. R. 56 governed the case of the appellant and as the amended Rule did not provide for termination of service on three months' notice, the service of the appellant could not be so terminated.

5. In Assam the memorandum was issued but F. R. 56 was not amended. The Assam F. R. 56 is in the same terms as the Madhya Pradesh F. R. 56, as it stood before the amendment. It is as follows:-

"F. R. 56.—(a) The date of compulsory retirement of a Government servant is the date on which he attains the age of 55 years. He may be retained in service after this age with the sanction of the State Government on public grounds which must be recorded in writing, and proposals for the retention of a Government servant in service after this age should not be made except in very special circumstances.

All persons who enter or have entered or are or have been re-employed in Government service on or after the 29th April, 1941, shall be called upon to retire on attaining the age of 55 years or on the completion of total period of 30 years qualifying service, whichever is earlier.

(b) Notwithstanding anything contained in clause (a) a Government servant under suspension on a charge of misconduct shall not be required or permitted to retire on reaching the date of compulsory retirement, but shall be retained in service until the enquiry into the charge concluded and a final order is passed thereon by competent authority."

6. The memorandum issued by the Government of Assam is on all fours with the memorandum issued by the Madhya Pradesh Government. Only in the latter memorandum the conditions laid down in paragraph 3 of the Assam memorandum were not there. The Assam Memorandum is as follows:-

"Government of Assam
Appointment (A) Department: Appointment Branch, No. AAP.217/62/15, dated Shillong, the 21st March, 1963.

Office memorandum

Sub: Raising of age of compulsory retirement of State Government employees.

Government have been considering for sometime past the question of raising the age of compulsory retirement of Government Servants from 55 years to 58 years. Sometimes back orders were issued that pending a final decision on the subject Government servants who are due to retire on or after 16th February, 1963 should be continued in service until further orders. It has now been decided that the age of compulsory retirement of State Government Servants should be 58 years.

2. This decision will apply to all Government Servants who retire or will retire on or after the 1st December, 1962. Government servants who were on leave preparatory to retirement on 1st November, 1962 will be entitled to this benefit. Government Servants who were on refused leave from a date prior to 1st December, 1962, will not be entitled to the benefit of the increased age of compulsory retirement. This will also not apply in case of Government servants, who having reached the age of superannuation on a date prior to 1st December, 1962, have been allowed extension of service. Persons who have been allowed to continue in service vide Government Memo No. AAP.212/62-A, dated 18th February, 1963 will be entitled to this benefit.

3. No Government servant will be entitled to the benefit of the increased age of compulsory retirement unless he has

partition unless a son was born to Pandurang. After Pandurang's death, there was no chance of any coparcener coming into existence as the widows' powers of adoption were at an end. The property must, therefore, be treated as separate property as defined by Mulla in Section 230 of his book in the extract quoted in the preceding paragraph. In 1945-7 FCR 1=AIR 1945 FC 25, their Lordships of the Federal Court have laid down that by 'separate' property in the Act it meant self-acquired property in the narrow sense. This narrow meaning can be found in Mulla at page 257 (Edition 10th) where he says:

"In practice the expression 'self-acquired' property is used as referring to property acquired by a Hindu by his own exertions without the assistance of family funds."

Thus, according to the decision of the Federal Court the widows would only be entitled to share in the self-acquired property in the narrow sense and not the other separate property which will pass to the grandsons of Pandurang."

12. Another decision which supports the contention urged on behalf of the appellant is the decision of Andh. Pra. in Chunduru Seshamma v. Chunduru Ramakoteswara Rao, AIR 1958 Andh Pra 280. The Division Bench held that the Act does not deal with all kinds of property of which a Hindu dies possessed. Sub-section (1) of Section 3 of the Act deals only with the self-acquired property of a deceased Hindu and neither that sub-section nor sub-section (2) deals with the two categories of separate property represented by what a Hindu holds as a sole surviving coparcener and what he has obtained at a partition as and for his share. In coming to this conclusion, the Division Bench dissented from the view in the decision of the Madras High Court in A. N. Subramanian v. A. S. Kalyanarama Iyer, AIR 1953 Mad 22 and Subramanian v. Kalyanarama Iyer, AIR 1957 Mad 456 as well as the view of the Orissa High Court in a decision in Jogen-dra Nath Das v. Charan Das, AIR 1958 Orissa 160.

13. We have already referred to the previous litigation between the parties in this very case, which came to this Court in the earlier round. The litigation between them and the questions now posed were discussed and considered but not ultimately decided in the Single Bench decision, 1958 Nag LJ 416=(AIR 1958 Bom 346). After referring to the decision of the Federal Court in Umayal Achi's case, AIR 1945 FC 25 which seems to have given rise to divergent interpretation, the learned Single Judge has observed as follows in paragraph 12:

"Question arose whether the ratio decidendi of that case was to be confined

only to property which devolved on a male Hindu as a sole surviving coparcener or was equally applicable to property acquired by him on partition of joint family property. In the case before the Federal Court the dispute was between the widow of a predeceased son on the one hand and the widows and daughters of the deceased owner on the other, and the rule which found favour with their Lordships was that property held by a sole surviving coparcener was not "separate property" within the purview of Section 3(1). It is true that the Federal Court was not called upon to deal with the question of devolution of property acquired by a male Hindu on partition with his son or sons but it does emerge from the judgment in that case that in the context of Section 3(1) the two types of property were equated and it will be noticed that they were bracketed throughout the discussion on the meaning of the expression "separate property." I am dutifully bound to follow the decision and it is not open to me to express any opinion of my own on the question of the interpretation of the expression "separate property". An alternative argument advanced by Mr. Bhagade, learned counsel for the appellants, was that the Federal Court has not decided that the share acquired by a male Hindu on partition in a family governed by the Mitakshara is not separate property and I must distinguish that case and hold that it is separate property. Mr. Bhagade's first contention was that in view of what has been stated in the judgment of the Federal Court in discussing the meaning of "separate property" it must follow that the share obtained by the father on a partition with his son or sons is "an interest in a Hindu joint family" and in the alternative he urged that the decision of the Federal Court should be distinguished."

"Now, speaking generally, the nature and incidents of such property held by a Hindu father must be ascertained as of the time when the question arises whether it is separate property or joint family property, and I confess to some difficulty in acceding to this argument. The construction urged has, of course, the merit of being a logical corollary to the narrow meaning of the expression "separate property" used in sub-section (1). Since that expression has to be understood in a narrow sense in sub-section (1) a parity of reasoning should apply and a comprehensive meaning and wide connotation must attach to the words "interest in joint family property" in sub-section (2). This is no doubt partly on the assumption that sub-sections (1) and (2) are intended to deal with all types of property of a Hindu governed by the Mitakshara School dying intestate leaving him surviving among his heirs his widow and a son

or sons. But the assumption is not a priori and is justified. It is extremely difficult to subscribe to the argument pressed before me on behalf of the respondent, that property acquired by a father on partition with his son is not within the scope of either of the two sub-sections of Section 3 and that this is a *casus omissus*. I have little doubt that any property left by a father in any such case must fall either under sub-section (1) or sub-section (2) of Section 3. Support is to be derived for this conclusion from the view expressed by the Federal Court in the case of Umayal Achi that one defect which the Act set out to remedy was the hardship which under the previous law was caused when the owner left a widow as well as sons. The expressions "separate property" and "interest in Hindu joint family property" are used in juxtaposition in sub-sections (1) and (2) of the Section and between them deal with all property left by such owner. Support is also to be derived for this view when the two expressions are read in the light of the context of the Act and the scheme of the Act. Then again, there is considerable support lent to this view from intrinsic evidence in the form of the words "when a Hindu governed by the Dayabhaga school of Hindu law dies intestate leaving any property". These words "any property" understood in their common and ordinarily accepted sense may or may not include any special or peculiar type of property but would in any case apply to property acquired by a father on partition with his son and property held by a sole surviving coparcener. If the Act deals with such property in a case governed by the Dayabhaga School, there seems no reason to suppose that the Legislature omitted to deal with such property in respect of a case governed by the Mitakshara School. For the reasons which I have indicated, I conclude that the 8.30 acres of land in question which Gadi died possessed of, was "interest in joint family property" and its devolution was controlled by sub-section (2) of Section 3."

14. The passage which we have quoted above from the judgment of the learned Single Bench would, therefore, indicate that so far as the issue between the parties to this appeal was concerned, the matter was finally decided with the finding in the Second Appellate Judgment that 8.30 acres of land which Gadi died possessed of was interest in the joint family property and that its devolution was controlled by sub-section (2) of Section 3.

15. However, as the matter was left open so far as the decision of the trial Court in that case was concerned, the second round of litigation was inevitable

between the parties. All the rights will have to be pronounced upon in this litigation.

16. We have referred to the decisions on which reliance is placed on behalf of the appellant in support of her contention that this is a case which is not provided for either by sub-section (1) or sub-section (2) of Section 3 of the Hindu Women's Rights to Property Act, and therefore, under the general law her husband Santosh would be the preferential heir as against Janabai. As against this view there were series of decisions of other Courts, taking different view, to which our attention was invited and which are necessary to examine. Tayi Visalamma v. Tayi Jagannadha Rao, AIR 1955 Ori 160 has taken the opposite view. The Division Bench has held that the disputed property, that is, the property left by father obtained on partition between himself and his sons was joint family property within the meaning of sub-section (2) of Section 3 of the Act and after the death of the father his widow was entitled to the same interest in that which he had, that is, entire 16 annas interest. On this view of the law, the suit brought by the son was dismissed. In a Single Bench decision of the Madras High Court in AIR 1953 Mad 22 a view was taken that the observations of the Federal Court as to the nature of the property that fell to the share of the father on partition were obiter in nature, and that the decision of the Federal Court should be final so far as its binding character is concerned only in respect of the property that devolved on the sole surviving coparcener. In repelling this suggestion, the Division Bench has observed that though the Federal Court was not directly concerned with a case of property that fell to a father on partition, with his sons, the reasons given in that judgment show that this class of property was treated practically on the same level as the property of a sole surviving coparcener. The passage to which reference seems to have been made from the Federal Court decision is to be found at page 32 of AIR 1945 FC 25:

"It is true, as the preamble enacts, that the measure was intended "to give better rights to women". But it must be remembered that the Act was not a codifying Act or even a general amendment of the Hindu law of inheritance. It will help us to ascertain the precise scope of the Act, if we can ascertain the defects which it set out to remedy. Even under the ordinary Hindu law, a widow would in certain circumstances have succeeded to the property held by her husband as the last surviving coparcener or as the holder of a share obtained on partition. By themselves, these cases did not call for the interference of the Legislature. It

is only if the owner had sons (including in that term, grandsons and great-grandsons) that the widow would be excluded by the sons. Legislative interference was required to obviate hardship when the owner left a widow as well as sons. Once we take note of the contingency requiring legislative interference, the difference between separate property in the strict sense and separate property in the loose sense will become apparent. In the former case, the sons would not become coparceners with their father and the inheritance would devolve on them only at their father's death. But in the case of property obtained by the father on partition or obtained by him as the last surviving coparcener, the moment sons are born to him, they will become coparceners and there will be no occasion for the property devolving on them at the death of the father. The closing words of Section 3(1) of the Act, viz. "devolve upon his widow along with his lineal descendants in like manner as it devolves upon a son" will be appropriate to the former case but not to the latter case. The language of the clause substituted by Act 11 of 1938 is slightly different but the scheme remains the same. The widow was certainly not intended to become a coparcener with her husband even during his lifetime. The Act of course intended to redress the widow's disabilities even in such a case, but that redress is provided by sub-section (2) and not by sub-section (1) of Section 3. When the sons become coparceners with their father in property which was originally held by him as sole surviving coparcener or as his share obtained on partition, the father and the sons become a joint family within the meaning of sub-section (2) and when the father dies his widow will under sub-section (2) get his share". (Underlining (here in ' ') is ours).

17. In view of this pronouncement by the Federal Court^{*} as far back as in 1948, it is difficult to accept the contention that both the parts of Section 3 of the Hindu Women's Rights to Property Act are not intended to cover cases of all kinds of property left by Hindu male leaving a widow. It is true, as urged so often, that the case leading to the decision in the Federal Court concerned the case of property in the hands of sole surviving coparcener. But the case of the property in the hands of sole surviving coparcener has been equated with and is considered on par with the property obtained by partition by the father, and it should really make no difference in principle whether the property obtained by father is as a result of partition between father and a son and father and the brothers.

18. In Madras High Court, the first time the question came up was in AIR 1957 Mad 456. The question was not finally decided, as mentioned in paragraph No. 6 in that case, observing that it was a difficult point as to what will be the share to which the widow would be entitled in such a case in respect of property left by her husband and whether she would be entitled exclusively to the property left by her husband, or was bound to share it with divided sons. But answers to these questions have been given in the next case in that Court in Onnamalai Ammal v. Seethapathi Reddiar, AIR 1961 Mad 90. The Division Bench held:

"The very object of the Hindu Women's Rights to Property Act was to modify the ordinary rule of Hindu law, by which a Hindu widow would be excluded from taking any benefit in the properties of her husband, which he obtained in a joint family partition, in the presence of her step-son.

After the partition between D and his son S by first wife, D married O and was in possession of his share till his death in 1951. After D's death S sued O for share in D's property. O relied on a will by D in her favour granting her entire property.

The true effect of Section 3(2) was to exclude S from taking any share in the properties in suit left by his father D, even if he had died intestate."

This interpretation of the provisions of Section 3 has been uniformly followed by the later decision of the Madras High Court in Commr. of Income-tax Madras v. S. S. Thiagarajan, AIR 1964 Mad 58 and the latest case is reported in P. N. Venkatasubramania Iyer v. P. N. Easwara Iyer, AIR 1966 Mad 266. The learned counsel for the appellant brought to our notice particularly the observations in paragraph 4 in the case reported in AIR 1964 Mad 58, where the Division Bench stated that if the matter were res integra, they would have been inclined to take a different view. Decision of this Court in 1958 Nag LJ 416=60 Bom LR 553=(AIR 1958 Bom 346) was cited before the Court. We do not think that there is any inherent contradiction in saying with respect to a Hindu who has partitioned his share that such a person dies "having at the time of his death an interest in the Hindu joint family property" and the case of a Hindu male who dies in a state of jointness with other members of his family whether those members are his sons or other coparceners. In our opinion, it will be equally legitimate to describe the interest of a Hindu male, who has had his share separated from either his son or other coparceners from out of an erstwhile Hindu joint family "as interest in

Hindu joint family property" because his branch could itself be considered a Hindu joint family so long as there was a possibility of a son being born or adopted in the family. It is not disputed that if in such a case a son is born to a separated father, that son would have interest by birth in the property which the father received as his share in partition with his separated sons. It is not the birth of the son which alters the character of the property, but it is because of the character of the property being joint family property that a son born to such father gets interest by birth in such property. It is also possible to conceive of cases where a son could, in given circumstances, be adopted, if unfortunately the separated sons are no longer there while the father is alive. If this be the true character of the property obtained by a coparcener or a male Hindu, as a result of the partition among the members of the joint family we do not see why such a case is not covered by the provisions of sub-section (2) of Section 3 of the Hindu Women's Rights to Property Act. This view also finds support in the decision of the Patna High Court in *Mt. Khatrani v. Smt. Tapeshwari*, AIR 1964 Pat 261 (FB). In paragraph 10, the Full Bench observed as follows:

"A Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it and therefore it is only when there is no woman capable of introducing a coparcener in the family, either in nature or by way of adoption, that the property held by sole surviving coparcener or property allotted on partition to a coparcener without a male issue ceases to be joint family property and becomes the separate property of the holder."

19. In the latest edition of Mulla's Hindu Law, the position is examined again vis-a-vis the provisions of the Hindu Women's Rights to Property Act and the effect of the decision of the Federal Court in Umayal Achi's case, AIR 1945 FC 25 vide Hindu Law by Mulla, 13th Edition, pages 95 and 96. At page 96, the learned editor, who was also the author of the decision of this Court in 1958 Nag LJ 416=(AIR 1958 Bom 346) has this comment to make:

"As already mentioned the preferable view would seem to be that the expression "separate property" used in sub-section (1) and "interest in a Hindu joint family property" used in this sub-section must be read in juxtaposition and that between them the two sub-sections deal with all property left by such owner. All cases, therefore, where the last owner died leaving property other than his self-acquired property must in view of the decision of the Federal Court,

it is submitted, fall under this Section. In this context it may be noted that this sub-section has adopted the Hindu conception that a widow is the surviving half of the deceased husband and introduced the *fatio furis* that she continues the legal person of her husband. Of course, this does not mean that the husband is for all purposes to be deemed to live till the widow claims partition or files a suit for working out her rights."

We agree with the view taken in the Single Bench decision of this Court as to the effect of Section 3(2) and hold that the property left by a Hindu male obtained at a partition between such male person and other members of the family where the partition was between a father and a son or between a father and the other members of the joint family, is covered by Section 3(2) of the Act.

20. On the review of the authorities, therefore, we have come to the conclusion that the question No. 1 referred to us should be answered in the affirmative and question No. 2 will be answered according as a person claiming such property on the death of the male Hindu is either a widow as a sole claimant, or other joint coparceners, who have right to inheritance along with the widow to the property of the deceased male Hindu and separated coparceners are excluded.

21. The papers may be placed before the learned Single Judge for final disposal of the appeal.

JRM/D.V.C.

Reference answered.

AIR 1969 BOMBAY 84 (V 56 C 16)
NAIN, J.

The Presidency Industrial Bank Ltd., Plaintiffs v. The Hindustan Leather Industries Ltd. and others, Defendants.

Poona Special Suit No. 34 of 1952, D/18-12-1967.

(A) Limitation Act (1908), Art. 183 — Civil P. C. (1908), S. 39 — Application under, for transmission of decree to another court — Not a revival of decree.

An application for transmission of a decree from one court to another was not by itself a revival of the decree within the meaning of the Limitation Act, inasmuch as an order thereon is a ministerial act of an officer of the Court, and not the judicial act of a Judge. AIR 1927 PC 73, Rel. on.
(Para 4)

(B) Civil P. C. (1908), O. 21, R. 6 — Transfer by operation of law — Effect of sanction of scheme of amalgamation under S. 44-A, Banking Companies Act — Transfer and vesting takes place by virtue of sanction — No separate order necessary

— O. 21, R. 16 applies — But under S. 153-A(2), Companies Act separate order is necessary for vesting and transfer.

While under Section 153-A (2), Companies Act, 1913 the vesting takes place by a separate order of the Court, under subsection (6) of Section 44-A of the Banking Companies Act, 1949, once the Reserve Bank sanctions a scheme of amalgamation, the transfer takes place by operation of law and no vesting order is made or is required to be made by the Reserve Bank of India. Therefore, in case of a transfer or vesting of the kind contemplated by S. 44-A(6) Banking Companies Act, the provisions of Order 21, Rule 16 are applicable. AIR 1948 Cal 131, Dist. (Para 5)

(C) Civil P. C. (1908), O. 21, R. 16 — Application for execution by transferee of decree — Formal order or at least recognition by Court that applicant is transferee of decree is necessary in either kind of transfer contemplated by rule.

Order 21, R. 16 Civil P. C. contemplates two kinds of transfer of a decree (1) by assignment in writing & (2) by operation of law. In either case of transfer, although O. 21, R. 16, does not in terms require that on an application for execution under the said rule the Court would pass an order that the applicant is the transferee of the decree, it is desirable that ordinarily such an order should be made. But even without the passing of a formal order, there must be a recognition by the Court that the person who has applied for the execution of the decree is a transferee within the meaning of Order 21, Rule 16. But for such recognition the person who applies for execution would be a stranger to the decree and would not be entitled to maintain the application. AIR 1946 Bom 27, Ref. to. (Para 6)

(D) Civil P. C. (1908), S. 11 — Execution proceedings — Principles of res judicata apply to execution application also — Previous order of High Court dismissing notice under O. 21, R. 16 on ground that application was not made to Court which passed decree — No appeal filed against order — Order operates as res judicata. (Para 7)

(E) Civil P. C. (1908), S. 47 and O. 21, R. 11 — Consent decree — Condition in decree that decree-holder shall first exhaust his remedies against properties charged under decree — Execution application against other properties of judgment-debtors not specifying what steps were taken to exhaust remedies against charged properties — Execution held not maintainable. (Para 10)

(F) Civil P. C. (1908), Ss. 38 and 47 — Executing Court cannot go behind decree — Consent decree — Court cannot enquire whether property charged with

payment of decretal claim was not available even at date of decree. (Paras 11, 12)

(G) Companies Act (1913), S. 109 — Consent decree creating charge on property of Company not registered — Effect — Charged properties in possession of decree-holder or persons on their behalf — Liquidator or any other creditor not challenging charge as void — Decree-holder entitled to proceed against charged property. (Para 13)

(H) Limitation Act (1963), Art. 136 — Limitation for execution of decree — Difference in old Act and new Act pointed out.

The present Limitation Act of 1963 has considerably changed the law and while under the old Act an application for execution had to be made within a period of three years or, if the decree was registered, within a period of six years, under the present Act even the first execution application can be filed within a period of 12 years. (Para 14)

(I) Limitation Act (1963) Art. 136 — Execution application filed within 12 years of decree against judgment-debtors one of whom was dead — Application is nullity so far as deceased judgment-debtor is concerned — Even otherwise if legal representatives of deceased judgment-debtors are impleaded after 12 years, execution would be barred against them. (Para 15)

(J) Civil P. C. (1908), Ss. 50, 39 and O. 21, R. 22 — Execution against legal representatives — Essential conditions.

The provisions of S. 50 read with O. 21, R. 22, C. P. C. make it clear that there are two requirements of an execution application against legal representatives. One is that the execution application must be made to the Court which passed the decree and the second is that the notice of execution must be issued to the legal representatives. An application for transfer of decree under S. 39 not being an execution application is not a sufficient compliance with S. 50 read with O. 21, R. 22. (Paras 16, 17)

Cases Referred: Chronological Paras
 (1948) AIR 1948 Cal 131 (V 35)=52
 Cal WN 58, Sailendra Kumar Roy v. 5
 Bank of Calcutta Ltd.
 (1946) AIR 1946 Bom 27 (V 33)=47
 Bom LR 728, Kirtilal Jivabhai v. 6
 Chunilal Manilal
 (1944) AIR 1944 Nag 145 (V 31)=ILR
 (1944) Nag 419, Gulabsingh v. 15
 Nathu
 (1927) AIR 1927 PC 73 (V 14)=54
 Ind App 129, Banku Behari
 Chatterji v. Narain Das Dat 4, 16

S. A. Desai with Purandare, for Applicants; A. H. Kirtikar with S. A. Kirtikar, (for Nos. 1A and 1B), V. N. Ramna-

than (for no. 4) and G. D. Moghe (for No. 5), for Defendants.

ORDER: This is an application dated 29th October 1964 for execution of a decree dated 12th December 1932 of the Court of the Civil Judge, Senior Division, Poona, in Special Civil Suit No. 84 of 1952. The application has been filed by the Bank of Karad Ltd. because by an order dated 26th April 1962 made by the Reserve Bank of India under Section 44A (4) of the Banking Companies Act, 1949, the judgment creditors, the Presidency Industrial Bank Ltd., were amalgamated with the applicants. The amount claimed is Rs. 28,997.75 and costs. The mode in which the assistance of the Court is required is by issue of notices under Order 21, Rules 16 and 22 of the Code of Civil Procedure and by attachment and sale of certain properties of the judgment-debtors. Pursuant to a chamber order dated 7th May 1965 the execution application was amended by substituting the names of the two sons of the judgment-debtor No. 2 R. G. Vijayakar as his legal representatives in his place, on the allegation that the said R. G. Vijayakar was dead and by seeking attachment and sale of certain properties of the said Vijayakar in the hands of the said legal representatives.

2. The applicants have stated that the decree was registered on 11th March 1953. The applicants have stated in the execution application that the first application, being Civil Application No. 160 of 1953 for execution, was made by the judgment-creditors on 16th July 1953 to the Court of the Civil Judge, Senior Division, Poona, and the said application was decided on 15th September 1953 by transfer of the decree to this Court for execution. Pursuant to that transfer, an application for execution was made in this Court in November 1953 in the meanwhile, the first judgment-debtor company had been ordered to be wound up, the application for execution in this Court was abandoned and treated as filed on 2nd November 1965. The second application for execution of the decree was made to the Court of the Civil Judge, Senior Division, Poona, on 3rd November 1955, being Darkhast No. 251 of 1955. The said application was dismissed on 13th June 1956. The said execution application was made against the judgment-debtor No. 7 only, and the Court held that the decree could not be executed against any of the judgment-debtors until the judgment-creditors had exhausted all their remedies against the property of the first judgment-debtor which was charged with the payment of the amount under Clause (5) of the consent decree. The third application for execution was made to the learned Civil Judge, Senior Division, Poona, on 22nd February 1958

and was disposed of on 14th April 1958. Thereafter on 1st April 1964 the present applicants made an application to the Civil Judge, Senior Division, Poona, for transfer of the decree to this Court for execution and on 12th September 1964 the decree was ordered to be transferred to this Court. The present execution application was filed on 29-10-1964. On the present application notices were ordered to be issued under Rules 16 and 22 of Order 21 of the Civil Procedure Code.

3. Notices under O. 21, R. 16 were dismissed by my learned brother Kantawala J. on 22nd November 1965 stating that "Dismissed with costs as the application is not made to the Court which passed the decree". It is the notice under O. 21, R. 22 of the Civil Procedure Code that has been argued before me.

4. The first objection to the execution taken by all the judgment-debtors and the legal representatives of the second judgment-debtor Vijayakar is that the present applicants are not entitled to execute the decree as being transferees by operation of law, they must first apply to the Court which passed the decree for execution of the decree and that they have not done so, therefore, they are not entitled to apply for execution to this Court. On behalf of the applicants it is contended that the application for transfer of the decree made to the Poona Court under Section 39 C. P. C. on 1st April 1964 was such an execution application by the present applicants. I am afraid, this contention is not correct. It has been held by the Privy Council in the case of Banku Behari Chatterji v. Narain Das Dat reported in AIR 1927 PC 73 that an application for transmission of a decree from one Court to another was not by itself a revival of the decree within the meaning of the Indian Limitation Act, inasmuch as an order thereon is a ministerial act of an officer of the Court, and not the judicial act of a judge.

5. It is next contended by Mr. Desai for the applicants that O. 21, R. 16 C. P. C. does not apply in the present case as the assets of the Presidency Industrial Bank Ltd. were vested in the applicants neither by an act of the parties nor by operation of law, but by an order of the Reserve Bank of India, under S. 44A(4) of the Banking Companies Act, 1949. Reliance has been placed on the case of Sailendra Kumar Roy v. Bank of Calcutta Ltd. reported in AIR 1948 Cal 131. This was a case where the amalgamation had taken place under S. 153A of the Indian Companies Act, 1913. The Calcutta High Court held that where a Court acting under Section 153A, Companies Act, sanctions a scheme of amalgamation of one company with another company and further, acting under sub-section (2)

of that section, orders the transfer of the assets belonging to the former to the latter, the transfer takes place by virtue of the order passed by the Court and that such transfer is not by assignment or operation of law within the meaning of the proviso to O. 21, R. 16 and the latter company need not proceed under Order 21, Rule 16 C. P. C. It is not necessary for me to state whether I agree with this judgment in so far as it decides about vesting of assets under S. 153A of the Indian Companies Act, 1913. I am not called upon to do this, because in the present case the vesting took place under Section 44A(6) of the Banking Companies Act, 1949. There is a material difference between the two provisions. Under S. 153A of the Indian Companies Act, 1913, where a Court sanctions a scheme of amalgamation, it also by a separate order provides for the transfer and vesting of the assets of the company which is amalgamated in the company with which it is amalgamated. In that case, the transfer does take place by an order of the Court. Whether such a transfer is or is not a transfer by operation of law, it is not necessary for me to decide. But under Section 44A(6) of the Banking Companies Act, 1949, on the sanctioning of a scheme of amalgamation by the Reserve Bank, the property of the amalgamated banking company shall by virtue of the order of sanction be transferred to and vest in the banking company which under the scheme of amalgamation is to acquire the business of the amalgamated banking company. While under Section 153A(2) of the Indian Companies Act, 1913 the vesting takes place by a separate order of the Court, under subsection (6) of Section 44A of the Banking Companies Act, 1949, once the Reserve Bank sanctions a scheme of amalgamation, the transfer takes place by operation of law and no vesting order is made or is required to be made by the Reserve Bank of India. Therefore, in case of a transfer or vesting of the kind which I have before me, the provisions of Order 21, Rule 16 are applicable and the applicants have failed to comply with the said provisions and are not entitled to execute the decree in this Court.

6. It has been held in the case of *Kirtilal Jivabhai v. Chunilal Manilal*, reported in 47 Bom LR 728=(AIR 1946 Bom 27) that decree-holder entitled to execute a decree as such must appear to be a decree-holder on the face of the decree. The executing Court can only execute the decree provided his name appears as decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying is the decree-holder. The judgment in the said case further provides

that O. 21, R. 16 contemplates two cases of a transfer of a decree, one by assignment in writing and other by operation of law. If the transfer is by assignment in writing, it is obligatory upon the Court to give a notice of the application to the transferor and the judgment-debtor, and the decree cannot be executed until the Court has heard their objections, if any. The application must be made to the Court which passed the decree and it must be an application for execution. No separate application need be made under Order 21, Rule 16. All that the rule requires is that the transferee must apply for execution to the Court that passed the decree. Although Order 21, Rule 16 does not in terms require that on an application for execution under the said rule the Court should pass an order that the applicant is the transferee of the decree, it is desirable that ordinarily such an order should be made. But even without the passing of a formal order, there must be a recognition by the Court that the person who has applied for the execution of the decree is a transferee within the meaning of O. 21, R. 16. But for such recognition the person who applies for execution would be a stranger to the decree and would not be entitled to maintain the application. In my opinion, this expression of opinion applies equally well to a transfer by operation of law as this kind of transfer is also provided for by Order 21, Rule 16, C. P. C.

7. However, these questions really do not arise in view of the fact that a notice under Order 21, Rule 16 has been dismissed by my learned brother Kantawala J. on 22nd November 1965 on the ground that the application was not made to the Court which passed the decree. The applicants have not gone in appeal against the said order. Principles of res judicata apply to execution applications also. I, therefore, hold that the applicants are not entitled to apply to this Court for execution of the decree.

8. The next objection of the judgment-debtors and the legal representatives of judgment-debtor No. 2 Vijayakar to the execution is that the decree is not executable before the judgment-creditors have exhausted all the remedies against the property of the judgment-debtor No. 1, which was charged by the consent decree with the payment of the decretal amount and that para 5 of the consent decree expressly provides for execution in the first instance against the said property and for recovery from the said property. Para 4 of the plaint in the suit reads as under:

"4. The Defendant No. 1 company has pledged her machinery, goods, documents, all kinds of securities, furniture, and assets etc., with the plaintiff for her loan

as collateral security, and on 31st of March 1949 gave a letter of hypothecation in the name of plaintiff bank by the Defendant Company and by all the defendants, and has given that machinery assets in the possession of the plaintiff and are being used by the defendant No. 1 with plaintiff's permission. Due to this letter of hypothecation or due to any other reasons plaintiff's right is not affected and plaintiff is entitled to recover his whole amount due from defendants jointly and severally or from any one of them."

9. The decree is a consent decree and term (5) thereof provides as under:

"Defendant No. 1 "The Hindusthan Leather Industries Ltd." is the registered company under the Indian Companies Act, and all assets and moveable properties of defendant No. 1 company are pledged with the plaintiff and the plaintiff has got first priority of its dues on the pledged assets and moveable properties, and these dues of the plaintiff are kept till the realisation of the amount as per decree; and the charge has been kept on the assets and moveable property under this decree, and the same is kept permanent. Plaintiff do recover amount in the first instance from the said charged property; if all the dues are not recovered from the charged property plaintiff is entitled to recover the residues from the other defendants". The second execution application filed by the judgment-creditors against the judgment-debtor No. 7 in the Court of the Civil Judge, Senior Division, at Poona was dismissed on 13th June 1956. The order dismissing the said application states:

"The decree is being sought to be executed against the 7th defendant. He naturally contends that as per the decree D. H. ought to first exhaust his remedies against the charged property of the J. D. No. 1 and against the J. D. No. 1. It is contended for the D. H. that the J. D. No. 1 has gone in liquidation. Assuming without proof that it is so, Mr. Khire for the D. H. could not dispute that he could still have his remedy against the J. D. No. 1. That being the position unless that remedy is exhausted the balance is struck, the D. H. could not proceed against the 7th or any other J. D.

ORDER

"The execution fails and the application is dismissed. Darkhast is disposed of. Costs on D. H. D. H. to pay the costs of J. D. No. 7".

It may be noticed that although the said execution application was against the judgment-debtor No. 7 only the order states that unless remedies are exhausted against the property of the judgment-debtor No. 1, the decree-holder, could not

proceed against the 7th or "any other judgment-debtor". Although the learned Judge was not called upon to decide what the position was with regard to the judgment-debtors other than the judgment-debtor No. 7 and the decision will not be res judicata with regard to the other judgment-debtors, the observation of the learned Judge is correct that the decree could not be executed even against the other judgment-debtors.

10. No account has been given by the applicants as to what steps they or Judgment Creditor took to exhaust their remedy against the said property before filing this execution application. I am afraid, they have not complied with condition No. 5 of the consent decree and the applicants are not entitled to maintain the present execution application on this ground also.

11. The applicants have contended before me that this property which was charged with the payment of the decretal amount was not available to them at the time of the suit as well as at the time of the consent decree. The applicants offered to lead evidence before me to prove this. I, however, informed Mr. Desai appearing for the applicants that an executing Court or for the matter of that even the Court which passed the decree is not entitled to go behind the decree which is sought to be executed and it was not open to the applicants either to lead evidence on this point or to contend that the statements in the plaint as well as the consent decree are false and that the property charged with the payment of the decretal amount was not at the relevant point of time available for satisfaction of the judgment-creditors' claim. However, to enable them to place the facts as to the non-availability of this property on record, I permitted them to set out the said facts in an affidavit. The applicants have thereafter filed the affidavit of Madhav Murlidhar Inamdar dated 13th December 1967 indicating that this property has not been available to the judgment-creditors from 1946. In para 13 of the said affidavit, it is stated as follows:

"I say that the properties hypothecated to the Presidency Industrial Bank Ltd. could not be proceeded against in execution of the decree herein in the circumstances aforesaid and the said properties remained all along in the possession of the New Citizen Bank of India Ltd. from the date of the hypothecation in its favour in the year 1946 till the appointment of the Court Receiver in the year 1953, and the said property was the subject matter of a prior encumbrance in favour of the New Citizen Bank of India Ltd. for Rs. 26,000 odd. Besides, the charge in favour of the Presidency Industrial Bank Ltd. was not registered

with the Registrar of Companies under the provisions of Section 109 of the Indian Companies Act, 1913, and the decree-holders were advised that in the circumstances the property charged could not be successfully followed. The applicants therefore were obliged to proceed against the other defendants to recover the amount of the said decree, and for that purpose they took various proceedings in execution. I say that the applicants should be allowed to lead this evidence in these proceedings".

12. I am afraid, I cannot go behind the terms of the consent decree and find that even at the date of the decree contrary to the provisions of the consent decree, the property was not available. However, this contention of the applicants is falsified by the affidavit of D. M. Shinde, the judgment-debtor No. 5, made on 18th November 1965, wherein he has stated that the property charged was in the possession of the Official Liquidator of judgment-debtor No. 1 and that the Official Liquidator has sold the said property and sale proceeds thereof to the extent of about Rs. 50,000 are in the hands of the Official Liquidator. I am also informed that the applicants have not filed any claim with the Official Liquidator. I, therefore, hold that the applicants have not complied with and carried out condition No. 5 of the consent decree and are not entitled to execute the decree against the judgment-debtors and the legal representatives of Vijayakar.

13. Mr. Desai for the applicants made a feeble attempt to argue that as the decree had not been registered with the Registrar of Companies under S. 109 of the Indian Companies Act, 1913, the charge created on the property was void and, therefore, no recourse could be had to the property and the applicants were entitled to execute the decree against judgment-debtors other than Judgment Debtor No. 1. There is, however, no substance in this contention as the said property was in terms of the consent decree in the possession of the judgment-creditors or persons on their behalf and it has not been made out that the charge was challenged by the liquidator or any other creditor of the company or that the liquidator has taken possession of the said property from the judgment-creditors on the ground that the charge against him was void.

14. The next objection of the judgment-debtors and the legal representatives of Vijayakar, the deceased judgment-debtor No. 2, is that the execution application is time barred. The decree was passed on 12th December 1952. The present execution application was filed on 29th October 1964 within 12 years of

the passing of the decree. Article 136 of the Indian Limitation Act, 1963, provides a period of 12 years for the execution of any decree from the time when the decree becomes enforceable. The present Limitation Act has considerably changed the law and while under the old Act an application for execution had to be made within a period of three years or, if the decree was registered, within a period of six years, under the present Act even the first execution application can be filed within a period of 12 years. The execution application is, therefore, in my opinion, not barred by the law of limitation as against the judgment-debtors. The position of the legal representatives of judgment-debtor No. 2 is, however, different and I shall deal with it presently.

15. The legal representatives of the deceased judgment-debtor No. 2 Vijayakar object to the application on the ground that the execution application is time barred against them. The present execution application was filed on 29th October 1964. In the application, execution was sought against the deceased judgment-debtor No. 2 Vijayakar. He had died on 31st July 1959. The execution application was, therefore, filed against a dead person and was, in my opinion, a nullity so far as the said judgment-debtor was concerned. It has been held in the case of Gulabsingh v. Nathu, reported in ILR (1944) Nag 419=(AIR 1944 Nag 145) that an application for execution of a decree against a deceased judgment-debtor is not an application according to law. By a Chamber order dated 7th May 1965, the legal representatives were joined. In any case, the execution application against them could only be deemed to have been filed on that day. This date was beyond the period of 12 years of the passing of the decree. In my opinion, the execution application is barred by Article 136 of the Indian Limitation Act 1963 in so far as the legal representatives of the deceased judgment-debtor No. 2 Vijayakar are concerned.

16. The legal representatives have also objected to the execution on the ground that the applicants have not applied for execution against them to the Court which passed the Decree under the provisions of Section 50 C. P. C. which provides that where a judgment-debtor dies before the decree has been fully satisfied, the decree-holder may apply to the Court which passed it to execute the same against the legal representatives of the deceased. This provision has to be read with Order 21, Rule 22 C. P. C. which provides that where an application for execution is made against the legal representatives of a party to the decree, the Court executing the decree shall issue a notice to the person against whom

execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. There are, therefore, two requirements of an execution application against legal representatives. One is that the execution application must be made to the Court which passed the decree and the second is that the notice of execution must be issued to the legal representatives. I have already observed that transfer application under S. 39 C. P. C. is not an execution application, as has been held in AIR 1927 PC 73. In the said case, it has also been observed that usually no notice of an application under S. 39 of the Civil Procedure Code is issued to any other parties. Rule 22 of Order 21 makes such notice compulsory. Assuming, therefore, that in the application for transfer the names of the legal representatives had been mentioned, even so, the said application would not be an execution application. I am afraid, the applicants have not alleged that they made any other application to the Poona Court for the execution of the decree. I must, therefore, hold that as the applicants have not made any application for execution against the legal representatives to the Court which passed the decree, the present application is not maintainable on this ground also.

17. A meaningless controversy has arisen whether in the original transfer application filed in Poona Court, names of the legal representatives were or were not mentioned. The legal representatives contend that the original transfer application in Poona Court is missing. The applicants have produced a certified copy purporting to be a certified copy of reconstructed record. It is alleged that it has been made from a copy of the transfer application in the possession of the applicants' advocate in Poona. Uchgaonkar, an Advocate of the Poona Court, has made an affidavit dated 24th February 1966 stating that the original transfer application had been lost and that the copy in his possession from which the record has been reconstructed and certified copy issued mentions the names of the legal representatives. The legal representatives deny that the original application filed in the Poona Court mentions their names. The contentions of the legal representatives appear to me to be correct, because, firstly, papers transmitted to this Court by the Poona Court do not mention the names of the legal representatives, secondly, names of legal representatives were brought on record in this Court by a Chamber order dated 7th May 1965, and thirdly, in three affidavits of M. M. Inamdar dated 30th April 1965, 18th October 1965 and 13th December 1965, it has been stated that neither the applicants nor the said Inam-

dar were aware of the death of judgment-debtor No. 2 Vijayakar until after the filing of the present execution application in the Bombay Court. If this is correct, the names of the legal representatives could not have been mentioned in the transfer application in Poona. However, in view of the fact that the transfer application itself is not sufficient compliance with the provision of S. 50 and O. 21, R. 22 C. P. C. this controversy is not material for deciding the point in issue.

18. In the result, I dismiss the execution application against all the judgment-debtors and the legal representatives of the deceased judgment-debtor No. 2 Vijayakar with costs in three sets. The costs are quantified at Rs. 500 for the legal representatives of the judgment-debtor No. 2, Rs. 250 for judgment-debtor No. 4, and Rs. 250 for judgment-debtor No. 5.

K.S.B.

Execution application dismissed.

AIR 1969 BOMBAY 90 (V 56 C 17)
PATEL AND CHITALE JJ

Jagu Anyaba Adhav, Applicant v. Bajrang Auba Jadhav and others, Opponents.

Civil Revn. Appln. No. 579 of 1967, converted from second appeal No. 1395 of 1964, D/-3-10-1967 from order of Asst. J. Satara, D/-12-1963.

Civil P. C. (1908), O. 21, R. 89 — Limitation Act (1908), S. 4 and Art. 166 — Limitation Act (1963), S. 4 and Art. 127 — Application to set aside execution sale — Requirements — Limitation for application not prescribed by R. 89 but by Article 166, Limitation Act — Limitation expiring during vacation — Application filed on re-opening day — Section 4, Limitation Act, applies.

The only condition laid down in O. 21, R. 89, Civil P. C. for an application to set aside an execution sale is that it can be made only on depositing the amount mentioned in that rule. That rule does not prescribe the limitation for filing such an application which, however, is prescribed by Art. 166 of the Limitation Act of 1908 (Art. 127 of new Act). That Article has to be read with S. 4 when the prescribed period of limitation expires during the summer vacation of the Court. The Judgment-debtor in such circumstances is entitled to file the application under O. 21 R. 89 Civil P. C. on the day on which the court reopened. (Paras 5 and 6)

The fact that part of the amount was deposited earlier cannot adversely affect the J. D.'s right under O. 21, R. 89, AIR 1938 Bom 209, Foll; AIR 1927 Bom 480

and AIR 1924 Bom 144 and AIR 1923 Mad 435 and AIR 1948 Mad 521 and AIR 1944 Bom 233 (2), Distinguished.

(Para 6)

Cases Referred: Chronological Paras (1948) AIR 1948 Mad 521 (V 35)=

1948-1 Mad LJ 49, In re Thokkudubiyavanu Immaniyelul

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(1947) AIR 1947 Mad 56 (V 34)=

1946-2 Mad LJ 110, Kalidasa Chetty v. Sidda Chetty

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(1944) AIR 1944 Bom 233 (2) (V 31)=

46 Bom LR 432, Amritlal Narsilal v. Sadashiv Anna

4

4a, 7

(1938) AIR 1938 Bom 209 (V 25)=40

Bom LR 152, Veerappa v. Iratappa

5

(1927) AIR 1927 Bom 480 (V 14)=29

Bom LR 981, Dharamsi Morarji Chemical Co. Ltd. v. Occhavla Hargovindas Shah

6

(1924) AIR 1924 Bom 144 (V 11)=

25 Bom LR 1296, Tata Industrial Bank Ltd v. Abdul Hussein

6

(1923) AIR 1923 Mad 435 (V 10)=ILR

46 Mad 938, British India Steam Navigation Co. v. H. M. Sharafally

6

K. R. Bengeri, Mrs. C. K. Bengeri and Miss U. K. Bengeri, for Applicant; V. N. Gadgil, for Opponents 1 to 6, 8 and 9.

CHITALE J.: This revision application arises out of an application by the judgment-debtor under O. 21, R. 89, C. P. C.

2. The relevant facts are as follows: In execution of a money decree certain property belonging to the judgment-debtor was put up for sale. The amount for which the property was sold was Rupees 412.91. The sale was held on 19-4-1961. On 16-5-61 the judgment-debtor deposited in the executing Court Rs. 412.91. The summer vacation for the executing court commenced within thirty days of the date of the sale and the Court reopened after summer vacation on 5th June 1961. On 5th June 1961 the judgment-debtor deposited in the executing Court Rs. 25 more and applied for setting aside the sale under O. 21, R. 89 C. P. C.

3. This application was opposed by the auction purchaser and the decree-holders on the ground that the conditions laid down by Order 21 Rule 89 C. P. C. were not complied with, hence the sale could not be set aside.

4. The executing Court took the view that the time prescribed by Art. 166 of the Limitation Act, 1908, (old Act) could be extended under Section 148 C. P. C. Accordingly it extended the time, and on principles of equity it condoned the delay and passed the order setting aside the sale. Against this order, the decree-holders and the auction-purchaser preferred an appeal to the District Court, Satara. The learned Assistant Judge, who heard the appeal, held that in view of the decision in Amritlal Narsilal v. Sadashiv Anna, 46 Bom LR 432=(AIR 1944 Bom

233 (2)) and the decision of Madras High Court in Kalidas Chetty v. Shidda Chetty, AIR 1947 Mad 56 time could not be extended under S. 148 C. P. C. and the executing Court was wrong in extending the time. On facts he held that the conditions laid down by O. 21, R. 89, C. P. C. were not complied with. Having taken this view, he allowed the appeal and set aside the order passed by the executing Court. Thus in effect he dismissed the judgment-debtor's application for setting aside the sale. The present revision application is preferred against this order.

4a. This revision application is referred to a Division Bench in view of the decision in Amritlal's case, 46 Bom LR 432=(AIR 1944 Bom 233 (2)). Mr. Bengeri, who appears for the petitioner-judgment-debtor, submits that the view taken by the lower appellate Court is wrong. He relies on the wording of O. 21, R. 89, C. P. C. and points out that the only condition laid down by that rule is that an application to set aside a sale under O. 21, R. 89 C. P. C. can be made only on depositing the amount mentioned in that rule. That rule does not prescribe the limitation for filing such an application. The limitation for filing such an application is prescribed by Article 166 of the Limitation Act, 1908. Mr. Bengeri submits that Article 166 must be read with S. 4 of the Limitation Act. If so, the judgment-debtor was entitled to file the present application to set aside the sale when the Court opened on 5-6-1961 after the summer vacation, as the period prescribed by Article 166 expired during the summer vacation. Mr. Bengeri does not seek to support before us the view of the executing Court that time could be extended under Section 148 C. P. C. We find that the first contention of Mr. Bengeri is correct. In view of that we need not enter into the question whether the Court could extend the time under S. 148 C. P. C.

5. Order 21 Rule 89, C. P. C. runs thus:

"(1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on depositing in Court,—

(a) for payment to the purchaser, a sum equal to five per cent of the purchase money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person under R. 90 to set aside the sale of his immovable property,

he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

The material expression to be taken into consideration for the purpose of this revision application is "may apply to have the sale set aside on his depositing in Court". On the facts stated above, it is quite clear that the judgment-debtor was entitled to file the present application to set aside the sale under O. 21, R. 89 C. P. C. on 5-6-1961 the date on which the Court opened after the summer vacation, the period of limitation for filing such an application having expired during the summer vacation. The only condition incumbent on the judgment-debtor was to deposit along with the said application the amount mentioned in Rule 89. On the facts stated above, it is quite clear that the necessary amount was deposited by the judgment-debtor on 5th June 1961 when he was entitled to submit the application to set aside the sale and when in fact he did apply. It is thus quite clear that on 5th June 1961 when the judgment-debtor applied for setting aside the sale, the conditions prescribed by Rule 89 of Order 21 C. P. C. were complied with by him. The fact that a part of the amount was deposited earlier would certainly not prejudice the rights of the judgment-debtor, if he otherwise had them according to law. We do not see any reason why S. 4 of the Limitation Act should not apply to applications under Order 21 Rule 89 C. P. C. On the wording of Section 4 it is clear that it applies not merely to suits and appeals, but applications as well. Decision of this Court in Veerappa v. Iratappa, 40 Bom. LR 152=(AIR 1938 Bom 209) is directly in point. Mr. Gadgil for the opponents is unable to point out any reason why the view taken in this decision should not be accepted.

6. Mr. Gadgil relies on the Dharansi Morarji Chemical Co. Ltd. v. Ochhavial Hargovindas Shah, 29 Bom LR 981=(AIR 1927 Bom 480) and the Tata Industrial Bank Ltd v. Abdul Hussein, 25 Bom LR 1296=(AIR 1924 Bom 144). Both these decisions proceed on the finding that the Court on the Original Side of Bombay High Court is not closed during summer vacation, as contemplated by S. 4 of the Limitation Act, for the purpose of filing suits with which these decisions were concerned. In the case before us, there is no doubt that the Court concerned was closed for summer vacation upto 5-6-1961 and the limitation under Article 166 of the Limitation Act expired during the summer vacation. It is, therefore, clear

that the judgment-debtor's application under Order 21, Rule 89 C. P. C. submitted on 5-6-1961 would be well within limitation in view of S. 4 of the Limitation Act. On the facts stated above, it is equally clear that the necessary amount, as required by Order 21, Rule 89, C. P. Code, was deposited in the Executing Court by 5-6-1961. There is, therefore, no reason why the judgment-debtor cannot avail of his right under Order 21 Rule 89, C. P. C. In our opinion, the mere fact that a part of the above-mentioned amount was deposited earlier than 5-6-1961 cannot adversely affect the judgment-debtor's right under O. 21, R. 89, C. P. C. Mr. Gadgil referred to AIR 1923 Mad 435 and AIR 1948 Mad 521. These decisions also proceed on the same basis as the abovementioned Bombay decisions relied upon by Mr. Gadgil. There is nothing to indicate that in the present case the Court was open for instituting suits and applications during the summer vacation. We, therefore, hold that in the present case the judgment-debtor did comply with the conditions prescribed by Order 21, Rule 89, C. P. Code.

7. The lower appellate Court felt that the decision of this Court in Amritilal's case, 46 Bom LR 432=(AIR 1944 Bom 233(2)) laid down that in no case an application under Order 21 Rule 89, C. P. C. could be filed beyond thirty days. In effect, it felt that the said decision laid down that S. 4 of the Limitation Act does not apply to applications under Order 21 Rule 89, C. P. C. We have carefully considered the said decision. The only point decided in that case is that unless the conditions prescribed by Order 21, Rule 89, C. P. C. are complied with, executing Court has under that rule no jurisdiction to set aside a sale held in execution of a decree. The point that arises before us did not arise in that case. The lower appellate Court was, therefore, wrong in coming to the conclusion that the point arising in the present case was covered by that decision. No cogent reason is pointed out to us why in the present case the judgment-debtor could not avail of S. 4 of the Limitation Act. Limitation is prescribed by Article 166 and that has got to be read along with S. 4 of the Limitation Act.

8. For the reasons indicated above, we make the rule absolute, set aside the order passed by the lower appellate Court and restore the order passed by the executing Court. In view of the fact that the ground on which this revision application succeeds was not taken in the Courts below, there will be no order as to costs throughout.
NR/V.B.B.

Revision allowed.

AIR 1969 BOMBAY 93 (V 56 C 18)

TARKUNDE AND NATHWANI, JJ.

Shiva Martand Tapkire and another,
Petitioners v. Arun Nankchand Khatri
and another, Opponents.

Special Civil Appln. No. 2526 of 1967,
D/- 16-1-1968.

Bombay Land Revenue Code (5 of 1879), Ss. 165, 178, 179, 181 — Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947), S. 31 — T. P. Act (1882), Ss. 6(h), 7 — Auction sale held under provisions of Land Revenue Code — Acceptance of minor's bid — Effect — Sale whether contravened S. 31 of Bombay Prevention of Fragmentation and Consolidation of Holdings Act.

In execution of an award which had been passed against the petitioner, his land was put up for sale under the provisions of the Bombay Land Revenue Code. At the auction sale the respondent, who was then a minor, gave the highest bid which was accepted by the officer conducting the sale. The petitioner applied under S. 178 of the Bombay Land Revenue Code for setting aside the sale. The petitioner contended that the sale was held in contravention of S. 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act 1947. He also contended that the acceptance of the minor's bid at the auction sale vitiated the sale.

Held, that since a transfer had not been completed in the present case, the auction sale could not be said to have contravened S. 31(a) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. (Para 4)

Held, further, that a minor was incapable of entering into a valid agreement and the acceptance of the minor's bid was an illegality which vitiated the sale. AIR 1965 Bom 139, Rel. on. (Para 5)

Cases Referred: Chronological Paras (1965) AIR 1965 Bom 139 (V 52)=
1965 Mah LJ 170, Mohanlal
Keshavji Kothari v. Mrs. Rose
Theresa Gonsalves 6

S. B. Bhasme, for Petitioners; M. S. Nargolkar, for Opponent No. 1.

TARKUNDE, J.: The petitioners claim to be the owners of a land, Gat No. 129, admeasuring 28 acres situate at village Jalochi near Baramati in the Poona District. In execution of an award which had been passed against the first petitioner & in favour of a co-operative Society, this land was put up for sale under the provisions of the Bombay Land Revenue Code. The auction sale was held on 26th February 1965. The first respondent, who was then a minor, gave the

highest bid for Rs. 15,100 and this bid was accepted by the officer conducting the sale. The petitioners applied within the prescribed time to the Deputy Collector under S. 178 of the Bombay Land Revenue Code for setting aside the sale. The application was rejected by the Deputy Collector. An appeal taken by the petitioners to the Collector and a further appeal taken by them to the Commissioner were dismissed. The petitioners have now approached this Court under Article 227 of the Constitution to challenge the legality of the decision of the Deputy Collector, the Collector and the Commissioner and to have the sale set aside.

2. One of the grounds on which the sale was sought to be set aside by the petitioners was that the proclamation of sale omitted to mention that there were two wells by which the land was irrigated. The Commissioner has observed in his judgment that the omission to mention the two wells in the proclamation was not a material irregularity, and Mr. Bhasme who appears on behalf of the petitioners argued that this view of the Commissioner was wrong. It appears to us that if the two wells in the land were capable of irrigating the land or a substantial part thereof, the omission of the two wells from the description of the land in the proclamation amounted to a material irregularity. The Commissioner, however, has further held that the land was sold at the auction for an adequate price and that no substantial loss was caused to the petitioners. Mr. Bhasme has challenged this finding of the Commissioner, but Mr. Bhasme could not show that this finding was vitiated by any error of law. The sale, therefore, cannot be set aside on the ground of the said irregularity.

3. Another ground on which the sale was challenged before the Commissioner was that it was held in contravention of Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. Mr. Bhasme drew our attention to clause (a) of section 31 of the said Act which provides that, notwithstanding anything contained in any law for the time being in force, no holding allotted under this Act, nor any part thereof, shall be transferred, whether by way of sale (including sale in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) or by way of gift, exchange, or lease, or otherwise, except in accordance with such conditions as may be prescribed. With reference to the petitioners' contention that the auction sale was in contravention of this provision, the Commissioner observed that the sale can be regularised by payment of penalty under Section 31AA of the said Act. The Com-

missioner, therefore, directed that the Collector should take steps to recover penalty of Rs. 100 under S. 31AA of the said Act. Now, S. 31AA provides, inter alia, that the transfers of any land in contravention of the provisions of this Act made before the 15th day of November 1965 shall not be deemed void merely on the ground of the contravention of any of the provisions of this Act, if the person "in possession of the land at the aforesaid date" by virtue of any transfers or purported transfers pays to the State Government within the prescribed period a penalty equal to one per cent of the consideration of the land transferred, or Rs. 100 whichever is less. Mr. Bhasme argued that the auction sale in the present case cannot be regularised under S. 31AA because the first respondent has not yet been put in possession of the land and he is, therefore, not a person "in possession of the land at the aforesaid date" i.e. 15th November 1965. We are of the view that S. 31AA has no application to the present case, not only because the first respondent is not in possession of the land, but also because a completed transfer of the land has not yet taken place. It is clear from the provisions of the Bombay Land Revenue Code that, after the auction sale of an immovable property under S. 165, an application to set aside the sale can be filed under S. 178. If no application for setting aside the sale is made under S. 178, or if such an application is made and rejected, the Collector may confirm the sale under S. 179. After the sale is confirmed, the Collector puts the person declared to be the purchaser into possession of the land and grants him a sale certificate under S. 181. No transfer of the property takes place till the sale is confirmed and a sale certificate is granted to the person declared to be the purchaser of the land.

4. Since a transfer has not been completed in the present case, the auction sale cannot be said to have contravened Section 31(a) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. As mentioned above, S. 31(a) provides inter alia that a holding allotted under the said Act shall not be transferred except in accordance with such conditions as may be prescribed. Rule 27(i) of the Bombay Prevention of Fragmentation and Consolidation of Holdings Rules, 1959, lays down that no consolidated holding shall be transferred as provided by clause (a) of S. 31 except with the permission of the Collector after making an application to him in that behalf. It is possible to have the necessary permission of the Collector for the proposed transfer of the land in the present case before the auction sale is confirmed and a sale certificate is granted to the first respondent. We are accord-

ingly of the view that no contravention of Section 31(a) of the said Act is involved in the auction sale.

5. Another and more substantial ground on which the auction sale is challenged by the petitioners is that the first respondent was a minor when he made the highest bid at the auction and that the acceptance of a minor's bid was an illegality which vitiated the sale. In our view this objection is sound and must be upheld. As mentioned above the mere acceptance of the highest bid at an auction does not result in a completed sale under the provisions of the Bombay Land Revenue Code. As a result of the acceptance of the highest bid the bidder acquires certain rights and incurs certain obligations. Under S. 173 of the Bombay Land Revenue Code the bidder has to deposit 25 per cent. of the amount of his bid immediately after he is declared to be the purchaser. Under S. 174 the remaining amount of the purchase money is to be paid before sunset of the fifteenth day from that on which the sale took place. Section 175 lays down that, in default of payment within the prescribed period of the full amount of purchase money, the deposit (i.e. 25 per cent. of the amount of the bid), after defraying therefrom the expenses of the sale, shall be forfeited to the State Government and that the property shall be resold. Section 176 provides that, if the proceeds of the resale are less than the price bid by the defaulting purchaser, the difference shall be recoverable from him as an arrear of land revenue. It appears to us that since a minor is incapable of entering into a valid agreement he is not bound, in case his bid is accepted, to make payments of the purchase price as provided by Sections 173 and 174, to suffer the amount deposited by him to be forfeited to the State Government under S. 175, and to make good any loss occasioned by the resale under Section 176. Since he does not incur these liabilities, he also does not acquire the rights of having the sale confirmed under Section 179 and of being placed in possession of the land and given a sale certificate under S. 181.

6. Considerable support to the above view is derived from a judgment of Mr. Justice K. K. Desai in Mohanlal Keshavlji Kothari v. Mrs. Rose Theresa Gonsalves, 1965 Mah LJ 170=(AIR 1965 Bom 139). In that case a land was sold in auction, on the original side of this Court, on the basis of "particulars and conditions of sale" in which the land had been described as being available for building purposes. The auction purchaser subsequently discovered that a substantial portion of the land was included in the development plan of the Municipal Corporation and was not available for building construction. The auction purchaser

applied for setting aside the sale but his application was opposed on the ground that an auction sale was not a contract and could not be set aside on a ground on which a contract can be rescinded. The learned Judge held that publication of the terms and conditions of a sale by auction amounts to an offer and that acceptance of a purchaser's bid results in a contract. We are, with respect, in agreement with this view.

7. On behalf of the first respondent Mr. Nargolkar argued, in the first place, that an auction sale is a sale and not a contract and that the sale is not invalid because a minor can be a lawful purchaser of immovable property.

8. Section 6(h) of the Transfer of Property Act provides, *inter alia*, that no transfer can be made "to a person legally disqualified to be transferee". Under Section 7 of the Transfer of Property Act, every person competent to contract is competent to transfer property to the extent and in the manner allowed and prescribed by any law for the time being in force. The result is that a minor can be a transferee but not a transferor of immovable property. The position is thus described in Mulla's Transfer of Property Act, 5th Edition, page 81:

"A minor is in English law disqualified to be a transferee of a legal estate in land but not of an equitable interest in land or other property, but in India although a minor's contract is void, yet a minor is not disqualified to be a transferee, and a minor may be a purchaser or a mortgagee. But neither the guardian of a minor nor his manager is competent to bind the minor or his estate by a contract for the purchase of immovable property but a lease to a minor is void, as a lease imports a covenant by the minor to pay rent and other reciprocal obligations. This was so decided before the Amending Act 20 of 1929 and the present section 107 makes it clear that a lease to a minor must be void because it must be executed both by the lessor and the lessee."

If an auction sale were a completed transfer of property, as urged by Mr. Nargolkar, there might have been some substance in his contention that the sale is not vitiated on account of the minority of the auction purchaser. As pointed out above the acceptance of a bid at an auction sale does not result in an immediate transfer of title to the bidder but creates certain rights and obligations. These obligations cannot be voluntarily incurred by a minor and he is, therefore, not entitled to the rights of an auction purchaser.

9. It was next urged by Mr. Nargolkar, that if an auction sale does not amount to a completed transfer, it amounts

to a completed contract and is, therefore, not vitiated on account of the minority of the highest bidder. The only reason advanced by Mr. Nargolkar to show that an auction sale results in a completed contract was that under Section 173 of the Bombay Land Revenue Code a bidder who is declared to be a purchaser is required to deposit immediately 25 per cent. of the amount of his bid. Obviously a contract arising on account of the acceptance of the bid does not cease to be an executory contract simply because 25 per cent. of the purchase price is to be deposited immediately after the bid is accepted.

10. A more substantial argument advanced by Mr. Nargolkar was that the rights acquired and obligations incurred by a successful bidder in an auction sale held under Section 165 of the Bombay Land Revenue Code are statutory and not contractual, and that a minor is not precluded from acquiring the statutory rights and incurring the statutory obligations. The answer to this argument is that when a minor bids at an auction sale, he does so voluntarily and not by virtue of any statute. Certain rights and obligations have been attached by the Bombay Land Revenue Code to the contract which emerges when a bid is accepted at an auction sale. The incompetence of a minor to enter into that contract is not cured by the fact that certain rights and obligations have been attached thereto by statute.

11. In the result the impugned orders of the Deputy Collector, the Collector and the Commissioner are quashed and the auction sale is also set aside.

12. In the circumstances of the case there will be no order as to costs.
JHS/D.V.C. Order accordingly.

AIR 1969 BOMBAY 95 (V 56 C 19)
PATEL AND NAIN, JJ.

M/s. Varjivandas Hirji and Co., Petitioners v. D. T. Ghatpande and another, Respondents.

Misc. Petn. No. 233 of 1965, D/- 1-4-1968.

(A) Words and Phrases — 'Dealer' — Meaning of — Dealer means a trader or a person who buys goods and sells them without processing them. (Para 9)

(B) Employees' Provident Funds Act (1952), S. 1(3)(b) — Government Notification No. GSR 346 D - 7-3-62 — 'Trading or Commercial establishment' — Concerns selling only goods manufactured by them fall within 'Trading or Commercial establishment' within the meaning of the notification. Writ Petn. No. 86

of 1962 D/- 21-3-1963 (SC), Rel. on AIR 1962 SC 1536, Dist. (Para 9)

(C) Employees' Provident Funds Act (1952), S. 1(3) (b) and (a) — Expression "any other establishment" refers to any establishment not falling under Cl. (a) whether it is a factory or not. AIR 1967 Madh Pra 157, Dissented from.

On a plain reading of Section 1(3) alone it is possible to conclude that the expression "any other establishment" in clause (b) could mean any establishment which did not fall in clause (a), whether such establishment be an establishment which is a factory, or an establishment which is not a factory. Section 1(3)(b) permits of not only classification but of application of the Act to an individual establishment, this provision serves a distinct purpose. There is nothing inconsistent in the scheme of the Act with the view that Section 1(3)(b) applies to all establishments whether such establishments are or are not factories. The expression "any other establishment" in clause (b), is capable of the interpretation that the reference is to any establishment that does not fall under clause (a), whether such establishment is or is not a factory. AIR 1967 Bom 126, Rel. on; AIR 1965 Ker 130, Disting.; AIR 1967 Madh Pra 157, Dissented from.

(Paras 11 and 14)

Cases Referred: Chronological Paras (1967) AIR 1967 Bom 126 (V 54)=68

Bom LR 689=1967 Cri LJ 605,
Central Hindustan Orange and
Cold Storage Co. Ltd. v. Prafulla-

chandra Ramchandra Oza 17 (1967) AIR 1967 Madh Pra 157 (V 54)=

1967 Jab LJ 86, Radhakrishnan
Narayandas v. Provident Funds
Commr. Madhya Pradesh Indore 18 (1965) AIR 1965 Ker 130 (V 52)=

1965 (1) Cri LJ 555, Provident Fund
Inspector v. Kerala Janata Printers
and Publishers Private Ltd., Triveni-
drum 18

(1963) Writ Petn. No. 86 of 1962
D/- 21-3-1963 (SC). Basantlal Jain
v. Regional Provident Fund
Commr. 9

(1962) AIR 1962 SC 1536 (V 49)=
(1962) Supp 3 SCR 795, Regional
Provident Fund Commr. of Bom-
bay v. Shri Krishna Metal Manu-
facturing Co. Bhandara 9

Atul M. Setalval, for Petitioners;
Rangnekar, for Respondents.

NAIN J.: This is a petition under Article 226 of the Constitution of India. The petitioners are a partnership firm engaged in the business of manufacturing and dealing in Asafoetida. Respondent No. 1 is the Regional Provident Fund Commissioner appointed by the Central Government for the State of Maharashtra. He has also been appointed by the Government of Maharashtra as an Inspector

under S. 13 of the Employees' Provident Funds Act, 1952. Respondent No. 2 is the Union of India. Respondent No. 1 has applied to the petitioners the provisions of the Provident Funds Act under a Notification issued by the Central Government on 7th March 1962 under S. 1(3)(b) of the Employees' Provident Funds Act, 19 of 1952 whereby the provisions of the said Act have been made applicable to every trading or commercial establishment employing 20 or more persons. The petitioners contend that they are an establishment which is a factory engaged in the manufacture of Asafoetida and under S. 1(3)(b) the provisions of the Employees' Provident Funds Act can only be applied to establishments which are not factories and that Respondent No. 1 has no jurisdiction to apply the said Act to them. They, therefore, seek a Writ of Mandamus or Prohibition or other appropriate Writ prohibiting the respondents from enforcing the provisions of Employees' Provident Funds Act against them. The Employees' Provident Funds Act, 19 of 1952, is hereinafter for brevity's sake referred to as "The Act", and the Notification dated 7th March 1962 is hereinafter referred to as "the Notifica-tion".

2. In the petition the petitioners have impugned the validity of S. 19A of the Act as being ultra vires the Constitution. Mr. Setalval for the petitioners has told us that before us the petitioners do not wish to take up this contention. Section 19A provides that if any difficulty arises in giving effect to the provisions of the Act, or if any doubt arises as to whether any particular establishment is or is not an establishment to which the Act applies by virtue of a Notification under S. 1(3)(b), such doubt or difficulty has to be resolved by the Central Government and its order in such cases is made final. We invited the attention of Mr. Rangnekar for the respondents to this provision and asked him if the Central Government would like to resolve this difficulty or doubt, and whether Respondent No. 1 was prepared to refer the matter to the Central Government. Mr. Rangnekar informed us that as the matter involved a difficult question of interpretation of the provisions of the Act, the Government would like the matter to be decided by the Court and that they do not wish to take up a contention that S. 19A barred the jurisdiction of the Court.

3. The petitioners state in the petition that they are a partnership firm registered under the provisions of the Indian Partnership Act 1932. They state that they carry on business as the manufacturers of Asafoetida and gum, and among other things they are dealers in Asafoetida and gum. For their business the petitioners have two premises, one is situated at 240,

Samuel Street, Bombay, and the other at Dariasthan Street, Wadgadi, Bombay. The processing of gum and the manufacturing of compounded Asafoetida of various varieties is carried out by the petitioners at their premises at Dariasthan Street, while their administrative offices are situated at 240, Samuel Street. The petitioners state that they employ 19 persons as labourers on daily wages in connection with their manufacturing business and 12 persons in connection with their administrative work. They further state that their premises at 240, Samuel Street, are registered under the provisions of the Bombay Shops and Establishments Act.

4. Respondent No. 1 has filed an affidavit dated 16-12-1965 in reply to the petition, wherein he has stated that the inquiries made by his office showed that the Petitioners are manufacturing and storing compounded Asafoetida at Dariasthan Street and that the minimum number of persons employed by the petitioners' establishment at both the places of business was 40 during the period April to December 1962, 35 in 1963, 34 in 1964 and 45 in the month of January 1965. In the said affidavit respondent No. 1 contends that the Act and the Scheme are applicable to the petitioners' establishment as it is a trading and commercial establishment engaged in the purchase, sale or storage of Asafoetida, and that their Department at Dariasthan Street is part of their establishment.

5. The respondents have admitted that the petitioners manufacture and store compounded Asafoetida both at Dariasthan Street and in their office at 240, Samuel Street, Bombay. There is a dispute as to the number of persons employed, but that is not material because it is agreed that the petitioners employ more than 20 persons. There is no dispute about the fact that the Departments at Dariasthan Street and at 240, Samuel Street, are part of the same establishment. In fact Section 2A of the Act provides that where an establishment consists of different departments or has branches whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment.

6. The only controversy is that the respondents contend that the petitioners are a trading and commercial establishment within the meaning of the Notification, while the petitioners contend (a) that they are not a trading and commercial establishment and (b) that even if they are such establishment, the Notification under Section 1(3) (b) of the Act cannot apply to such establishments which are factories.

7. In order to appreciate these two contentions of the petitioners it is necessary to refer to some of the provisions of the Act and to the Notification which is the subject matter of the controversy. The preamble to the Act provides for the institution of provident fund for employees in factories and other establishments. Section 2(g) defines a 'factory' as meaning any premises, including the precincts thereof in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power. It will be noticed that the definition of the word 'factory' in this Act is different from the definition of the same word in the Factories Act. S. 2(ia) defines manufacturing or "manufacturing process" as meaning any process for making, altering, repairing, finishing, washing, cleaning breaking up, demolishing or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal. S. 4 of the Act empowers the Central Govt. to add to Schedule I by a Notification any industry which was not originally included in it under S. 1(3)(a). Sub-section (2) of the said section provides that all Notifications under sub-section (1) shall be laid before the Parliament as soon as may be, after they are issued. Section 1 contains the short title, extent and application of the Act, and sub-section (3) reads as under:

"1. (3)—Subject to the provisions contained in S. 16 it applies—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which (twenty) or more persons are employed, and

(b) to any other establishment employing (twenty) or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than (twenty) as may be specified in the notification."

The Notification in controversy is published in Part II, Section 3, sub-section (i) of the Gazette of India dated 7th March 1962, and reads as under:

"Government of India,
Ministry of Labour and Employment.
Dated, New Delhi 7-3-62.

NOTIFICATION

G. S. R. 346. In exercise of the powers conferred by clause (b) of sub-section (3) of Section 1 of the Employees' Provident Funds Act, 1952 (19 of 1952) the Central Government hereby applies the said Act, with effect from the 30th April 1962, to

every trading and commercial establishment employing twenty or more persons each and engaged in the purchase, sale or storage of goods, including establishments of exporters, importers, advertisers, commission agents and brokers, and commodity and stock exchanges but not including banks or ware-houses established under any Central or State Act....."

8. The Act applied originally to factories engaged in 6 Industries specified in Schedule I, which is referred to in Section 1(3)(a) of the Act. The Act has subsequently been extended to several other industries by notifications issued under S. 4. The Act was amended by Act 94 of 1956, whereby the present sub-section (3) was substituted for the old one, whereby clause (d) was introduced for the first time. By the amending Act 46 of 1960 the number of persons employed was reduced from 50 to 20 in all the parts of sub-section (3).

9. The first contention of the petitioners is that they are not a trading or commercial establishment because (a) their dominant activity is manufacturing and dealing in Asafoetida is a minor activity. (b) that they sell only goods manufactured by themselves and this will not constitute them a trading or commercial establishment. As for the second part of their contention, they have stated in Para 1 of their petition that they "carry on business as manufacturers of Asafoetida and gum and inter alia dealers in asafoetida and gum". There is no statement that their business as dealers in Asafoetida and gum is confined to selling goods manufactured by themselves. A dealer means a trader or a person who buys goods and sells them without processing them. We have no material to come to the conclusion that apart from manufacturing and selling their own goods, the petitioners do not buy and sell Asafoetida in the market. There is, therefore, no substance in the contention that they are not a commercial or trading establishment on this ground. But assuming that they sell only goods manufactured by themselves, they would still be a trading or commercial establishment as has been held by the Supreme Court in the judgment D/- 21-3-1963 in the case of Basantlal Jain v. Regional Provident Fund Commr., Writ Petn. No. 86 of 1962 (SC). In that case the petitioner manufactured Indian sweets in one premises where he employed 18 persons, and sold them in a separate retail shop where he employed 16 persons. The Act was applied to him by virtue of the same notification as in this case. The petitioner contended that the two branches were distinct and separate and were not part of the same establishment. This contention was negatived. The second contention of the petitioner was that as he sold the goods

manufactured by himself, he did not purchase or sell or store any goods so as to fall within the scope of the notification. The Supreme Court held that the finished product was still goods within the meaning of the notification and, therefore, the petitioner's business consisting of two parts viz manufacture and sale of sweetmeats, came within the purview of the notification. In view of this judgment even if the business of the petitioners in this case was exclusively to sell goods manufactured by themselves, they would still be a trading and commercial establishment. Also in view of the same judgment the contention that their dominant activity was manufacture and that dealing in Asafoetida was a minor activity, even if factually correct would not survive. The petitioners have cited to us a judgment of the Supreme Court in the case of Regional Provident Fund Commr. of Bombay v. Shri Krishna Metal Manufacturing Co. Bhandara, reported in AIR 1962 SC 1536. This was a case not under Section 1(3)(b) but under Section 1(3)(a) of the Act. In that case the establishment carried on two manufacturing businesses, one of which fell in Schedule I and the other did not. It was held that if the dominating activity fell within Schedule I, the entire establishment would attract the provisions of Section 1(3)(a). That case has, in our opinion, no relevance to the contention of the petitioners under Section 1(3)(b), which is directly governed by the case of Basantlal referred to above.

10. We must here observe that there remains the contention of the petitioners that even if they are a trading and commercial establishment, a Notification under Section 1(3)(b) cannot apply to such establishments which are factories, and conversely that it can only apply to establishments which are not factories. This contention turns on the interpretation of Section 1(3)(b) of the Act and was neither raised nor decided in Basantlal's case.

11. It has been argued by Mr. Setalwad for the petitioners that Section 1(3)(a) applies to every establishment (a) which is a factory, (b) engaged in any industry specified in Schedule I, and (c) in which 20 or more persons are employed. All the three conditions must co-exist in order to bring an establishment within the meaning of clause (a) of sub-section 1(3). If any of these conditions is not satisfied, the provisions of clause (a) will not be attracted. Mr. Setalwad has argued that if the first condition is satisfied, viz. (a) that an establishment is a factory, but the condition (b) is not satisfied because the factory is not engaged in an industry specified in Schedule I and the Central Government want to ex-

tend the Act to such establishment, they can by a notification under Section 4 add that industry to the Schedule and lay the notification before the Parliament. He pointed out that the Central Government have in fact, time and again, exercised this power and added numerous industries to Schedule I. He further argued that if the first condition (a) is satisfied, viz. that the establishment is a factory, but the condition (c) is not satisfied because the factory does not employ 20 or more persons and the Central Government want to extend the Act to such establishment they can by a notification under the proviso to Section 1(3) apply the Act to any establishment employing less than 20 persons. From this, he argued that it is only when the first condition — condition (a) — is not satisfied because the establishment is not a factory that resort must be had to a notification under clause (b). Clause (b), therefore, would obviously according to him, apply when an establishment is not a factory. He contended that if Clause (b) applied to establishments which are factories the existence of Section 4 in the Act will be meaningless and otiose. The Central Govt. could notify a class of establishments under clause (b) and apply the Act to industries other than those in Schedule I and avoid laying the notification before the Parliament. He also contended that there would be over-lapping between S. 4 and clause (b) and that neither such result was intended nor should the Court so interpret the sub-section as to lead to that result. He also contended that in the expression "any other establishment" in clause (b) the word 'other' means not the same as already mentioned in clause (a) and as covered by it, and that 'other' establishment in clause (b) must be separate in identity and distinct in kind from it. It must therefore be an establishment which is not a factory. We must concede that these arguments are plausible and it is not impossible to agree with them. But the other interpretation suggested by Mr. Rangnekar on behalf of the respondents is equally plausible and a possible interpretation. We cannot say that on a plain reading of Section 1(3) alone it is not possible to come to the conclusion that the expression "any other establishment" in clause (b) could mean any establishment which did not fall in clause (a), whether such establishment be an establishment which is a factory or an establishment which is not factory. Mr. Setalwad contended that the interpretation suggested by Mr. Rangnekar will have to leave out of account firstly the scheme of the Act whereby extension of the Act to industries other than those in Schedule I is provided for in Section 4, and extension of the Act to industries employing less than twenty

persons is provided for by the proviso in Section 1(3) and only the extension of the Act to establishments other than factories remains to be provided for by clause (b); and secondly that such interpretation will render Section 4 meaningless, redundant and otiose and in any case superfluous, and thirdly the use of the word 'other' in clause (b) would indicate an establishment of a kind different from and not the same as "an establishment which is a factory."

12. Mr. Rangnekar has taken us through the history of changes made in the Act from 1952 and has shown to us how initially the Act was made applicable only to factories employing fifty or more persons and engaged only in six industries and how today the Act has been made applicable to other establishments also, the number of persons employed has been reduced to twenty or more and a number of industries have been added to the Schedule. He has argued that the Act is a beneficent piece of legislation and where more than one interpretation of a provision is possible, the provision should be so construed as to benefit the largest number of persons. With this we, in principle, agree. The reply of Mr. Setalwad to this point is that if the Government thinks that Asafoetida industry ought to be covered, they can add it in the Schedule by a notification. Only such notification will have to be laid before the Parliament and that there is no reason to fight shy of laying a notification before the Parliament if the scope of a beneficent legislation is to be extended to a larger number of persons.

13. We are, however, of the opinion that by the interpretation suggested by Mr. Rangnekar, Section 4 will not be rendered redundant or meaningless. Under Section 4 the Central Government can by a notification add to Schedule I the entire industry, while under Section 1(3) (b) they can extend the Act even to a single establishment or a class of establishments. Clause (b) permits of classification within the industry, which Section 4 does not. Under Section 4 either the entire industry has to be included or not included. Section 16 provides that the Act is not to apply to certain establishments. Sub-section (2) of Section 16 provides that if the Central Government is of the opinion that having regard to the financial position of any class of establishments or other circumstances of the case, it is necessary or expedient to exempt any class of establishments from the operation of the Act, it may by a notification do so. This would indicate that there could be several considerations such as financial position of any class of establishments or other circumstances due to which the Central Government may rightly like to extend the provisions of

the Act only to a specified establishment or a specified class of establishments. Section 1(3) (b) will enable the Central Government to do this. They could possibly not do this under Section 4. The two provisions fulfil a distinct purpose, and there is no substance in the argument that the interpretation suggested by Mr. Rangnekar will render Section 4 meaningless.

14. We also find by going through the Act that the word "establishment" is used in sub-sections (4) & (5) of Section 1 and also in Sections 16 and 17 and may be in other parts of the Act, indicating that the word "establishment" is used as genus, of which a factory is a species. It may be that to a certain extent the provisions of Section 4 may overlap the powers of the Government under Sec. 1 (3) (b). But this we suppose would be a necessary measure as a matter of abundant caution to cover cases which would not fall under Section 1 (3) (b). But as we have pointed out that Section 1 (3) (b) permits of not only classification but of application of the Act to an individual establishment, this provision serves a distinct purpose. There is nothing inconsistent in the scheme of the Act with the view that Section 1 (3) (b) applies to all establishments whether such establishments are or are not factories. The expression "any other establishment" in clause (b), is capable of the interpretation that the reference is to any establishment that does not fall under clause (a), whether such establishment is or is not a factory. We have therefore no hesitation in accepting that interpretation, as that interpretation will extend the benefit of this beneficent piece of legislation to a larger number of persons.

15. Mr. Rangnekar then argued that if the scope of clause (b) is limited to non-factory establishments, even diamond merchants who may, according to him, employ one person to cut diamonds, and another person to polish them and several persons to sell them, will claim to be manufacturers and therefore factories, because they have to cut or polish diamonds before selling them and they will thus escape the operation of the Act. We are however not impressed by this argument, because if that were so, the fault will lie with the wideness of the definition of the words and expressions 'factory', 'manufacture' and 'manufacturing process' in the Act. The object in so defining must have been to bring in larger number of establishments within the ambit of the Act. Nothing would prevent the Govt from adding an industry to the list of Industries in the Schedule I.

16. It is not alleged by the respondents that the contention of the peti-

tioners that they are a factory is false or mala fide. They allege that they employ 19 persons in the factory and 12 persons in the office. But in view of Section 2A it makes no difference where larger number of persons is employed because they have all to be added up. Raw Asafoetida is a strongly aromatic resinous gum and has to be mixed with wheat flour and non-resinous gum to be adapted for domestic or medicinal use. It is usually packed before sale. These processes clearly bring the activity of the petitioners within the definition of "manufacture" or "manufacturing process" and the petitioners are undoubtedly a factory although simultaneously, on their own admission, they are also dealers. Their entire establishment will however come under Clause (b) because of Section 2A of the Act.

17. The question canvassed before us came up before our learned brother Mr. Justice Padhye sitting as a single Judge at Nagpur in the case of Central Hindustan Orange and Cold Storage Co. Ltd. v. Prafullachandra Ramchandra Oza, reported in 68 Bom LR 689 = (AIR 1967 Bom 126). He also took the view that Cl (b) refers to establishments which are not included in Schedule I of the Act and to other establishments which are non-factory establishments, if there is a proper notification by the Central Government. He was of the view that the reading of the two clauses did not show that they were actually exclusive of each other. We respectfully agree with the conclusion to which Padhye, J., arrived.

18. Our attention is also drawn to the case of Provident Fund Inspector v. Kerala Janata Printers and Publishers Private Ltd., Trivendrum, reported in AIR 1965 Ker 130. In this case validity of Section 15 of the Working Journalists (Conditions of Service) Act, 1955 was impugned. Section 15 of the Act extended the provisions of the Employees' Provident Funds Act to the working journalists at a time when the Act was applicable only to factories and not to non-factory establishments. The Act was applied to the working journalists not by a notification under Section 1 (3) (b) but by S. 15 of the Working Journalists' Act itself. The Judgment in this case contains certain observations to the effect that by notification under Section 1(3)(b) the Act could be applied to all establishments, factory or non-factory. Although the question raised in this matter did not directly arise in that case because it turned on the effect of the extension of the Act by virtue of Section 15 of the Working Journalists Act and not by virtue of a notification under Section 1 (3) (b), we are in agreement with the observations of the learned Judges in that case. A Division Bench of the M. P. High Court has

in the case of Radhakrishnan Narayandas v. Regional Provident Funds Commissioner, Madhya Pradesh, Indore, reported in AIR 1967 Madh Pra 157, taken a contrary view and has dissented from the judgment of the Kerala High Court referred to hereinabove. But for reasons hereinabove stated we are unable to agree with the judgment in the M. P. case.

19. For reasons fully set out hereinabove, we hold that Clause (b) of Section 1 (3) of the Employees' Provident Funds Act, 1952, empowers the Central Government to apply the Act to all trading or commercial establishments, whether such establishments are factories or not. Secondly, the Notification dated 7th March 1962 set out hereinabove will apply to such trading and commercial establishments, whether they are factories or not. The petitioners being such an establishment, the said Notification will apply to them.

20. In the premises the petition must be dismissed with costs and we order accordingly. The costs are quantified at Rs. 375.

GGM/D.V.C.

Petition dismissed.

AIR 1969 BOMBAY 101 (V 56 C 20)

VIMADALAL J.

Central Bank Executor & Trustee Co. Ltd., Plaintiffs v. Hormusji Nusserwanji Madraswalla and others, Defendants.

Suit No. 468 of 1967, D/- 25-10-1967.

Trusts Act (1882) S. 78 — Power of revocation — Reservation to author — Power must have been reserved in the revocation deed itself.

Provisions of S. 78 apply to private trusts as well as a public trust. Under it a trust created otherwise than by will, cannot be revoked, except in three cases viz. (a) where beneficiaries are competent to contract, and consent to its revocation, (b) where a power of revocation is expressly reserved to the author of the trust, and (c) where the trust is for the payment of debts of the settlor, and has not been communicated to the creditors. As regards reservation of power of revocation to the author, unless such power is reserved in the Deed of Revocation itself a new trust declared in the Deed of Revocation cannot be revoked by virtue of the power of revocation contained in the original Deed of Settlement. (1717) 24 ER 213, Rel. on. (Paras 8 & 9)

Cases Referred: Chronological Paras (1717) 24 ER 213=Prec. Ch. 474,

Hele v. Bond

Hormusji (Vimadalal J.)

ORDER: This is an Originating Summons taken out by the plaintiff-Co. which is the present Trustee of the Deed of Settlement executed by one Maneckji Ratanji Bharucha on 22nd April 1942 for the determination of certain questions that have been framed in it.

2. By clause 2 of the said Deed of Settlement, dated 22nd April 1942, the settlor provided that the net income of the trust estate was to be paid by the Trustees to himself for life. By clause 4 thereof, it was provided that from and after the death of the Settlor, the Trustees were to pay the net income to the Settlor's sister Banubai, if she be then living, for the term of her natural life. Clause 5 of the said Deed provided that, from and after the death of the said Banubai, or in case she predeceased the Settlor then, on the death of the Settlor, the Trustees were to divide the Trust premises into two equal parts and hold them upon certain trusts thereafter specified. Clause 6 provided that one of those parts was to be held in trust for the issue of the said Banubai, but if the said Banubai died without leaving any issue, the Trustees were to hold the same upon trust to pay the net income thereof to her husband for life, and, in default of such husband, to apply the net income for the benefit of the Settlor's brother Ardeshir, if he be then alive, for his life, and, in default of the said Ardeshir, to transfer the said part of the Trust premises to the Parsi Panchayat Board at Surat for the benefit of a certain infirmary situated there. Clause 7 of the said Deed provided that the net income of the other part of the Trust premises was to be paid to the Settlor's brother Ardeshir, if he be then alive, and thereafter for the benefit of the wife and children of the said Ardeshir. Clause 8 of the said Deed provided that, from and after the death of the said Ardeshir and the said Banubai, the Trustees were to hold the said Trust premises upon certain other trusts in favour of the issue of the said Ardeshir, but if the said Ardeshir were to die leaving no issue and no widow, the said part of the Trust premises was to be transferred to the Parsi Panchayat at Surat for the benefit of a certain technical institute situated in that town. Clause 18 of the said Deed is in the following terms:

"18. The said Maneckji Ratanji Bharucha (alias Gadiwala) may from time to time and at any time or times by a Deed or Deeds revocable or irrevocable or by Will or Codicil wholly or partially revoke and make void or vary all or any of the trusts, uses, powers, and provisions hereinbefore created declared and contained and by the same Deed or any other Deed whether revocable or irrevocable or by Will or Codicil declare any new or other trusts uses powers or provisions concern-

ing the premises the trusts, uses, powers, and provisions whereof shall have been so varied or revoked as aforesaid".

3. It may be mentioned that the Settlor's brother Ardeshir died unmarried on 10th May 1956, and the Settlor's sister Banubai also died unmarried on 22nd October 1957.

4. In exercise of the power conferred by the said clause 18 of the Deed of Settlement dated 22nd April 1942, the Settlor, by a Deed of Revocation dated 15th October 1958, revoked clauses 4, 5, 6, 7, 8 and 9 of the said Deed, and declared and directed that, after his demise, the Trustees were to convert the investments representing the Trust Fund into money and divide the net amount into six equal parts which were to be dealt with in the manner laid down therein. Five of those six equal parts were directed by the said Deed of Revocation to be applied to various charitable institutions, and it is unnecessary for me to refer to the same. The sixth part of the income was directed, by clause 2(f) of the said Deed of Revocation, to be invested, and the net income thereof to be paid to the Settlor's friends, who are the 1st and 2nd defendants to this Originating Summons, for the term of their natural lives and from and after the death of both of them, half of the investments representing the said one-sixth share were to be handed over to the Trustees of the Bandra Parsi Convalescent Home for Women and Children, and the other half to the Trustees of the Shirinbai Cama Convalescent Home for Men and Boys, to be held upon trust to apply the net income thereof for the maintenance of the said institutions. Clause 3 of the said Deed of Revocation was in the following terms:

3. Save as hereinbefore modified the said Indenture of Settlement is hereby confirmed and shall remain in force and effect in every respect."

5. By another Deed of Revocation dated 11th August 1962, the Settlor in purported exercise of the power of revocation reserved to him by the said Deed of Settlement dated 22nd April 1942, varied and altered the uses in the said Deed of Revocation and New Appointment dated 15th October 1958 in the manner stated therein, namely, that clause 2(f) of the said Deed of Revocation dated 15th October 1958 was to be deleted, as if it had not appeared at all in the said Deed, and a new clause 2(f) substituted in its place, which provided that the said one-sixth part of the Trust Fund was to be applied to certain charities specified in the said Deed of Revocation dated 11th August 1962. It is unnecessary for me to refer to the directions given by the said Deed for Revocation, beyond pointing out that the effect of

those directions was that the provision in clause 2(f) of the Deed of Revocation dated 15th October 1958, under which the income of the said one-sixth part was to be paid to the 1st and 2nd defendants, did not find place. It is the contention of Mr. Nariman on behalf of the 1st and 2nd defendants that the Settlor had not power to revoke the Deed of Revocation dated 15th October 1958, as he purported to do under the power of revocation originally contained in the Deed of Settlement dated 22nd April 1942. It is, on the other hand, submitted by Mr. Laud on behalf of the plaintiffs, and by Mr. Dubash on behalf of the Charity Commissioner (Defendant No. 3), that the Settlor did have the power to revoke the said Deed of Revocation dated 15th October 1958.

6. The whole argument of Mr. Laud in support of the above submission comes to this, that what was sought to be done by the said Deed of Revocation dated 15th October 1958 was to revoke clauses 4 to 9 of the original Deed of Settlement dated 22nd April 1942, and to incorporate in that very Deed of Settlement certain new trusts and provisions contained in the said Deed of Revocation dated 15th October 1958. It was argued by Mr. Laud that if his contention to that effect was accepted, the effect would be that the new trusts and provisions so incorporated would continue to be subject to the power of revocation contained in clause 18 of the Deed of Settlement dated 22nd April 1942. In support of that argument, Mr. Laud relied on the fact that clause 18 of the said Deed of Settlement itself provided, in terms, for the revocation being effected "from time to time" by a "Deed or Deeds revocable or irrevocable". Mr. Laud contended that clause 18, as framed, therefore, showed clearly that a Deed of Revocation effected pursuant thereto could itself be revoked or varied from time to time.

7. As against that argument of Mr. Laud, Mr. Nariman sought to contend that the said Deed of Revocation dated 15th October 1958, as drafted, did not bear out the contention of Mr. Laud, in so far as it did not provide for the new trusts created therein being incorporated in the original Deed of Settlement. Mr. Nariman also relied on the terms of clause 18 of the Deed of Settlement dated 22nd April 1942, whereby, according to him, the only power of revocation was to revoke the trusts "hereinbefore created", which would mean the trusts created by the original Deed of Settlement itself, and not the trusts as varied by the subsequent Deed of Revocation dated 15th October 1958. Mr. Nariman further submitted that, both under Section 78 of the Indian Trusts Act as well as under the corresponding provisions of law appli-

cable to public trusts. a document creating a trust cannot be revoked unless it itself provides for a power of revocation therein.

8. The question which I have to decide is, therefore, a very narrow one, but the learned counsel appearing in the matter have stated that the same is not covered by authority, except that, in the ancient English case of Hele v. Bond, (1717) 24 E. R. (Chancery) 213 in which, on exactly similar facts as those of the present case, it was held that, in the absence of a power of revocation being reserved in the Deed of Revocation, the new trusts declared in the Deed of Revocation could not be revoked by virtue of the power of revocation contained in the original Deed of Settlement. Mr. Nariman has also referred to statements of law contained in certain standard works to which I will refer later on.

9. The first point which appears to be fairly clear is the one which was argued by Mr. Nariman, namely, that, as laid down in Section 78 of the Indian Trusts Act, a trust created otherwise than by Will, cannot be revoked, except in three cases viz., (a) where beneficiaries are competent to contract, and consent to its revocation, (b) where a power of revocation is expressly reserved to the author of the trust, and (c) where the trust is for the payment of debts of the Settlor, and has not been communicated to the creditors. The Court is concerned, in the present case, only with clause (b) of that section. The position in regard to public trusts is also the same, and the proposition in Section 78 of the Indian Trusts Act, to which I have just referred, finds place in the statement of the law in Halsbury, 3rd edition, Volume 30, p. 267, paragraph 507, and in Farwell on Powers, 3rd edition, pp. 306-307, as a general proposition applicable to all trusts, public as well as private. The result of this legal position is that unless Mr. Laud's contention with regard to the incorporation of the new trusts in the original Deed of Settlement is accepted by me, his submission that the Deed of Revocation dated 15th October 1958 could be revoked, cannot stand. I have considered carefully the form of the Deed of Revocation dated 15th October 1958. In support of his argument with regard to the incorporation of the new trusts in the original Deed of Settlement, Mr. Laud has relied strongly on clause 3 of the said Deed of Revocation dated 15th October 1958, which lays down that, save as modified therein, the original Deed of Settlement was confirmed and was to remain in full force and effect in every respect. I am afraid, however, the Deed of Revocation of 15th October 1958, as framed, does not purport to incorporate the new trusts in the original Deed of Settlement, but purports to create new

trusts as therein laid down. This is apparent from a comparison of clause 2 of the said Deed of Revocation dated 15th October 1958 with clause 2 of the subsequent Deed of Revocation dated 11th August 1962, the latter of which provides, in clear terms, for the incorporation of the new trusts in the original Deed of Settlement. That is not the way the Deed of Revocation dated 15th October 1958 is drafted, and, under the circumstances, I am afraid, I cannot accept Mr. Laud's contention that the trusts created by the said Deed of Revocation dated 15th October 1958 should be read as if they were incorporated in the Deed of Settlement dated 22nd April 1942, so as to enable the settlor to avail himself of the power of revocation contained in clause 18 of the latter Deed. Clause 2 of the Deed of Revocation dated 15th October 1958, in terms, purports to "declare and direct" the division of the Trust Fund into six equal parts, and to apply the same in the manner directed therein. There can be no dispute that the said Deed of Revocation dated 15th October 1958 does not contain a power of revocation or variation of the new trusts created by it. Under the circumstances, I have come to the conclusion that Mr. Laud's argument on this point cannot be accepted by me.

10. In the result, I answer the questions formulated in the Originating Summons as follows:

11. Question No. 1: in the negative.
Question No. 2: In the negative.
Question No. 3: In the negative.
Question No. 4: In the affirmative.

12. As far as costs are concerned, the costs of the plaintiffs and of the Charity Commissioner (Defendant No. 3), in separate sets, between attorney and client, to come out of the trust estate. The costs of Defendants Nos. 1 and 2, also to come out of the trust estate.

GGM/D.V.C.

Order accordingly.

AIR 1969 BOMBAY 103 (V 56 C 21)
BAL J.

Bijibai Saldhana, Petitioner v. Rama Manohar Thannu Mishra and another, Respondents.

Special Civil Applns. Nos. 243 and 244 of 1967, D/- 6-2-1968.

(A) Houses & Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Ss. 5, 14 and 15 — As amended by Bombay Act (49 of 1959) — Effect of — Lease-deed expressly authorising tenant to sub-let — Sub-letting by tenant after 21-5-1959 — Sub-lessee though

lawful sub-tenant cannot claim status of head tenant under S. 14 or that of statutory tenant under S. 5(11)(b).

Prior to amendment of S. 15 by Bombay Act (49 of 1959) sub-letting, transfers and assignments were totally prohibited irrespective of whether the contract of lease permitted the same or not. But after the amendment, Section 15(2) by its first paragraph legalises sub-letting transfers and assignments which had taken place prior to 21st May, 1959, provided the sub-tenants, transferees or assignees had continued in possession till that date while under the second, after 21st May 1959, a tenant could lawfully sub-let if, and only if, the contract of lease expressly permitted him to do so. (Paras 9, 10)

Under S. 14 in order to be elevated to the status of a direct tenant of the landlord on the determination of the interest of the head tenant, the sub-tenant must not only be a lawful sub-tenant but the premises must further have been let to him prior to 21st May 1959. Hence, where the lease deed dated 13-4-1959 expressly permitted the tenant to sub-let the premises leased to him and the premises had been sub-let in September 1959, the sub-tenant though a lawful sub-tenant under S. 15 is not entitled to the benefit of the provisions of S. 14 of the Act nor can he claim the status of a statutory tenant under S. 5(11)(b). (Paras 12 & 29)

(B) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 12 (1) — Protection from eviction is available only to a statutory tenant against his landlord at relevant time under the Act.

In order to give protection to the tenant, S. 12(1) imposes a prohibition against the landlord in the matter of recovering possession. The expression 'tenant' appearing in this section must of necessity mean a statutory tenant, for no question of recovering possession can arise unless the contractual tenancy is first terminated. The protection is available to the tenant against the person who can be said to be his landlord under the Rent Act at the relevant time. (Para 14)

(C) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), S. 5(11) — Tenant — Contractual tenant and statutory tenant — Interpretation of S. 5(11)(b) — Expression "who had derived title before the commencement of Bombay Ordinance, 1959" qualifies 'any person' and not 'his predecessor' — (Transfer of Property Act (1882) S. 108(i)).

The main definition of a tenant in Section 5(11), contemplates only a contractual tenant because rent is payable by him alone. Clauses (a) to (c) contemplate persons who are tenants by virtue only of the statutory provisions and are

hence commonly known as 'statutory tenants'. (Para 16)

Clause (b) of S. 5(11) contemplates two categories of statutory tenants not covered by the other clauses viz. (i) a person to whom premises are leased and who remains in possession after determination of lease and (ii) a person to whose predecessor the premises are leased and who has derived his title from the lessee prior to Bombay Ordinance 1959 and who remained in possession after the determination of lease. (Para 16)

The expression "who had derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance 1959" in S. 5(11)(b) was intended to qualify "any person" and not "his predecessor". The reference to derivative title is inappropriate in the case of a person to whom the premises are leased. The clause itself speaks of the premises having been leased to the predecessor and there could, therefore, be no question of his deriving any further title. On the other hand that expression would be quite appropriate to the case of a person obtaining some kind of title from the original lessee before the determination of his lease. (Para 18)

Under the general law i.e., under the Transfer of Property Act a tenant has in the absence of a contract to the contrary, a right to sub-let or to transfer or assign his interest in the premises let to him, but the Rent Act while giving protection to the tenant against eviction, took away this right of his and even after the Ordinance and the Act which replaced it, that right has not been restored to him. The partial relaxation made by introducing the words "but subject to a contract to the contrary" in Section 15(1) has not that effect. (Para 20)

Though the Legislature did not prohibit sub-letting, transfer or assignment after the Ordinance if made in pursuance of an express contract, it did not intend to extend the protection of the Rent Act to sub-tenants, transferees or assignees claiming under such transactions but left them to be governed by the general law. The interpretation of clause (b) of subsection (11) of Section 5 of the Rent Act must be consistent with the above considerations. (Para 27)

(D) Civil P. C. (1908) Pre — Interpretation of Statutes — Punctuation marks — Cannot be regarded as controlling factor and cannot be allowed to control plain meaning of text. (Para 18)

(E) T. P. Act (1882), Ss. 8 and 105 — Deed — Construction — Document on basis of which tenancy right is claimed — Interpretation of, is a question of law — Compromise purhsis satisfying requirements of a contract of tenancy — It is not

necessary to state expressly in document that certain person was accepted as tenant. (Paras 31, 32)

(F) Constitution of India, Art. 227 — Discretion of High Court — Contractual tenant illegally dispossessed by landlord — Tenant's suit for restoration of possession dismissed by both lower Courts — Suit premises demolished and in its place new premises coming into existence in course of litigation — High Court would not interfere under Art. 227 when an order for possession in favour of tenant would be unexecutable and infructuous and especially when he flatly refused to deposit arrears of rent as ordered by Court. (Para 36)

V. T. Walawalkar with D. D. Samant, for Petitioner, (in both matters); R. B. Andhyarujina with Vilas V. Kamat, for Opponent No. 1 (in both matters).

ORDER: These two companion matters raise a common question of law for decision and can be conveniently dealt with together. The facts giving rise to them are briefly these:

2. The property bearing Tika No. 16, C. S. Nos. 5 and 6 of Thana, formerly belonged to one Vasanji Padamsi. On a part of this property there was a shed known as the "Big godown". By a lease-deed dated 13th April 1959 Vasanji leased out the shed and the site under it to one D. B. Naik at a monthly rent of Rs. 225. Under the terms of the lease the lessee was entitled to make improvements, alterations or modifications at his own cost and was also entitled to sub-let the premises subject to the condition that when the lease was terminated the sub-lease would also be deemed to be terminated. Naik converted a part of the shed into four shops. Two of these were let out by him to Mahamood Abdul Rahman alias S. A. P. Mahamood, the petitioner in Special Civil Application No. 244 of 1967, at a monthly rent of Rs. 150 and one more was let out to Bijibai Saldhana, the petitioner in Special Civil Application No. 243 of 1967, at a monthly rent of Rs. 60. There was a dispute as to when these shops were let out to the two petitioners; the petitioners claiming that they had entered into possession on 25th April 1959 and the respondent No. 1 (hereinafter referred to as 'the respondent') contending that they had come on the property in September 1959. Both the Courts below have, however, concurrently found that the premises were let to the petitioners in September 1959 and that finding is not challenged before me by Mr. Walavalkar, learned Counsel for the petitioners.

3. On 28th September 1959 Naik assigned his rights to one P. Hamid Koya by an assignment-deed of that date and the petitioners attorned to the assignee.

Thereafter, in 1961, Vasanji filed a suit for eviction and arrears of rent against Naik and Koya in the Civil Court at Thana. The claim for eviction was, however, subsequently given up and a decree for arrears of rent alone was passed in that suit. Pending the said suit the property was purchased from Vasanji by Ram Manohar Thannu Mishra, the respondent in both these petitions. It is not known whether the respondent had been brought on the record of that suit before the decree was passed but proceedings for the execution of that decree were started jointly by Vasanji and the respondent. A Receiver came to be appointed in those proceedings and although his appointment was for the purpose of collecting rent from the sub-tenants who were occupying the premises, he somehow obtained possession of the premises in the occupation of Mahamood on 22nd March 1962 by breaking open his locks during his absence. This led to an application by Mahamood (Misc. Application No. 53/62) to the Executing Court for restoration of possession. The matter was compromised and a compromise purhis signed by the respondent and by the constituted attorney of Mahamood as well as by the Receiver, was filed in Court on 2nd July 1962. Under the terms of the compromise Mahamood was to be restored to possession on 6th July 1962 on his paying Rs. 530. Mahamood was further to pay Rs. 175 per month as rent of the premises from 1st July 1962 onwards. Mahamood paid Rs. 530 as agreed and was put in possession of the premises on 6th July 1962.

4. After Mahamood was thus restored to possession, the respondent filed Civil Suit No. 271/62 against Naik and Koya for eviction. To that suit he joined the Receiver also as a party-defendant. None of the two petitioners was, however, made a party to that suit. The suit was dismissed by the trial Court but in an appeal filed by the respondent in the District Court at Thana, that dismissal was set aside and the suit was decreed. The respondent then started execution proceedings and in execution of a warrant issued in those proceedings dispossessed both the petitioners on 1st August 1964.

5. The petitioners approached the Executing Court by filing applications for restoration of possession under Rule 100 of Order 21 of the Code of Civil Procedure but their applications were dismissed. Both of them then filed original suits in the Civil Court at Thana for establishing their right to present possession and for restoration of possession. Their suits, however, came to be dismissed and the appeals filed by them in the District Court at Thana also met with the same fate. They have, therefore, come to this High Court under Article 227 of

the Constitution for challenging the decisions of the Courts below.

6. On these facts which are no longer in dispute, Mr. Walavalkar, learned Counsel for the petitioners, argued two points before me viz. -

(i) that the premises were let to the petitioners lawfully by Naik and hence they were 'tenants' as defined in S. 5(11) (b) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the 'Rent Act'); and

(ii) that by virtue of the compromise between the respondent and Mahamood (recorded in Misc. Application No. 53/62) the latter also became a contractual tenant of the respondent from July 1962. According to Mr. Walavalkar, the petitioners being thus 'tenants' under the Rent Act, were entitled to the protection of that Act and were not liable to eviction in execution of the decree obtained by the respondent in Civil Suit No. 271/62 against Naik and Koya.

7. Before dealing with the first of the above points it will be convenient to set out the relevant provisions of the Rent Act which admittedly applies to the premises with which we are concerned in these petitions.

8. Section 15(1) of the Rent Act reads as follows:

"15. (1) Notwithstanding anything contained in any law, but subject to any contract to the contrary, it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein."

There is a proviso to this section but it is not material for the purposes of this case.

9. The expression "but subject to any contract to the contrary" was introduced retrospectively by Bombay Ordinance III of 1959 (hereinafter referred to as "the Ordinance") which was later repealed and replaced by Bombay Act 49 of 1959. Prior to this amendment sub-letting, transfers and assignments were totally prohibited irrespective of whether the contract of lease permitted the same or not. A large number of tenants had, however, sub-let the premises let to them or transferred or assigned their interest therein in spite of the prohibition, with the result that the sub-tenants, transferees or assignees as well as the tenants themselves stood in danger of being evicted. To remedy the situation thus created and to provide a dead line after which sub-letting would not be lawful, the Governor of Bombay promulgated the Ordinance on 21st May 1959. Section 15 as it then stood was re-numbered as S. 15(1) and a new sub-section was added as sub-section (2). It was again substituted by a fresh sub-section (2) by Maharashtra Act No. 36 of 1962.

10. Section 15(2) as it now stands consists of two paragraphs. The first legalises sub-letting, transfers and assignments which had taken place prior to 21st May 1959, provided the sub-tenants, transferees or assignees had continued in possession till that date, while the second provides: "The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the commencement of the Ordinance aforementioned". Thus after 21st May 1959, a tenant could lawfully sub-let if, and only if, the contract of lease expressly permitted him to do so. In the present case, the lease-deed dated 13th April 1959 by clause (4) of it, expressly permitted the lessee Naik to sub-let the premises leased to him and it is, therefore, beyond dispute that the petitioners were lawful sub-tenants. The question, however, is whether for that reason they became the tenants of the landlord Vasanji and after him of his transferee i.e. the respondent, and were entitled to protection against eviction by him in execution of his decree against Naik.

11. Section 14 of the Rent Act which was amended simultaneously with S. 15(1) in 1959 reads:

"14. Where the interest of a tenant of any premises is determined for any reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance (1959) shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms and conditions as he would have held from the tenant if the tenancy had continued."

12. This shows that in order to be elevated to the status of a direct tenant of the landlord on the determination of the interest of the head-tenant, the sub-tenant must not only be a lawful sub-tenant but the premises must further have been let to him prior to 21st May 1959. In the Courts below the petitioners were contending that the premises had been let to them by Naik prior to 21st May 1959 and hence they became direct tenants of the respondent on the determination of the interest of Naik by the decree obtained against him by the respondent. That contention is not now open to them in view of the concurrent finding of the Courts below that the premises were let to the petitioners on or about 1st September 1959 and Mr. Walavalkar has rightly not urged that contention before me but has on the contrary fairly conceded that the petitioners are not entitled to the benefit of the provisions of Section 14.

13. Reliance is placed by Mr. Walavalkar solely on the provisions of Section

5(11)(b) of the Rent Act. He argues (without prejudice to his second contention on behalf of Mahamood) that both the petitioners are statutory tenants according to the definition given in this section and are hence entitled to the protection embodied in Section 12(1) of the Rent Act, which reads:

"12(1). A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act."

14. In order to give protection to the tenant, this section imposes a prohibition against the landlord in the matter of recovering possession. The expression 'tenant' appearing in this section must of necessity mean a statutory tenant, for no question of recovering possession can arise unless the contractual tenancy is first terminated. It is also clear that the protection is available to the tenant against the person who can be said to be his landlord under the Rent Act at the relevant time. It must, therefore, be seen whether the petitioners were statutory tenants of the respondent as contended by Mr. Walavalkar, at the time when the respondent evicted them.

15. Although, Mr. Walavalkar is relying only on clause (b) of sub-section (11) of Section 5 of the Rent Act, in order to understand his argument it will be necessary to refer to some of the other clauses also. Section 5(11) of the Rent Act which defines the term 'tenant' for the purposes of that Act reads:

"5(11) 'tenant' means any person by whom or on whose account rent is payable for any premises and includes—

(a) such sub-tenants and other persons as have derived title under a tenant before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959;

(aa) any person to whom interest in premises has been transferred under the proviso to sub-section (1) of Section 15;

(b) any person remaining, after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959;

(c) any member of the tenant's family residing with him at the time of his death as may be decided in default of agreement by the Court."

16. The main definition contemplates only a contractual tenant because rent is

payable by him alone. Clauses (a) to (c) contemplate persons who are tenants by virtue only of the statutory provisions and are hence commonly known as 'statutory tenants'. Mr. Walavalkar argues that clause (b) on which he relies, contemplates two categories of persons not covered by the other clauses. There he is right. He is also right in saying that one of these categories contemplates a person to whom the premises are leased and who remains in possession after the determination of his lease. Mr. Walavalkar however goes further and says that the second category contemplates a person to whose predecessor the premises are leased prior to the commencement of the Ordinance and who remains in possession after the determination of the lease, irrespective of whether the person in question came on the premises before or after the commencement of the Ordinance. According to him the expression 'who has derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959' occurring in clause (b) qualifies the expression "his predecessor" and not "any person" as would *prima facie* appear. In other words according to Mr. Walavalkar, all that is necessary to make any person (of this category) a statutory tenant under Section 5(11)(b) of the Rent Act is that the premises must have been leased to his predecessor before the commencement of the Ordinance. It is then immaterial whether the person claiming to be a tenant was inducted in the premises by his predecessor before or after the commencement of the Ordinance.

17. The argument is untenable and cannot be accepted for several reasons.

18. A plain reading of clause (b) indicates that the expression "who had derived title before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance 1959" was intended to qualify "any person" and not "his predecessor". The reference to derivative title is inappropriate in the case of a person to whom the premises are leased. The clause itself speaks of the premises having been leased to the predecessor and there could, therefore, be no question of his deriving any further title. On the other hand that expression would be quite appropriate to the case of a person obtaining some kind of title from the original lessee before the determination of his lease. That the Legislature has used an almost identical expression in connection with sub-tenants and other persons obtaining title through the original tenant, can be seen from clause (a) and it is unlikely that the very expression would be used in the same section in connection with a different category of persons without any apparent reason. It is true as pointed out by Mr.

Walavalkar, that there is no comma after the word "predecessor", but it is well known that punctuation cannot be regarded as a controlling factor and cannot be allowed to control the plain meaning of a text. Mr. Walavalkar is not right in saying that unless his argument is accepted, the second category of persons would be covered by clause (a) and a part of clause (b) would be redundant. There is a clear distinction between the cases contemplated by clause (a) and clause (b). Clause (a) contemplates a case where the lease in favour of the head-tenant is not terminated but is subsisting, while clause (b) contemplates a case where that lease has been already terminated.

19. It would be unreasonable to suppose that the Legislature wanted to treat the "pre-ordinance lessees" as a specially privileged class by conferring upon them the right to induct on the premises after 21-5-1959, persons who could claim the protection of the Rent Act, when lessees to whom the premises are let after that date would have no such right; that would, however, be the direct result of accepting the argument of Mr. Walavalkar.

20. The obvious policy of the Rent Act is to prohibit sub-letting and transfers or assignments of his interest by a tenant. As originally enacted, it totally prohibited such transactions since the date of its coming into force and penalised the tenant as well as his sub-tenants, transferees and assignees by making them liable to eviction under Section 13(1)(e) as it then stood. Section 15 was amended in 1959 to save the situation created by a large number of illegal transactions of sub-letting, transfers and assignments by tenants, but then it was made clear that 21-5-1959 would be a dead-line and no sub-letting, transfer or assignment made thereafter would be recognised for giving protection to the sub-tenants, transferees or assignees. Under the general law i.e., under the Transfer of Property Act a tenant has, in the absence of a contract to the contrary, a right to sub-let or to transfer or assign his interest in the premises let to him, but the Rent Act while giving protection to the tenant against eviction, took away this right of his and even after the Ordinance and the Act which replaced it, that right has not been restored to him. The partial relaxation made by introducing the words "but subject to a contract to the contrary" in Section 15(1) has not that effect. It only saves a sub-letting, transfer or assignment made in pursuance of an express contract permitting it, from being unlawful, but does not extend the protection of the Rent Act to the sub-tenant, transferee or assignee brought in after the commencement of the Ordinance.

This is made clear by Section 14, which I have already quoted.

21. A question may properly arise as to why the relaxation was then made at all and what was it that was intended to be achieved thereby. The answer is to be found in Section 13(1)(e) which was simultaneously amended by substituting the words "unlawfully sub-let" for the word "sub-let" which was originally there. Section 13(1)(e) as it now stands reads:

"13(1) Notwithstanding anything contained in this Act but subject to the provisions of Section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied—

(e) that the tenant has, since the coming into operation of this Act unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein".

22. Prior to the amendment a tenant who sub-let the whole or part of the premises let to him or transferred or assigned his interest therein in any other manner after the Act came into force, was liable to eviction but after the amendment he will be liable to eviction only if the sub-letting, transfer or assignment is unlawful. He will not incur the liability to eviction if the sub-letting, transfer or assignment is lawful as being permitted by an express contract. The purpose of the amendment was thus to save the tenant from eviction if the sub-letting, transfer or assignment made by him was permitted by the contract of lease; the sub-tenant, transferee or assignee being left to his rights, if any, under the general law.

23. Clause (j) of sub-section (1) of Section 13 is in the following terms:

"13(1) Notwithstanding anything contained in this Act but subject to the provisions of Section 15, a landlord shall be entitled to recover possession of any premises if the Court is satisfied — (j) that the rent charged by the tenant for the premises or any part thereof which are sub-let before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959 is in excess of the standard rent and permitted increases in respect of such premises or part or that the tenant has received any fine, premium, other like sum or consideration in respect of such premises or part."

24. Under this clause a tenant who has sub-let the premises or a part thereof prior to the commencement of the Ordinance (so that the transaction is legalised by the amended Section 15) is still liable to eviction if the rent charged by him to the sub-tenant is in excess of the standard rent and permitted increases or if he has received any fine, pre-

mium, other like sum or consideration in respect of such premises but, if the argument of Mr. Walavalkar, is accepted, he would not incur the liability even if he did any of these things, if the sub-letting by him is subsequent to the commencement of the Ordinance, because in that case Section 13(1)(j) would not apply.

25. Section 22(1) of the Rent Act provides as follows:

"22(1) Every tenant who, before the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Ordinance, 1959, has without the consent of the landlord given in writing, sub-let the whole or any part of the premises let to him or assigned or transferred in any other manner his interest therein, and every sub-tenant to whom the premises are so sub-let or the assignment or transfer is so made, shall furnish to the landlord, within a month of the receipt of a notice served upon him by the landlord by post or in any other manner, a statement in writing signed by him giving full particulars of such sub-letting, assignment or transfer including the rent charged or paid by him."

26. This section casts an obligation on a pre-ordinance sub-tenant, transferee or assignee and the tenant sub-letting, transferring or assigning to him, to furnish particulars of the transaction between them within one month if the landlord calls upon them to do so by a notice given in the prescribed manner. The protection against eviction given to them is thus coupled with an obligation, breach of which constitutes a criminal offence under Section 22(2); but if the argument of Mr. Walavalkar is accepted, a tenant permitted to sub-let by the contract of lease and sub-letting after the commencement of the Ordinance, as well as his sub-tenant would get the protection of the Rent Act without any similar obligation.

27. It would be unreasonable to suppose that the Legislature intended the above results or wanted to discriminate in that manner between sub-letting, transfer or assignment made prior to the commencement of the Ordinance (and legalised by it) and lawful sub-letting, transfer or assignment made subsequent thereto. The only reasonable conclusion would, therefore, be that though the Legislature did not prohibit sub-letting, transfer or assignment after the ordinance if made in pursuance of an express contract, it did not intend to extend the protection of the Rent Act to sub-tenants, transferees or assignees claiming under such transactions but left them to be governed by the general law. The interpretation of clause (b) of sub-section (11) of Section 5 of the Rent Act must be consistent with the above considerations and it must therefore be held, rejecting

the argument of Mr. Walavalkar, that the expression "who has derived title before the commencement of the Bombay Rents, Hotel & Lodging House Rates Control (Amendment) Ordinance 1959", occurring in the said clause qualifies the expression "any person" and not "his predecessor". It follows that neither of the petitioners had acquired the status of a statutory tenant under the Rent Act.

28. Again, the protection afforded by the Rent Act is available to a tenant against his own landlord. In the case of a sub-tenant his landlord is the head-tenant till the interest of the latter in the premises in question is determined. The protection available to the sub-tenant till then would, therefore, be against eviction by the head-tenant. So long as the interest of the head-tenant subsists, the original lessor is not his landlord and there can be no occasion for the latter to seek to evict him. This is clear from the definition of the term landlord given in Section 5(3) which reads:

"5. In this Act unless there is anything repugnant to the subject or context—

(3) "landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian or Receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant a tenant who has sub-let any premises."

29. The original lessor would become the landlord of the sub-tenant and the protection would be available to him against the lessor only if the sub-tenant steps into the shoes of the head-tenant on the determination of his interest in the premises; but for this to happen, Section 14 prescribes a condition viz., that the premises must have been sub-let before the commencement of the Ordinance. This condition is admittedly not satisfied in the case of either of the two petitioners. None of them was therefore, entitled to protection under the Rent Act against eviction by the respondent when he dispossessed them on 1-8-1964.

30. Bijibai Saldhana, the petitioner in Spl. C. A. No. 243/67 has not pleaded any other ground in support of her petition and her petition must, therefore, fail.

31. Turning to the second point urged by Mr. Walavalkar (which is available only to Mahamood, the petitioner in Spl. C. A. No. 244 of 1967) the agreement relied on is in writing in the form of a compromise purhsis dated 2-7-1962 filed in

Misc. Application No. 53/62 of the Civil Court at Thana. It is a short document signed by the parties and is in the following terms :—

"It is agreed between the parties that the aforesaid applicant will be put in possession, within five days from this day i.e. on Friday 6-7-1962, of Gala of three rooms on the ground floor now in possession of Shri Supjaran. The possession of the upper portion of the said Gala of three rooms and articles therein is also to be handed over to the said applicant. The applicant to pay Rs. 530 (Rs. five hundred thirty only) before obtaining the possession i.e. on Friday the 6th July 1962.

The applicant agrees to pay Rs. 175 per month as rent of the premises from 1st July 1962 onwards.

Parties to bear their own costs."

Being a document on which the petitioner's claim to tenancy rights is based, the interpretation of this purshis would be a question of law. In fact it needs no "interpretation" as such because its meaning is plain on the face of it. The respondent had already become the owner of the property and was entitled to receive the rent and the petitioner agreed to pay Rs. 175 per month as rent of the premises in his occupation from 1st July 1962 onwards. The payment was towards future rent and had nothing to do with the amount of the decree obtained by Vasanji against Naik and Koya for past arrears. It was the respondent who signed the purshis as the principal party. The endorsement of the Court shows that it was read out to him and he admitted the agreement before the compromise was recorded. By this agreement petitioner Mahamood became the person by whom the rent for the premises was payable and hence a contractual tenant under the principal definition in Section 5(11) of the Rent Act, while the respondent who was the other party to the agreement became entitled to receive the rent from Mahamood and hence his landlord according to the definition of that term in Section 5(3) of the Rent Act, which I have quoted above. There cannot be the least doubt about this legal position. There is no dispute that in pursuance of this agreement Mahamood paid Rs. 530 and was put in possession on 6-7-1962. It is significant to note that the rent which was formerly Rs. 150 per month was, by this agreement; raised to Rs. 175 per month. It may be, as contended by Mr. Andhyarujina, that this was because Mahamood was found to be in possession of three shops although initially only two shops had been let to him. That does not derogate from the legal effect of the agreement but on the contrary confirms the position that a fresh agreement of

tenancy was entered into between the parties.

32. The Courts below rejected the contention of Mahamood on this point because in the compromise it was nowhere stated that Mahamood was accepted by the respondent as a tenant. That is clearly an erroneous view of the law. When the requirements of a contract of tenancy are fulfilled, it is not necessary that it should be stated expressly that the person in question was 'accepted' as a tenant.

33. Mr. Andhyarujina argued that the creation of a contractual tenancy in favour of Mahamood on 2-7-1962 was a legal impossibility because the tenancy of Naik was then subsisting. The argument has no substance. It is incorrect in the first place to say that the contractual tenancy of Naik was subsisting on 2-7-1962. It is an admitted position that suit No. 271 of 1962 was filed by Vasanji and the respondent on 5-7-1962. This must have been on the basis that the contractual tenancy of Naik had already been terminated (presumably before the filing of the former suit of 1961, which was also for eviction). Naik was, therefore, only a statutory tenant who had already parted with possession. Assuming, however, that the contractual tenancy of Naik was subsisting, the contention urged by Mr. Andhyarujina may perhaps be available to Naik but certainly not to the respondent who purported to create the tenancy in favour of Mahamood and accepted Rs. 530 under the agreement. He cannot be allowed to take advantage of his own wrong. If it be a wrong at all. He must be held bound by the agreement according to its tenor. Same would be the position regarding Mr. Andhyarujina's argument that the respondent could not have created a tenancy in favour of Mahamood as the premises were then in the possession of the Receiver. It has to be remembered that the Receiver had been appointed for the benefit of the respondent who was the real decree-holder and was acting on his behalf.

34. It is an admitted position that the contractual tenancy of Mahamood was never terminated nor was any decree for possession obtained against him. His dispossess by the respondent on 1-8-1964 was, therefore, clearly illegal.

35. Although I have found in favour of Mahamood on the point of his claim to contractual tenancy, I do not think I should interfere with the orders of the Courts below in his case for the following reasons:

36. The suit premises are admittedly not in existence now. They were demolished long ago and in place of the old structure an entirely new building of a different type is now standing. An order awarding possession to him would there-

fore be unexecutable and infructuous. Secondly, before dispossession Mahamood was in occupation of the premises for 25 months and was, under the agreement, liable to pay Rs. 175 per month during that period. He, however, made no payment whatsoever. On the contrary when he applied for a temporary injunction against the respondent during the pendency of the suit and the Court called upon him to deposit the amount or at least to give security for the same he flatly refused to make the deposit or even to give security for the amount admittedly due from him.

37. The petition of Mahamood must also, therefore, fail but I will not saddle him with the costs thereof.

38. Mr. Andhyarujina referred me to several cases, mostly on the scope of the powers of the High Court under Article 227 of the Constitution and the principles governing the exercise of those powers. In view, however, of the conclusions I have arrived at and in view of the fact that I am not interfering with the orders of the Courts below which are in favour of Mr. Andhyarujina's client, it is not necessary for me to deal with any of those cases.

39. In the result the Spl. C. A. No. 243 of 1967 fails and the rule issued therein is discharged with costs. The Spl. C. A. No. 244/67 also fails and the rule therein is discharged but there will be no order as to costs.

K.S.B.

Rules discharged.

AIR 1969 BOMBAY 111 (V 56 C 22)

CHANDRACHUD, J.

Ramchandra Sheshgiri Kamath, Appellant v. Janardan Vishwanath Hegde, Respondent.

A. F. O. D. No. 355 of 1967, D/- 15-11-1967, from decision of Judge City Civil Court, Bombay, in Suit No. 2364 of 1960.

(A) Civil P. C. (1908), S. 11 — Res judicata — Presidency Small Cause Courts Act (1882) (as it stood prior to amendment by Maharashtra Act 41 of 1963), Ss. 41, 43, 46, 47, 49 — Dismissal of ejectment application under S. 41, previously filed by plaintiff, on ground that defendant was sub-tenant — Subsequent suit for possession alleging licence given to defendant was determined not barred by res judicata.

The appellant had filed an application under S. 41 of the Presidency Small Cause Courts Act (1882) for possession of premises from the respondents on the ground that the respondent was in possession of the premises as a licensee and that the

licence was withdrawn. This application was dismissed by the Small Cause Court accepting the allegation of the respondent that he was a sub-tenant of the appellant. Subsequently the appellant filed a suit against the respondent in the City Civil Court for possession alleging that respondent was his licensee and that the licence was duly determined. On the question whether the suit was barred by res judicata under S. 11, C. P. C. or on principles analogous to res judicata by reason of the decision given in ejectment application:

Held that (i) the suit was not barred by res judicata under S. 11 C. P. C. as the proceeding taken by the appellant under S. 41 of the Act was not a "suit" within S. 11, C. P. C.

(ii) the suit was not barred even on the principles analogous to res judicata. Apart from the fact that the proceeding under Chapter 7 of the Act was of a summary nature and the Legislature itself contemplated that an order under S. 43 would be subject to a decree passed in a regular suit and no appeal was provided for against an order passed under S. 43, the matter directly and substantially in the two proceedings was different. The simple issue in the summary inquiry under Chapter VII of the Act was whether the tenancy was determined or the licence was withdrawn and if the applicant established that bare fact, he was entitled to an order under S. 43. The matter which was directly and substantially in issue in the suit was whether the plaintiff was the licensor or the landlord of the defendant, which was a very much different matter from the one which was involved in the earlier proceeding. The suit therefore would not be barred by principles analogous to res judicata. AIR 1921 PC 11 and AIR 1953 SC 33 and AIR 1927 Mad 321 and AIR 1940 PC 7, Rel. on; AIR 1965 SC 1153, Ref.

(Paras 11 and 13)

(B) Civil P. C. (1908), S. 11 — Principles of res judicata — Applicability — It must apply with equal vigour to all parties to earlier proceedings.

Section 11 is founded on a principle of public policy and that principle is that there should be finality to litigation. If the principle has to apply it must apply with equal vigour to all parties to the earlier proceeding and it cannot be enforced so as to deprive only one of the two parties of an opportunity to re-agitate an issue. Whether it is the terms of Section 11 or the principle underlying it, there must be some reciprocity in the bar which arises by reason of the principle and it cannot be that the principle that a party should not be harassed twice over in respect of the same cause would apply to one party to the proceeding but not to the other.

(Para 18)

Cases Referred:	Chronological Paras
(1965) AIR 1965 SC 1153 (V 52)=67	
Bom LR 673, Gulabchand Chhotalal Parikh v. State of Gujarat	14
(1953) AIR 1953 SC 33 (V 40)=	
1953 SCR 154, Rajlakshmi v. Banamali	8
(1940) AIR 1940 PC 7 (V 27)=67	
Ind App 1, Babu Bhagwan Din v. Gir Har Saroop	9
(1927) AIR 1927 Mad 321 (V 14)=52	
Mad LJ 100, J. Manicka Chettiar v. Kuppuswami Naicker	9
(1921) AIR 1921 PC 11 (V 8)=48 Ind App 187, Hook v. Administrator General	8

K. Joseph, for Appellant: R. V. Joshi and J. V. Kasbekar, for Respondent.

JUDGMENT: This is an appeal by the plaintiff from the judgment of the City Civil Court, Bombay dismissing his suit on the preliminary issue that it is barred by res judicata by reason of a previous decision between him and the defendant.

2. The plaintiff used to run a tailoring shop at Tribhuvan Road, Girgaum, Bombay. The shop consisted of two rooms and was run by the plaintiff in the name of Kamath Brothers. The plaintiff was a tenant in respect of the two rooms but by an agreement dated the 1st of November 1965, he gave to the defendant the right to conduct the shop for one year. The defendant obtained possession of one of the two rooms under this agreement and at the end of the year, he exercised the option available to him under the agreement for extension of the period mentioned therein. Under the terms of the agreement, the plaintiff was entitled to recover possession of the shop from the defendant if he failed to pay the monthly royalty for a period of three months. The defendant appears to have fallen in arrears for over three months and thereupon, the plaintiff terminated agreement and filed an application under Section 41 of the Presidency Small Cause Courts Act, 1882 (Ejectment Application No. 8/177 E of 1958) for possession of the shop premises from the defendant. The plaintiff alleged in that application that the defendant was put in possession of the shop as a licensee and that the licence having been withdrawn he was liable to hand over possession. The defendant contended in that proceeding that he was in possession not as a licensee of the plaintiff but as his sub-tenant and he was therefore entitled to the protection of the Rent Act. The Small Cause Court, Bombay by its order dated the 14th of March 1960 dismissed the plaintiff's application for possession on the ground that the defendant was a sub-tenant and not a licensee of the plaintiff.

3. On the 28th of April 1960, the plaintiff brought the present suit against the

defendant (Suit No. 2364 of 1960) in the City Civil Court, Bombay for possession of the shop premises from the defendant alleging that the defendant was his licensee and that the licence was duly determined. The defendant contended by his written statement that he was in possession of the premises as a sub-tenant of the plaintiff and therefore, the plaintiff had no right to recover possession from him, save under the Bombay Rent Act. On the 28th of November 1966, the defendant amended his written statement with the leave of the Court and he raised an additional contention that the suit was barred by res judicata or on principles analogous to res judicata, by reason of decision of the Court of Small Causes, Bombay in Ejectment Application No. 8/177 E of 1958.

4. The learned trial Judge then framed an issue, whether the suit was barred by res judicata as contended by the defendant and tried that issue as a preliminary issue. The learned Judge was apparently in two minds and he felt that there was considerable substance in the submission made on behalf of the plaintiff that, the decision in the earlier proceeding could not create the bar of res judicata. The attention of the learned trial judge was however, drawn to a decision of the then Principal Judge of the City Civil Court in which he had taken the view that a suit of the present nature would be barred by principles analogous to res judicata. The learned trial judge felt that in the interest of uniformity he should follow the decision of the principal judge and he has therefore dismissed the suit on the ground that it is barred by principles analogous to res judicata. The correctness of this view is questioned in this appeal.

5. In order to determine the question whether the suit is barred by principles analogous to res judicata, it would be necessary to draw attention to the provisions of Chapter 7 of the Presidency Small Cause Courts Act, 1882, which is entitled "Recovery of Possession of Immoveable Property". Section 41 which is the first of the group of nine sections appearing in that chapter provides, to the extent it is material, that when any person has had possession of any immoveable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rackrent does not exceed three thousand rupees, as the tenant, or by permission, of another person and such tenancy or permission has determined or been withdrawn, and such tenant or occupier refuses to deliver up such property in compliance with a request made to him in this behalf by such other person, an application may be made to the Small Cause Court for a summons

(1861) 29 Beav 394=54 ER 680, Walker v. Smith	64
(1861) 30 Beav 34=54 ER 801, Vaughton v. Noble	86
(1861) 3 Giff 337=66 ER 439, In re Holmes' Estate, Woodward v. Humpage	73
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(1854) 18 Jur 839=23 LJ Ch 529, Holman v. Loynes	73
(1841) 8 Cl & Fin 657=8 ER 256, Carter v. Palmer	84
(1834) 3 M & K 113=40 ER 43, Hunter v. Atkins	75
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(1811) 18 Ves 120=34 ER 263, Wood v. Downes	70
(1811) 18 Ves 302=34 ER 331, Montesquieu v. Sandys	70
(1807) 9 RR 276=14 Ves 273, Huguenin v. Baseley	28, 75
(1806) 13 Ves 136=33 ER 246, Wright v. Proud	75
(1804) 9 Ves 292=32 ER 615, Hatch v. Hatch	75
(1787) 1 Cox Eq Cas 414=29 ER 1227, Dixon v. Olmius	75
(1784) 1 Cox 112, Welles v. Middle- ton	70
(1757) 97 ER 22=Wilm 58, Henry Toye Bridgeman v. George Green	28, 62, 68, 70, 74, 75
(1754) 2 Ves Sen 547=28 ER 349, Hylton v. Hylton	75
(1735) Cas Temp Talb 111=25 ER 690, Proof v. Hines	25

Prafulla Kumar Roy and Samarendra Nath Banerjee, for Appellants; Banamali Das, B. N. Thakur, D. C. Basu and M. N. Ghosal, for Respondents other than Respondent No. 2 (3); Deva Prasad Chaudhury, for Respondent No. 2 (3).

Editorial Note

(The report here is the summary of the judgment by Mr. Justice Bijayesh Mukherji. The para numbers in the report refer to paras in original judgment.)

P. N. MOOKERJEE, J.:— I have had the advantage of reading, in advance, the judgment, prepared by my learned brother. I fully agree with him in his conclusion that the appeal should fail and be dismissed and that there should be no order for costs, either here or in the Court below.

2. BIJAYESH MUKHERJI, J.:— The decision of this appeal by Pannalal Sen the unsuccessful plaintiff, in the Court of first instance, turns principally on the question whether the two documents listed below are vitiated by undue influence or not—

(i) A registered deed of gift, as respects a pucca one-storied house with

amongst others, land admeasuring 3 cottahs 13 Chhittacks and 32 square feet, being part of 66/3 Kaibartapara Lane, Salkia, within the jurisdiction of Malipanchghora Police Station in the Town of Howrah, executed on 7th February, 1951, by Muktalal Sen, since deceased, a brother of the appellant Pannalal, in favour of Ashalata Ghose, the first defendant, who is the wife of Manmatha Nath Ghose, the second defendant, a pleader practising in the Howrah Courts.

(ii) A registered agreement or annuity bond executed on the same day (7th Feb. 1951), between the said Ashalata Ghose and Muktalal Sen, whereby the first party Ashalata binds herself, her heirs and legal representatives, amongst other things, to maintain and tend the second party Muktalal, as also to stand for the expenses of his pilgrimage to Puri, Navadvip and Brindaban, durante vita, that is, so long as he is alive in default, to pay him Rs. 40/- a month for maintenance, medical treatment, pilgrimage and the like.

2. The appellant Pannalal died during the carriage of this appeal and has since been substituted by his heirs.

3. The facts set out in the plaint need not be referred to further than as follows:

Late Kanailal Sen bequeathed by will, the immoveable property he had, to his four sons — Pannalal (the original appellant), Jaharlal, Muktalal, (a name which bulks so large in this litigation), and Bejoylal. The property in suit happens to be the most valuable part of Muktalal's share, rendered still more valuable by the addition he had made, with his own funds, of a room and a kitchen.

"Of less than average intelligence and almost uneducated", Muktalal "was by habit stingy." He married when he was "past forty", but only to become a widower at 50 or thereabouts. "He cooked his own food." And his was a "style of living" so poor, even though he, a money-lender at that, "earned considerable sums of money" as a draper, and "had a comfortable monthly income" too by letting out three out of the four rooms, in his house — the house in controversy here.

Such a one fell so easy a prey to the "deep-laid plan" of Manmatha, "a wily and veteran lawyer", aided and abetted by Ashalata, "his able wife". The plan worked itself by-and-by in the manner following—

(i) An "outward show of sympathy for his hard lot", emanating from Manmatha and Ashalata, was followed by periodic invitations to dinner which was served by Ashalata herself.

(ii) Manmatha used to tend his law-suits and thereby won his confidence.

(iii) More, Manmatha fostered in him "the idea that the rooms in his house could be let out at a much higher rent", once the three existing tenants were got rid of, nothing to say of construction of a first floor which would enhance the letting value of the property so much the more, in view of the prevailing house famine, and got, indeed, three actions in ejectment, "full of false allegations", raised by him against the three tenants, with a view to getting rid of them.

(iv) Again, it was constantly impressed upon Muktalal, a man of weak intellect, and befriended by none, that Ashalata was a mother unto him, so much so that he was even told: 'in some previous birth she must have been your natural mother. Such indeed is the dream she had dreamt."

(v) The 'sop' of enabling him to acquire religious merit by providing for his visit to "famous places of pilgrimage" was thrown out too.

Having thus obtained "complete mastery" over Muktalal, "a man of weak mentality", Manmatha and Ashalata, "with the help of their creatures, Ganesh Chandra Dutta, Haradhan De and Panchanan Chatterjee", as also others, "managed to get up (the) two documents", referred to above. But Muktalal did not understand the effect and implication thereof. He was even denied the opportunity to consult any disinterested person or lawyer.

The three ejectment suits meanwhile succeeded and the tenants left. Result: Muktalal became the lone occupant of the house in controversy. "On the specious plea" of providing for his safety and comforts, Manmatha posted his nephew Saroj Kumar Ghose and Ganesh Chandra Dutta, the writer of the two documents, in the house. But the real object was to keep Muktalal under surveillance, so that he might not contact others, and get to know what was what. Still, he was disillusioned in no time; more, he started giving out his mind to undo what he had done. And, six months and six days after the gift, to be exact, on 15th August, 1951, his dead body highly decomposed, with a piece of cloth round the neck, was discovered "in a standing posture", leaning against the walls of the privy in the house. Saroj, Manmatha's nephew, informed the police, who, however, after "a perfunctory inquiry", reported it to be a case of suicide.

Hence the suit (i) for setting aside the deed of gift, as also the agreement, if necessary, (ii) for declaration of title to the property in dispute and possession thereof, as also (iii) for mesne profits.

4. The defence entered into by Manmatha and Ashalata in a joint written statement is, inter alia, a denial of the very various allegations made in the

plaint, coupled with an admission of the deed of gift and the agreement which, however, it is pleaded, "were the result of free and unfettered deliberations on the part of Muktalal" who had had the benefit of consultations with his friends and a disinterested lawyer, and was not, therefore, a victim to any manner of an undue influence.

5. The learned Subordinate Judge finds —

1. Muktalal, sufficiently intelligent, used to manage his own affairs. It is not believable that such a one would be so easily influenced in the manner, it is said, he was.

2. What Muktalal did not get from his near ones, in love, affection and kindness, he got in ample measure from Manmatha and Ashalata. The impugned documents were, therefore, the result of his "free and unfettered mind", nothing like any undue influence having been anywhere near.

3. Muktalal had had the benefit of independent advice.

6. In view of such findings, he dismisses the suit. Hence the appeal.

7. The appeal has been opened on two points. One, the impugned documents cannot stand, tainted and infected as they are with undue influence of Muktalal's pleader, Manmatha. Two, looked at a little below the surface, the deed of gift is, in reality, a transaction between Muktalal, the client, and Manmatha, his pleader, bound in a fiduciary character to protect the interests of the former (Muktalal); far from having afforded protection, such a one — a fiduciary — gained advantage, which, therefore, he must hold, under Section 88 of the Trusts Act, 2 of 1882, for the benefit of that one: Muktalal. On no other point have we been addressed.

(The judgment then enters into pleadings, as also evidence, and continues)

24. *

In the circumstances, ejectment suits, as also their timing, are matters to be remembered for ever, and not to be forgotten in three to four years' time. Thus, having so pretended amnesia, Manmatha colours his evidence over-much, and cannot, therefore, be believed in safety on the point I am on now. These are the things contrary to what would have otherwise passed as good evidence. In sum, I disbelieve him, on such a scrutiny of his evidence; not because he is a party. The reason is plain: in spite of being a party he is as much a competent witness as any other: Section 120, Evidence Act, 1 of 1872, and Jogendra Krishna Roy v. Kurpal Harshi & Co., AIR 1923 Cal 63=ILR 49 Cal 345=35 Cal LJ 175.

25. There is another feature in Manmatha's evidence, which calls attention, and may conveniently be disposed of here. Dr. Bhandari, while introducing Muktalal to Manmatha, said: "Be sympathetic to Muktalal who has none to look after him." A clear distinction is there between the factum of a statement and the truth thereof. Since Dr. Bhandari is not called as a witness, the former (whether or no the statement was made) when relevant, does not give rise to hearsay; the latter (whether what Dr. Bhandari said is true or not) does. This is what the Privy Council, the Board consisting of Lord Radcliffe, Lord Tucker, and Mr. L. M. D. De Silva (by whom the reasons for allowing the appeal are delivered), points out in Subramaniam v. Public Prosecutor, (1956) 1 WLR 965 at p. 970:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness in whose presence it was made."

In the context of the facts here, what counts is the truth of what Dr. Bhandari told Manmatha: "here is Muktalal with none to look after him." But it is hearsay and inadmissible, Dr. Bhandari having not been examined. The attempt to get from Manmatha, on cross-examination, whether Dr. Bhandari posted him or not with "any antecedent" of Muktalal, (hinting obviously his having been an idiot and the like), has failed. Had it succeeded, hearsay would have blocked its way, in the absence of Dr. Bhandari as a witness.

* * * * *

27. Thus, there is much to criticise in the evidence led by both parties. But, to sum up, there seems to be no escape from the following:

1. Muktalal had had a cloth shop set up for him by his father in 1918.

2. He was a money-lender too: paragraph 2 of the plaint, though Pannalal's sworn testimony is not just that: he did not run the money-lending business; his sister Chandan Kumari did, but with the money given her by Muktalal.

3. Not only did he earn, but also he had saved, with the result that he left behind him Rs. 19,000/- in cash, in a

bank, the accounts of which he himself used to operate, a statement Pannalal concludes his cross-examination with. He left behind him too (i) moveables worth Rs. 4,000/- to Rs. 5,000/-, if not more, as is the trend of Pannalal's evidence, on cross-examination, (ii) cloths said to have been distributed to the poor, and (iii) 12 plus 10, i.e., 22 cottahs of land, (as Pannalal says), out of which the house with an area of a little less than 4 cottahs has been the subject of the gift in controversy.

4. He constructed "a new room and a kitchen out of his own funds."

5. He looked after his own litigation.

6. He did collect rents from the tenants.

These are all in the realm of admissions.

So the finding cannot be, as the plaint wants it to be, that Muktalal "was of less than average intelligence" or "a man of weak mentality". The finding, upon the whole of the evidence, instead, is that he was certainly of average intelligence, if not much more, business-minded, and capable of fending for himself: just the finding come to by the learned trial Judge. On top of that, he was a miser — a matter on which the parties, in the midst of their so many differences, are agreed, as noticed: Manmatha going so far as to say:

"He was so miserly that he did not want to spend any money for a square meal a day."

28. Such was the man: Muktalal, not a callow youth, but one aged 55, intelligent, able, and having behind him a long experience in business for some thirty-three years (1918-1951), where he must have learnt and learnt in various ways, not the least amongst them having been that sort of valuable learning through one's own mistakes. And the house in controversy gifted was the property of such a one, who had the complete freedom to do with it, whatever he liked. That is indeed trite. Still what Lord Commissioner Wilmot said more than 200 years ago in Henry Toye Bridgeman v. George Green, (1757) Lord Chief Justice Wilmot's cases and opinions, page 58=97 ER 22, is worth recalling today with pleasure and profit, if I may say so, with respect:

"..... our laws, very unfortunately for the owners, leave them at liberty to dissipate their fortunes as they please, to the ruin of themselves and their families. The Roman laws drew a line between liberality and profusion; they, very wisely for the public, and very kindly for the parties, considered immoderate extravagance — "inconsulta largitio" — as a distemper of the mind, and treated a "prodigus" as a mad man They thought it safer for the public, as well as

kinder to individuals, to lay by their estates, whilst they were under the tyranny of their passions, and reserve them for their use, when under the direction of their reason. But our laws strike no such boundary: every man may give a part or all of his fortune to the most worthless object in the creation."

Fifty years later, Lord Eldon, L.C., emphasized in *Huguenin v. Baseley*, (1807) 9 RR 276=14 Ves 273, that it was not for the Court to undo instruments, executed not only voluntarily, but with that knowledge of all their effect, nature, and consequences. Said his Lordship:

"To the question, whether, these Instruments being such as I have represented them, the consequence is, that this Court shall undo them, I answer, no; if they are the pure, voluntary, well-understood, acts of her (the executant Mrs. Huguenin's) mind."

Again, fourteen years later, in *Goddard v. Carlisle*, (1821) 9 Price 169=147 ER 57, Lord Chief Baron Richards had before him an instrument by the plaintiff Goddard granting an annuity to Maria Sloper, the wife of Solicitor Sloper, who was Goddard's mother's brother and his father's executor too, and observed:

"..... this instrument could not be affected, if it were shown to be a mere voluntary deed proceeding purely from the unbiased act of the party; because every one has a right to dispose of his own property, in any way in which he may think fit, however foolishly he may act in so doing; and this Court cannot disturb such disposition, if there were nothing else in the case to give us jurisdiction — if, in short, it were purely a voluntary gift."

Baron Graham adding:

"Courts of Equity have certainly nothing to do with purely voluntary deeds, nor can they disturb acts of mere generosity."

29. Now, how is the gift of 7th February, 1951, by Muktalal in favour of Ashalata like? Has it been a voluntary gift? It is the pure, voluntary and well-understood act of Muktalal? Does the whole of the evidence reveal circumstances sufficient to establish that the gift was the spontaneous act of Muktalal? Such are the questions to which I address myself now.

* * * * *

59. Such then are the facts and circumstances that emerge upon the whole of the evidence. Do they not show almost conclusively that Muktalal did broach and intend the bounty to Ashalata? Indeed, the pressure of events, one after another, made him do so.

60. 8. Has the gift by Muktalal been a most thoughtless act by which he reduced himself to beggary?

If yes, it goes a long way to void the gift. Because, it then becomes plain to be seen that Muktalal was not the master of his psychological home, and could not therefore, know what he was doing on 7th February, 1951. None but a recluse deliberately courts extreme poverty. Muktalal, for all I see upon evidence, was no recluse, religious-minded though he was.

61. Here also evidence is the answer. And the answer is: on 7th February, 1951, the date of the gift, Muktalal had, at the least, the following assets:

1. Cash in bank	... Rs. 19,000
2. Moveables	... Rs. 5,000, if not more.
3. Cloths said to have been made a gift of to the poor	... Value not dis- closed in evidence.
4. Land—	
12 plus 10 cottahs out of which, say, 4 cottahs go with the gift, leaving a residue of 18 cottahs, value of which, in a place like Howrah, some 4 years after partition, cannot be less than	... Rs. 86,000

Total Rs. 80,000

Going by the deed of gift, Muktalal got by his father's will a little less than 16 cottahs of land: exhibit A. Pannalal makes it 12 cottahs instead of 16, though the probated copy of the will, which would have shown what's what, in the custody of his nephew and witness, Tin-kari, he does not care to produce. Let this discrepancy be ignored. Let it be taken for granted instead that Muktalal had 22 cottahs of land, just as Pannalal says, out of which 4 cottahs went with the gift. Even then, on the date of the gift, Muktalal had assets worth some Rs. 60,000/-, in addition to his right, conferred by the agreement of the same date, Exhibit B, to use the room etc. he has been using in the gifted house, throughout his life, and more than one room constructed on the first floor, to use any room there for his residence, nothing to say of free food and the like. How much could one of Muktalal's type need to live decently, even if he, a miser, had wished to? It cannot, therefore, be found that his was an act so poor in foresight that it can be regarded as his own act.

61A. 9. Was legal advice essential in a transaction as this?

That legal advice was taken is another matter, which will be considered in due course. The question, this paragraph starts with, questions the very necessity of any legal advice in all circumstances here. Here was Muktalal, so miserly that he loved money for more than himself. Necessarily, therefore, he was living miserably. His miseries increased a lot over since the death of his sister and wife in or about 1945. And within two years from that, he had come in contact, closely enough by-and-by, with Manmatha, Ashalata, and all, of a compact family, from whom he received affection and consideration. That had melted the heart of a miser and made him resolve to make the gift he did to his second mother Ashalata. So the stream from which the bounty followed is visible, and so clearly too. What would a lawyer advice him in the face of such resolution and determination to make the gift with no complication anywhere? 'Do not go in for the gift' might have been the advice, only to merit the riposte from one like Muktalal: "No; I will." There the matter would have rested in a stalemate, for a short while, doing little good to Muktalal, who would have proceeded in the end to make the gift he was bent upon making.

62. No more tenable is the old doctrine that in every case "it is the action resulting from the advice, not action against the advice, that binds the donor", to quote from Farwell, J., in Powell v. Powell, (1900) 1 Ch 243. Nor is it valid to maintain today as a matter of course that "the same power which produces one (the gift or donation) produces the other (refusal to heed advice to refrain from it), and, therefore, instead of removing such an imputation, it is rather an additional evidence of it", to quote from Lord Commissioner Wilmet in (1757) Wilm 58=97 ER 22 (supra). Each case must depend on its own facts, and there can be no formula of universal application. That the position at law is now so, — elastic, and not inflexible, as in the past, — appears to be clearly borne out by the Privy Council decision in the Inche Noriah case, Inche Noriah v. Shaikh Allie bin Omar, 1929 AC 127=AIR 1929 PC 3 =1929 Mad WN 105, the case of a gift by an aunt, feeble and old, to a nephew who managed his property, where though the gift ultimately failed, Lord Hailsham, Lord Chancellor, delivering the opinion of the Board, laid down the following amongst other propositions, after a review of some, out of a number of cases cited, all not easy to reconcile unless treated as governed by the particular facts of the case then under discussion:

A. Independent legal advice is not the only way in which the presumption of undue influence can be rebutted.

B. If evidence is given of circumstances sufficient to establish the fact that it was the spontaneous act of the donor, there is no reason for disregarding them, merely because they do not include independent advice from a lawyer.

C. Independent legal advice, when given, may well rebut the presumption, even though such advice was not taken.

63. So, I ask again, what was there, for legal advice to be called for, in a simple matter as this? Overwhelmed by the kindness and motherly affection of Ashalata, just what he was starving for, for months and years, Muktalal made up his mind to make the gift he did, keeping enough and to spare for him. The facts and circumstances catalogued in the foregoing lines tell. Death of Chandan Kumari, the sister followed soon enough by the death of his wife, a downcast Muktalal with nobody to call his own, cooking his own food, not helped, but persecuted, by his relatives, who, by their conduct, proved themselves neither near nor dear to him, the kindness and hospitality of Ashalata and her people, tending him even in his illness, the find in her by the religious-minded Muktalal of a second mother radiating affection and consideration he had not tasted for long, the idea of gift originating from him as a token of his gratitude, the transaction bearing the stamp of righteousness and naturalness too, and far from being an improvident act, by which he was certainly not landed in penury, Muktalal abiding by the gift even more than three months after its execution, the simple nature of the transaction: a gift simpliciter, he was determined to make and had every right to make, not needing any legal advice, — all go to show that it was the spontaneous act of Muktalal, a miser converted by love, generosity and affection into a giver. Independent legal advice, even if refused, would not mar such a gift, in all circumstances here, just as the law laid down in the Inche Noriah case, 1929 AC 127=AIR 1929 PC 3=1929 Mad WN 105 (supra) is. More, spontaneity of the gift having been proved, the necessity of independent legal advice eliminates itself. That is also the law laid down in the same case: vide proposition B in paragraph 62 ante.

64. All the same, this is but one way of looking at the litigation in hand. There is still another way of viewing it. As Sir John Romilly, M. R., observed in Walker v. Smith, (1861) 29 Beav 394, a case of gift by Miss Walker to Smith, her solicitor, certain legacies apart:

"There are always two points to be considered in these cases. First, whether the donor really made the gift; and secondly, whether the influence of the donee or recipient of the bounty was

improperly exercised on the donor to induce the donor to make the gift in question."

The first point has been considered. And the finding has been come to that Muktalal, the donor, really made the gift to Ashalata. Even so, this finding will fail her, if the determination of the second point reveals improper exercise of influence on Muktalal to induce him to make the gift he did. But the very considerations which sustain the determination of the first point do sustain that of the second point too, unless there be anything to the contrary. More of which in paragraph 69 et seq. infra.

65. The donee or recipient of the bounty here is Ashalata, wife of Manmatha, admittedly Muktalal's pleader, at all relevant time. The attempt to show that during the crucial period, a little on this side or that side of 7th February 1951, Muktalal's pleader was not Manmatha, but Kshitish Chandra Datta, looks puerile on the face of it. The evidence of this pleader, Kshitish, the eighth witness of the defendants, read with the hajiras, Exhibits 5 and 5 (a), the entries in Kshitish's diary, Exhibits G series, and the Vakalatnama, Exhibit J, shows that he was pressed into service to tend the carriage of Muktalal's litigation in a very minor way during December 1950 to early in March 1951, so that Manmatha's name might not then appear, Manmatha having come out of his disguise from March 17, 1951, as the hajiras, Exhibits 5 (b) to 5(d), filed by him that day and on subsequent days go to show. To put it mildly, all this shows Manmatha in an odious light, and is quite in keeping with the ingenuity of his evidence on cross-examination reveals:

"It cannot be taken that the transaction in suit was a transaction between me and Muktalal. The transaction in suit took place between my wife and Muktalal."

66. A little reflection makes it clear that such ingenious and wishful thinking on the part of Manmatha cannot stand. Indeed, a gift by the client to the pleader's wife is as good or as bad a gift to the pleader himself. If it is a taboo to the husband to avail himself of the influence which he, being the pleader, manifestly possesses and may mischievously misapply, the interdict which applies to him will, sure enough, extend to affect his wife. In 1821, Lord Chief Baron Richards, presiding over the Court of Exchequer, laid down the law as under in (1821) 9 Price 169=147 ER 57 (supra):

"There is no difference in principle for this purpose between a gift of this sort to a man's wife and one immediately to himself, if the gift to the wife be affected

by undue means on the part of the husband. We must, therefore, treat it as if it were a direct gift to the husband himself."

Baron Graham observing:

"..... and the grant being to the wife is much too thin a disguise to make any difference in this transaction." And the transaction was a grant, by the plaintiff Goddard, of an annuity of £ 200 to Maria, wife of Sloper, solicitor, executor and uncle of Goddard, evincing not the client-solicitor relationship only.

67. In 1895, Lopes, L. J., could recognize no distinction between a gift made to a solicitor himself and one made to his wife, the reason being—

"It is obvious that a solicitor might benefit largely by a gift to his wife, and there would be similar temptation to exercise undue influence in respect of such a gift. The wife might make over the property to him the day after it had been given to her."

Liles v. Terry, (1895) 2 QB 679=73 LT 428. And the transaction there was still less a transaction between solicitor and client only. Mrs. Terry, the recipient of the bounty, was no doubt the wife of Mr. Terry, the solicitor for Miss Jane Liles, the donor. But she was not that and that only: she was the niece (sister's daughter) of the client Jane Liles, and as such a person on whom the client might naturally be disposed to confer a benefit, apart from any influence arising from the relationship of solicitor and client. Still the transaction went down, the grant to the wife having been regarded as the grant to the solicitor husband.

68. Such being the law, and the reason of the law, — reason which is based on justice and good sense, — it is not possible to accept the contention on behalf of the respondents that the very fact that the object of the bounty is Ashalata, not her husband Manmatha, the pleader, makes all the difference, standing between Manmatha and the application of another branch of law, said to be inflexible, by virtue of which "an attorney shall not take at all", as the relation between him and client, "and the power which his situation gives him over his client makes it impossible to distinguish between free agency and undue influence and imposition," to quote again from Lord Commissioner Wilmot's judgment in Bridgeman case, (1757) 97 ER 22=Wilm 58 (supra). The object of bounty being Ashalata instead of Manmatha, therefore, makes no difference, for the simple reason that there is no distinction between a gift to a solicitor and one made to his wife. On the line of a number of cases cited, the word "solicitor" is being used. But that includes Manmatha, a pleader. An advocate in Aberdeen is the same as an attorney

or solicitor elsewhere: *McPherson v. Watt*, (1877) 3 AC 254. Just so here too: a pleader in Howrah is the same as an attorney or solicitor elsewhere.

69. That is not the problem. The problem is: how stands here the law which, it is said, prescribes that a solicitor shall not take from his client, his taking giving rise to an irrebuttable legal presumption of undue influence? The appellants contend, such law, enunciated in a long line of English cases, applies here with all its rigour, compelling the Court to hold that Manmatha's influence was improperly exercised on Muktalal to induce him to make the gift and precluding the Court from even entering into evidence of rebuttal. The respondents, on the other hand, contend: On the view taken in some of the English cases, Muktalal's gift may fail. But the law here is codified. The leading statutory provisions are Section 111 of the Evidence Act, 1 of 1872, Sections 88 and 89 of the Trusts Act, 2 of 1882, and Section 16 of the Contract Act, 9 of 1872, — none of which ipso facto void a gift by the client to his solicitor.

70. Let the two opposing contentions be examined, one by one. To the appellant's contention first. The case in hand is no doubt confined to the relation between solicitor and client. But what needs to be looked into, for a proper apprehension of the law, is the variety of relations of confidentiality. Take the case of *Mitchell v. Homfray*, (1882) 8 QBD 587, a case of physician and patient, where Lord Selborne, L. C., observes:

"I know of no difference between solicitor and client, on the one hand, and parent and child on the other."

With this in the forefront of one's consideration, let a short review be made of cases where the law has been laid down that a gift by a client to his solicitor or by one to another, both in like position, raises an irrebuttable presumption of undue influence:

1. (1757) 97 ER 22=Wilms 58 (*supra*), a case of an overbearing footman and an imbecile master, an unscrupulous attorney, Lock by name, having revelled "in masks and disguises" and thereby lent his aid as "accessory to the robbery" of the master. The relation between them (attorney and client) precludes the attorney from taking at all, as noticed in paragraph 68 ante, where an excerpt from Land Commissioner Wilms' judgment in this case has been quoted. What remains to be quoted yet is a little more, showing how the doctrine of irrebuttable presumption of undue influence is extended to other relations as well:

"Marriage brocage bonds, bonds to lewd women from heirs apparent upon contingencies — this Court sees the par-

ties in a situation so liable to be unduly influenced and imposed upon, that it will presume they were so, and admit no proof to the contrary."

2. *Welles v. Middleton*, (1784) 1 Cox 112, a case of certain deeds (including a gift) by a client in favour of two attorneys, related in some degree to the client executant, where Lord Thurlow, L. C., reiterates the law as under:

"In the case of attorneys, it is perfectly well known that an attorney cannot take a gift while the client is in his hands, nor instead of his bill. And there would be no bounds to the crushing influence of the power of an attorney who has the affairs of a man in his hands, if it was not so: but once extricate him, and it may be otherwise."

3. *Wood v. Downes*, (1811) 18 Ves 120, where Lord Eldon, L. C., commenting on the case just mentioned, observes:

"The case of (1784) 1 Cox 112 is an extremely strong case of the kind. The transaction was liable to no objection as between Man and Man, but it was overturned on the great principle, — the danger from the influence of attorneys or counsel over their clients while having the care of their property, and whatever mischief may arise in particular cases, the law, with the view of preventing public mischief, says that they shall take no benefit derived under such circumstances."

4. *Montesquieu v. Sandys*, (1811) 18 Ves 302, is a case where the client was indebted to the solicitor in a larger sum, for which he deducted £ 100 as the price of the plaintiffs' interest in the Advowson, before delivery of his bill. On such facts, Lord Eldon, L. C., again, sees nothing like a gift or reward to an attorney taken by him beyond the amount of his bill for service done, but restates the principle wisely established by cases:

"..... an attorney shall not take from his client a gift or reward while standing in that relation, the connection between them subsisting, with the influence attending it, though the transaction may be as righteous as ever was carried on."

5. (1821) 9 Price 169=147 ER 57 (*supra*): Lord Chief Baron Richards does not go so far as to lay down: a voluntary gift for a solicitor never—

"I do not mean to say that a solicitor may not, on any occasion, take a voluntary gift, from a person for whom he may be engaged to transact law business."

adding, however,

"but where it can be shown that he was so connected with his client, as to have obtained any considerable influence over him, there it is that the Court will always lean against the effect of the acts of his client in his favour, to the client's prejudice,"

of whatever age the client may be. If the Court leans so always, it really comes to saying that the presumption of undue influence, founded on "client-solicitor" relationship is incapable of being met or rebutted.

71. To digress a little, translating the decision of Richards, C. B., to the case in hand, the fact that Muktalal was 55 or thereabouts on 7th February, 1951, the date of the gift, may not go far, when the Court has to weigh Manmatha's conduct to his client Muktalal. But, upon the whole of the evidence, can it be said that Manmatha had any considerable influence over him? In my judgment, that cannot be said, in the face of the facts and circumstances which go before and have been summarised in paragraph 63 ante. The reason of the gift lies there, not in any influence of Manmatha over Muktalal, not a moron, but quite an intelligent man and a successful businessman too, capable of holding his own against Manmatha, not much of a lawyer even, in spite of some 30 years' standing, at the time of the trial, as his evidence, a poor specimen, by any standard, reveals:

"I joined the Bar in 1925. I do not really understand that the relationship between a lawyer and his client is a fiduciary one. I know that such relationship is a matter of great trust. I am not aware of any such law that it prohibits any transaction between a lawyer and his client."

72. There is another consideration yet. What is the yardstick of influence — considerable or inconsiderable? In the Carlisle case, (1821) 9 Price 169=147 ER 57 yardstick or no yardstick, considerable influence was writ large upon the facts. Goddard, the plaintiff, was of very tender years when his father died, leaving behind him real estates, which he (Goddard) became possessed of. Solicitor Sloper was Goddard's mother's brother, as also his father's executor. Such a one had the superintendence of Goddard's all manner of pecuniary affairs. And when Goddard came of age, Sloper — solicitor, executor and uncle — was indebted to him for £ 10,500, which he did acknowledge, pressed by Carlisle, a mutual friend, and for which he promised to give security. His promise remained a promise. Worse still, he prevailed upon Goddard to grant Maria, Sloper's wife and Goddard's aunt, an annuity of £ 200 for life, by indenture of bargain and sale, to Carlisle and Sloper Jr. in trust for her, without Carlisle's knowledge and execution of the deed by him. That done, Sloper Sr. executed a deed of assignment, in consideration of his debt, to Goddard, of £ 10,000, of his lease-hold house and furniture, in trust, to be sold to pay the debt. That little even was not allowed to remain long. Persuasion

again by Sloper Sr., — uncle, solicitor, and executor, all combined. And Goddard returned the furniture to Maria, only to be received by Sloper Jr. in his house. No other security, though promised, was made available to Goddard. And the property assigned did not on the sale produce more than £ 300, where the debt ran to £ 10,500. Compare such a one, Goddard, — nephew, ward, and client — brought up by Solicitor Sloper from infancy to adolescence, with Muktalal, the intelligent, in his relation with Manmatha? You then compare the incomparable. Goddard was one of fantocini moving just as Sloper Sr. wanted him to move; so much so, that instead of exacting security for his debt, he was offering, and in fact offered, more and more to Sloper Sr. So, considerable influence of Sloper Sr. over Goddard was patent. Nothing like this can be said of Manmatha and Muktalal, save that the relation of pleader and client was there. Such relation simpliciter cannot prevail over the overwhelming facts and circumstances pointing to the spontaneity of the gift by Muktalal — a well-understood act of his mind. It is not suggested for a moment that Manmatha had had no manner of influence over Muktalal, even though the amount of influence may well defy measurement in very many cases. As Bacon, V. C., puts it in Morgan v. Minett, (1877) 6 Ch D 638:

"These Courts have not those golden scales which are said to be used in the mythological heaven to regulate the destinies of mankind."

Even without the golden scales, the Courts, from time to time, do estimate the degree of confidence existing and the amount of influence acquired, as Sir Montague E. Smith did, delivering the opinion of the Privy Council in the Pisani case, Henry Peter Pisani v. Attorney General for Gibraltar. (1874) 5 PC 516, in the manner following:

"Their Lordships do not go the length of regarding the case as one not between solicitor and client. The relation of solicitor and client existed between Pisani, a barrister, practising, as is usual in Gibraltar, as an attorney too, and Miss Porro. Such relation made it necessary for Pisani to show that the bargain he made with Miss Porro was a fair one. But in dealing with the facts, the circumstances of Pisani's employment may be considered, and the amount of influence estimated. By that test, no high degree of confidence existed: not much influence had been acquired either."

73. To resume the review of cases laying down that an attorney shall not take — a review which has been left incomplete in paragraph 70 ante, because of a little digression in the succeeding two paragraphs, here are a few more:

6. Holman v. Loynes, (1854) 18 Jur 839 (843)=23 LJ Ch 529, is a case where Turner, L. J., lays down:

"The rules against gifts are absolute, and against purchases they are modified." The sole exception being this:

Gifts from clients to their attorneys can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also.

7. Tomson v. Judge, (1855) 3 Drewry 306. What is at issue here is the validity of a conveyance of a certain real estate for a consideration of £ 100, though its real value is upwards of £ 1200, by Chamberlayne to Thomas Gulliver Judge, Chamberlayne's solicitor and son of one for whom Chamberlayne during a long course of years entertained feelings of great regard and respect. Indeed, Chamberlayne was Judge's patron. The nominal consideration of £ 100 has been there to save stamp duty which would have been some trifle higher on a deed of gift. The conveyance is, therefore, really a deed of gift. Upon such facts Kindersley, V. C. observes:

"A solicitor can purchase his client's property even when the relation subsists; but the rule of the Court is, that such purchases are to be viewed with great jealousy, and the onus lies on the solicitor to show that the transaction was perfectly fair, that the client knew what he was doing, and in particular that a fair price was given, and of course that no kind of advantage was taken by the solicitor. If the solicitor shows that the transaction was fair and clear, there is no difference between a purchase by him and by a stranger."

But what about a gift? Sir Richard Torin Kindersley, the Vice-Chancellor, continues:

"Is the rule with regard to gifts precisely the same; or is it more stringent? Less stringent it cannot be. There is this obvious distinction between a gift and a purchase. In the case of a purchase the parties are at arm's length, and each party requires from the other the full value of that which he gives in return. In the case of a gift the matter is totally different, and it appears to me that there is a far stricter rule established in this Court with regard to gifts than with regard to purchases, and that the rule of this Court makes such transactions, that is of gift from the client to the solicitor, absolutely invalid."

8. In re Holmes' Estate, (1861) 3 Gift 337, is a case of an alleged gift to a solicitor from his client, where the Vice-Chancellor recognizes the same exception as in (1854) 18 Jur 839=23 LJ Ch 529 (supra): Once the influence, which a solicitor may be supposed to exert over his client, has been removed, the solicitor

may become the object of his client's bounty, and may receive from him a gift, which will be valid both at law and in equity. The rule, to which this is an exception, is, therefore, as before: a solicitor shall not take a gift from his client, so long as the relation of solicitor and client, or even an influence arising from such relationship, exists.

9. (1877) 6 Ch D 638 (supra). One Reverend H. C. Morgan, vicar of Goodrich and a county magistrate, was unmarried and a comparatively poor man. Such a one succeeded, on the death of his brother, in 1864, to a large estate of real and personal property with an income of £ 7,000 a year. Minett, a clerk to the magistrates of whom Morgan was one, acted as Morgan's solicitor too. More, on terms of close intimacy, Morgan provided for an allowance of £ 100 a year to Minett and was in the habit of lending him money as well. On Morgan's spontaneous request in September 1874, two releases, written by Minett in his own hand, of various sums lent to him, aggregating £ 3000, were executed by Morgan—one on October 1 and another on October 2, 1874, without a particle of explanation why one release was on one day and the other on the next day. A further release of £ 500 was there on February 1, 1875. In July 1875, Morgan died, aged 84. The executors of his will sued to set aside the three releases, as having been executed by the testator under the professional influence of Minett and without proper independent advice. Upon such facts, Bacon, V. C., finds and lays down—

A. The relation of solicitor and client existed between Morgan and Minett.

B. Not that that relation prevents a client bestowing his bounty upon his solicitor. But what the law requires is that, considering the enormous influence which a solicitor in many cases must have over his client, in order to give effect and validity to a donation from a client to his solicitor, that relation must be severed. The parties must be at arm's length. The relation must have ceased to exist.

C. A client inclined to bestow bounty upon his solicitor is at perfect liberty to do it, and the solicitor is at perfect liberty to accept it, but both of them must act under circumstances which preclude the possibility of suspicion, for suspicion is enough. Suspicion is the basis of that rule of influence, and nothing could have been easier for Minett than to say: 'Let us put an end to that relation and let us stand as strangers to one another.'

D. Save as above, the rule, requisite for safety of the society, is: a solicitor shall not take a gift from his client while the relation subsists.

10. (1881) 8 QBD 587, (come into the reports in 1882), is a case of physician and patient. Baggallay, L.J., reiterates the rule:

"The proposition has been repeatedly laid down in equity that gifts made to persons standing in a confidential relation cannot be upheld."

But the gift in 1871, by Mrs. Geldard, then at Gainford, to the defendant, her medical adviser, of two cheques, one for £ 500 and another for £ 300, stood, for two reasons. One, from 1872, Mrs. Geldard ceased to live at Gainford and went to reside at Barnard Castle, about 8 miles distant, where she continued to reside, without the medical advice any longer of the defendant, until her death which happened in July 1876. So the relation of physician and patient had ceased some three to four years before the donor's death. Two, in spite of that, and in spite of any effect produced by such relationship having been removed, she intentionally abode by what she had done. (In the case before us, Muktalal intentionally abode too by what he had done, though not for that long as Mrs. Geldard had done, but only for three months and a little more: paragraph 63 ante. It might have been longer than Mrs. Geldard's but for the untimely and unnatural death of Muktalal in mysterious circumstances.)

11. 1895-2 QB 679: paragraph 67 ante. Let it be recalled that it is a case of a gift by Jane Liles, a spinster aged 77 years, to her sister's daughter, Mrs. Terry, whose husband, Mr. Terry, a solicitor, did tend the litigation of his wife's aunt, that is, Miss Jane Liles, over her houses, without charging anything, just in keeping with the request of the old lady. Upon such facts, Lord Esher, M.R., feels bound by the authorities to hold that there is a rule in equity, by which a legal presumption of undue influence by the solicitor, in a case of this type, is incapable of being met or rebutted by evidence, but not without lamenting:

"I own that I think it unfortunate that such a rule should have been laid down, because in particular instances it may work great injustice; and I do not think that a hard and fast rule which may work such injustice ought to be the rule of law in the matter."

Lopes, L.J. and Kay, J.J., two other members of the Court of Appeal, however, differ from the Master of the Roll's comment on the rule of equity on the subject. Lopes, L.J. says in reply:

"I cannot consider it an unfortunate rule. It appears to me to be a hard and fast rule which is founded on public policy. In exceptional cases, it may possibly work hardship: but in the generality of cases it is highly beneficial, and I should regret to see it altered."

Kay, L.J., answers:

"I cannot conceive a wiser rule than this, or one more calculated in most cases to ensure the observance of justice and equity in such a confidential relation."

74. Such then is the class of case, upon which the appellants rely. Not that all the eleven cases I have reviewed above, (paragraphs 70 and 73), the appellants cite on the point I am on now. They cite, amongst them, only three: (1877) 6 Ch D 638, (1882) 8 QBD 587 and (1895) 2 QB 679=78 LT 428, all reviewed in the preceding paragraph. Now, the law laid down in this class of case for over one century from (1757) 97 ER 22= Wilm 58 to 1895-2 QB 679=73 LT 428 is: an attorney shall not take a gift from his client when the relation of attorney and client, or any influence from such relationship, subsists. If this is the last word on the subject, the contention of the appellants that Muktalal's gift to Ashalata, wife of Manmatha, his pleader, fails on the rule of public policy — a hard and fast rule for safety of the society — must prevail. It will however be my endeavour to show that such view is not, and cannot be regarded, as the last word on the law, principally for three reasons. First, an opposite view is clearly discernible even at or about the time the strict rule that an attorney shall not take is being enunciated and adhered to. Second, the strict rule has been departed from in later cases, leaving to the Courts exercise of a certain freedom in their decisions as to where the rule should be applied. Third, none of the leading statutory provisions, referred to in paragraph 69 ante, or, for the matter of that any statutory provisions, prescribe that so soon as a client makes a gift to his solicitor such gift goes down as void, the presumption of undue influence of the solicitor over his client being an irrebuttable presumption. Indeed, Section 111 of the Evidence Act provides for just the opposite. The presumption against good faith is liable to be rebutted, the onus being on the party who is in a position of active confidence.

75. That an opposite view has been taken becomes manifest from the cases listed below:

1. Hylton v. Hylton, (1754) 2 Ves Sen 547. Here the gift of an annuity by a nephew, soon after coming of age, to his uncle and guardian, who was acting too as executor and trustee in wills, by which the nephew had considerable gifts or provisions left to him, was set aside on principles of public utility. But the facts were heavily against the uncle, who haggled for the annuity at the time of accounting for and delivering up the estate to his nephew, to whom what was said really comes to this: "I will not

deliver up the estate you are entitled to, and account, unless you grant me this." So, the rule of the Court as to guardians — an extremely strict rule — based on the principle of humanity, great utility, as also necessity: "that it is a debt of humanity that one man owes to another," was in flagrant breach. And the nephew was totally relieved against the grant. Still Lord Hardwicke, L. C., whose decision it is, did not make it a hard and fast rule. For, his Lordship observed:

"Undoubtedly, if after the ward or cestui que trust comes of age, and after actually put into possession of the estate, he thinks fit, when *sui juris* and at liberty to grant that or any other reasonable grant by way of reward for care and trouble, when done with eyes open, the Court could never set that aside."

2. *Hatch v. Hatch*, (1804) 9 Ves 292. Mrs. Hatch, when a girl of 4, lost her father, Giles Hatch was her sister's husband. With him and under his protection, she lived after the death of her father. In October 1779 she came of age. And on January 20, 1780, she executed a conveyance, in consideration, as it was expressed, of her great friendship, kindness and regard for him, the care taken of by him, love and affection. Thomas Hatch, an attorney and a brother of Giles, prepared the deed. The accounting between her and Giles was settled too in 1780. In 1784, the girl, come of age in October 1779, and quite a grown-up then, married Thoms Hatch and became Mrs. Hatch. In 1800, after the death of Giles, she filed the Bill, charging fraud, pleading that she was very deaf, and praying for being relieved against the conveyance. What Lord Eldon, L. C. said, on such facts, appears to be worth quoting over and over again, if I may say so, with the greatest respect:

"There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a Trustee having done his duty, the cestui que trust, taking it into his fair, serious and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it; except quite satisfied, that the act is of that nature, for the reason often given; and recollecting, that in discussing, whether it is an act of rational consideration, an act of pure volition, uninfluenced, that inquiry is so easily baffled in a court of justice, that instead of the spontaneous act of a friend, uninfluenced, it may be the impulse of a mind, misled by undue kindness, or forced by oppression; the difficulty of getting property out of the hands of the Guardian or Trustee thus increased; and therefore, if the Court does not watch these transactions with a jealousy almost invincible, in the great

majority of cases it will lend its assistance to fraud; where the connection is not dissolved, the account not settled, everything remaining pressing upon the mind of the party under the care of the Guardian or Trustee."

Again,

"This case proves the wisdom of the Court in saying, it is almost impossible in the course of the connection of Guardian and Ward, Attorney and Client, Trustee and Cestui Que Trust, that a transaction shall stand, purporting to be bounty, for the execution of antecedent duty."

What does, therefore, (1804) 9 Ves 292 show? An irrebuttable presumption, or a rebuttable presumption, though it is a very, very uphill task to rebut it? The words "almost impossible" appear to be deserving of notice; no less the call by the Lord Chancellor upon the Courts to watch such transactions with jealousy almost invincible. If in spite of such watch, the transaction stands, what is "almost impossible" becomes possible. Therefore, the rule laid down is not an irrebuttable presumption, but a rebuttable one, no matter how hard the task is to rebut it. That this is so appears to be clear from the next two cases I review below, but not in order of date.

3. *Wright v. Carter*, (1903) 1 Ch 27=72 LJ Ch 138=51 WR 196. It is hardly necessary to narrate all the facts which run to some length. Suffice it to say that Col. Wright, the senior partner in a banking business, down to 1898, was badly involved in a deal with Capital and Counties Bank for £ 1,10,000. With a view to preventing the whole of his property being swept away by the bank, on May 15, 1900, March 14, 1901, and July 13, 1901, of a specific share (2/20th) out of trust funds and of specified sums of money, he made, *inter alia*, a gift to, and settled on, Carter who had acted as his solicitor and confidential adviser from 1899 and continued to act so till August 1901. Naturally, the question of a gift by client (Col. Wright) to solicitor (Carter) bulked so large in the action by Col. Wright to have all the instruments — two of 1900 and two of 1901 — set aside, on the ground of their having conferred benefits upon Carter, his solicitor, and having been executed during the existence of relation of solicitor and client. Naturally, (1804) 9 Ves 292 also came up for consideration. Vaughan Williams, L. J., read the very words of Lord Eldon I have reproduced in the first excerpt above, and said this, amongst other things, of the rule laid down by the Lord Chancellor in that case:

"The principle that I understand Lord Eldon to be affirming is this — that whenever you have these fiduciary rela-

tions (and in the present case we have to deal with the particular fiduciary relation of solicitor and client), the moment the relation is established, there arises a presumption to influence which presumption will continue as long as the relation, such as that of solicitor and client, continues, or at all events until it can be clearly inferred that the influence had come to an end. 'Now I am not saying that the presumption of influence affecting or avoiding the gift is an irrebuttable presumption: I do not think that the cases go that length, and I do not think that Lord Eldon meant so to lay down'. To my mind, all that he means is that, so long as this fiduciary relation continues, so long will it be very difficult to support the gift, and so long will the Court refuse to go into nice discussions as to whether the gift — taking the case of a gift by a client to his solicitor — was a gift which was advantageous to the client or whether it was not. I do not mean to say that, if the gift to the solicitor is manifestly one which a prudent man would not have given supposing the relation of solicitor and client to have determined in *hac re*, such a fact may not be taken into consideration as showing that, notwithstanding the determination of the actual relation, or (as the case may be) the non-employment of the solicitor in the particular matter, it is obvious that the influence of the solicitor had not ceased, but, on the contrary, had still continued'. So, the presumption of a solicitor's influence over his client, making a gift to his solicitor, is not a presumption incapable of being met or rebutted. That is so clear from the extract above, made clearer still by the portion I have underlined (herein ' ') for italics.

The following from the judgment of Cozens-Hardy, L. J., another member of the Court of Appeal, in 1903-1 Ch 27 points to the same conclusion:

"Assuming, as I do, that the presumption of undue influence in the case of a gift by a client to his solicitor during the continuance of the relationship is not irrebuttable, I hold that something beyond what was done here is essential to sustain such a gift."

No doubt, it is an assumption; but it is an assumption based upon the exposition of the law made by Vaughan Williams, L. J.

There is a little more yet to be looked into in 1903-1 Ch 27=72 LJ Ch 138=51 WR 196. Having laid down that the presumption of undue influence in the case of a gift by a client to his solicitor is not irrebuttable, having observed that even Lord Eldon did not mean so to lay down, and having held that an improvident gift by a client to his solicitor would

show continuance of the solicitor's influence, even though the relation of solicitor and client might have been determined in *hac re*, Vaughan Williams, L. J., pointed to still another consideration which would make the presumption a rebuttable one all the more:

"So, on the other hand, the fact that the gift is a very trifling gift, or a gift made by a man with so ample a fortune that it must have been trifling to him, is a matter which might fairly be taken into consideration in considering whether the influence continues."

Apply this test to the facts of the case on hand. Even after the impugned gift, Muktal remained seized of cash and other assets worth Rs. 60,000, if not more, as also of the right to live in any part of the house gifted away, as the house stood then or was to be built upon later, in addition to free food and other amenities: paragraph 61 ante. Considering the type Muktal was, a gift as this could not have been much to him.

The contention on behalf of the appellants is that a trifling always means a trifling only: something of a small value. In support thereof, reference is made to what Kay, L. J., says in (1895) 2 QB 679 =73 LT 428 (*supra*). And what his Lordship says may be put thus:

Setting aside a deed obtained by the keeper of a mad-house from a boarder and ex-patient, in *Wright v. Proud*, (1806) 13 Ves 136, Lord Erskine lays down the rule:

"So, independently of all fraud, an attorney shall not take a gift from his client, while the relation subsists, though the transaction may be, not only free from fraud, but the most moral in its nature."

In (1804) 9 Ves 292 however, Lord Eldon says, it is almost impossible that a like transaction shall stand, as just noticed. Pointing this out, Kay, L. J., observes:

"What was said by Turner, L. J., in *Rhodes v. Bate*, (1866) 1 Ch A 252, seems to explain the slight difference between the two statements. He there says that in the case of merely trifling gifts the Court would not interfere to set them aside upon the mere fact of a confidential relation and the absence of proof of competent and independent advice. But with regard to all other gifts he lays it down as a strict rule that persons standing in a confidential relation towards other cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the persons by whom benefits had been conferred had competent and independent advice in conferring them."

Certainly, an approach as this supports the appellants. The house gifted by

Muktalal to Ashalata cannot be called a merely trifling gift: a gift of a very small value. But the law has not remained static since 1866 when Turner, L. J., (whom Kay, L. J., quotes) rendered his judgment. Thirty-seven years later that is, in 1903, Vaughan Williams, L. J., was speaking in 1903-1 Ch 27=72 LJ Ch 138=51 WR 196 of a gift made by a man with so ample a fortune that it must have been trifling to him. Muktalal might not have been a man with ample a fortune. But what he gave was much less than what he had. And what he had, after the gift, was much more than what he could need. So the gift was near-trifle to him. More, Vaughan Williams, L. J., put the word 'trifle' in its proper place, if I may say so. A relative term, it plainly means, what is a trifling to one, who is a millionaire several times over, may be quite a big thing to another of small means. Had Muktalal given his all, leaving nothing for him, the existence of Manmatha's influence over him would have been patent, other things being there. Since that is not so, since what was given was much less than what he held, since what he held was more than what he could need, Manmatha's influence does not look so obvious, made indeed still less obvious, nay nonexistent, by the very broad considerations, as distinguished from "nice discussions", recorded in the foregoing lines and summarised in paragraph 63.

4. Daing Soharah Binte Daing Todaleh v. Chabak Binte Lasalih, AIR 1927 PG 148. In 1921, the Bugis ladies, Mahomedans and of advanced ages (over 70), whose suit it was to set aside the gift in favour of their nephew and agent, Hadji Mohamed, and his sister Etendir Binte Laplanni, landed in Singapore (from Borneo where they lived) en route to Mecca on pilgrimage, and made the impugned gift, on September 19 of that year, of their Singapore property. The case of the first kind, in the statement of claim, resting on misrepresentation by Hadji Mohamed who, it was said, represented to the ladies that the document was a will, though it was an assignment, was negatived by the trial Judge and the Court of Appeal too. The case of the second kind, although not distinctly set out in the statement of claim: that the burden was on the assignee, standing in a fiduciary position, of giving full details of the circumstances under which the assignment to him was made: remained. Naturally, there was deficiency in that sort of evidence which would have been tendered, if the case had proceeded to trial on that footing. One thing more about the facts: the very character of the assignment of September 19, 1921, revealed the following:

i. In consideration of (i) natural love

and affection (ii) Mohamed and Etendir having maintained the ladies for sometime past, and (iii) their agreeing to maintain them for the future during their respective lives, two undivided thirds of the Singapore property were for Hadji Mohamed and one undivided third was for Etendir.

2. Followed a covenant for maintenance, in the future as in the past, of the assignors by the assignees — (which has only to be compared with the agreement or annuity bond for the maintenance of Muktalal by Ashalata).

3. The document in English was explained by Mohamed to the assignors, ignorant of English. Here the document in Bengali was read by the scribe and Muktalal himself: Muktalal who knew Bengali.

Upon these facts, as also on the consideration that no proceedings were taken to question the gift for three years, the instrument of assignment was not set aside. Viscount Haldane, delivering the opinion of the Board, summed up the position as follows:

The relationship of the parties, the desire, naturally to be inferred, of the ladies to make a disposition of their affairs before going away on a long journey to Mecca, and the opportunity offered by the flying visit to Singapore, where the property was, but where they were not resident, — all render it probable that the transaction had been considered and represented the deliberately conceived intention of the assignors.

Trying to emulate this, I have summarised the telling features of the case on hand in paragraph 63 ante.

But the propositions of law laid down by Viscount Haldane, demonstrating inter alia that the presumption of undue influence by an attorney over his client is not an irrebuttable one, have yet to be stated. They are—

A. The principle is that a person, standing in a relationship in which authority or influence may be supposed to exist, cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence. The relief given by a Court of equity is a secondary consequence of this principle.

B. The relationship itself does not necessarily preclude the making of the gift but the burden lies on the donee to show that there was no such influence as to the source of the gift. He can discharge the burden incumbent on him by showing that, the relationship notwithstanding, the donor knew completely what he was doing, and acted of his own completely free will.

Apply these two propositions to what I have found in the case in hand and summed up (paragraph 63). The findings

I have come to, supported by the reasons I have given, pass, in my judgment, the test these two propositions lay down. But, it is said, the Sohara Binte case, AIR 1927 PC 148 deals with a gift by an aunt to her nephew, whereas the gift in hand is by a client to his pleader. That indeed is true. So what? The relief, where available, stands upon a general principle, applying to all the variety of relations, in which one person may exercise dominion over another. The relation of solicitor-client apart, the cases in the books reveal, amongst others, that of footman and master (1757) 97 ER 22= Wilm 58, of ward and guardian (1754) 2 Ves Sen 547; (1804) 9 Ves 292, of child and parent, Wright v. Vanderplank, (1856) 8 D. M. & G. 133, Lancashire Loans Ltd. v. Black, (1934) 1 KB 380, of physician and patient, (1882) 8 QBD 587; Dixon v Olmius, (1787) 1 Cox Eq Cas 414, of keeper of a mad-house and a boarder who is an ex-patient; (1806) 13 Ves 136, of principal and agent (1866) 1 Ch A 252, of even a tradesman who officially interfered Proof v. Hines, Cas Temp Talb 111=25 ER 690, of brother and brother belonging to the same religious Order Morley v. Loughnan, (1893) 1 Ch 736= 62 LJ Ch 515, of priest and laity (1807) 9 RR 275=14 Ves 273, of a spiritual medium and one under his charm Lyon v. Horne, (1868) 6 Eq 655, of one to whom, another trusts her matters spiritual, and that another, who reposes her trust so Allcard v. Skinner, (1888) 36 Ch D 145, of husband and wife Tungabal v. Yeshvant Dinkar Jos, 49 Cal WN 55=(AIR 1945 PC 8), etc., etc. This is why Viscount Haldane says, in Sohara Binte case, AIR 1927 PC 148:

"The Courts have refused to enumerate exhaustively the cases in which the presumption of undue influence will prima facie be made. Religious influence is included, and so are many other classes of influence in which the donee may from his position be presumed to be likely to have exercised special influence over the mind of the donor."

So, what does it matter that the Sohara Binte case, AIR 1927 PC 148 or the Inche Noriah case, 1929 AC 127=AIR 1929 PC 3=1929 Mad WN 105 deals with the case of a gift by an aunt to a nephew? The principle is the same, though the application of the principle will vary according as the position of confidentiality is strong or weak. To quote again Viscount Haldane:

"With certain kinds of fiduciary relations, such as that of a solicitor taking a gift from his client, this is, obviously, much more difficult to establish than in others where the duty is less definite. Courts of Equity have, therefore, exercised a certain freedom in their decisions as to where and how the principle must

be applied. This appears to their Lordships to be the outcome of numerous authorities which they have examined." Thus, the law on the relation of solicitor and client is here too, though it is a case resting on that of aunt and nephew. And such law, as laid down by the Privy Council in 1927, after examination of "numerous authorities", is that the presumption of influence of a solicitor over his client is not an irrebuttable one. But, in the very nature of the relationship, it is very difficult to rebut the presumption. That is not denied. What is denied is the extreme proposition that you cannot rebut such presumption at all. What is asserted and found on facts here is: so difficult a task of rebutting the presumption and establishing the gift, spontaneously and willingly by the client Muktalal to his pleader Manmatha, treating the gift to Ashalata as such, has been well performed.

Such being the law laid down by the Judicial Committee, so late in 1927, about the presumption of a solicitor's influence over his client being a rebuttable one, reference to other cases may as well be eliminated. Still here are a few amongst them:

5. Hunter v. Atkins, (1834) 3 M & K 113. Though in the nature of an obiter dictum, because the relation of solicitor and client did not exist on facts found, the following from Lord Brougham's judgment, "a great deal of observation" in which "has been often commented upon and often criticised", as Bacon, V. C. puts it in (1877) 6 Ch D 638, brings out the unreasonableness, if not the absurdity, of the extreme proposition that an attorney shall not take a gift from his client in any circumstance:

"A client, for example, may naturally entertain a kindly feeling towards a solicitor by whose assistance he has been benefited; and he may fairly and wisely desire to benefit him by a gift. No law that is tolerable among civilised men — who have the benefits of civility without the evils of excessive refinement and overdone subtlety — can ever forbid such a transaction, provided the client be of mature age and of sound mind and there be nothing to show that deception was practised, or that the solicitor availed himself of his situation to withhold any knowledge, or to exercise any influence hurtful to others and advantageous to himself."

The findings I have recorded above be recalled. Muktalal, the client, was of mature age and of sound mind. Nothing like any deception was practised on him ever. Nor did Manmatha, the pleader avail himself of his situation to withhold any knowledge. Tending three simple ejectment suits concerning rooms, bear-

ing a paltry rent, and arrears writ large, what possible knowledge could he acquire, and what manner of influence, hurtful to others or advantageous to himself, could he exercise? None whatever. Not that he was out to regain, by litigation, a property his client Muktalal had lost; and in the course of his investigation as a lawyer, he came by valuable information of which Muktalal was ignorant. First and last, what the passage quoted stands for is a rebuttable presumption, not an irrebuttable one.

6. (1866) 1 Ch 252, hardly shows the existence of a hard and fast rule about the presumption of undue influence being incapable of being met or rebutted. It shows instead that, the donor having independent advice, the presumption is rebutted, and the transaction is regarded as fair and straightforward.

7. (1856) 8 D M & G 133. Here the daughter elected to abide by the gift to her parent — a gift which, she knew, was impeachable. No impeachment was allowed after her death, in an action to set aside the gift, ten years after its execution. To prove that the daughter had elected so, what was needed was no positive act showing as much, but a fixed, deliberate and unbiased determination on her part that the transaction should stand. So, here is one more instance of the presumption being a rebuttable one.

8. (1888) 36 Ch D 145. If 10 years' delay in the preceding case was one of the two grounds which led to the inference that the donor, the daughter, abode by the gift, here 6 years' delay (1879, when the plaintiff left the sisterhood, to 1885, when she issued the writ in the action) debarred her from obtaining the relief she would otherwise have been entitled to. In the Soharah Binte case, AIR 1927 PC 148, the delay was for three years. Therefore, delay has a part to play in determining whether or no there has been an election on the part of the donor to confirm the gift. In fine, it becomes a case of rebuttable presumption capable of being rebutted by delay in appropriate cases. In the case in hand, be it stated at the risk of repetition, Muktalal elected to abide by the gift dated 7th February, 1951, by having recorded on 17th May, 1951 in Ashalata's application for mutation of her name in the books of the municipality that he had no objection thereto: (Paragraphs 63 and 73). Delay of some 3 months and 10 days no doubt. But, upon the whole of the evidence, it very much looks that had Muktalal not met the unnatural death he most unfortunately did, the delay would have been far greater.

9. In re Coomber; Coomber v. Coomber, (1911) 1 Ch 723. Cozen-Hardy, M. R. cautious here not to set up a presumption against the validity of the gift in

every fiduciary relation and every relation of confidence — a course which will be not according to authority, but distinctly contrary to principle. In saying so, his Lordship observes:

"There are confidential relations in which there is a presumption of undue influence. Take the case of solicitor and client. Another instance is where a young person, immediately after attaining twenty-one, makes a gift to a parent or a person standing in loco parentis. When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it. What is thus laid down is that such presumption is rebuttable.

10. Inche Noriah case, 1929 AC 127= AIR 1929 PC 3=1929 Mad WN 105 (paragraph 62). Lord Hailsham, L. C., approves the judgment of Cotton, L. J., in (1888) 36 Ch D 145 in making a dichotomy of gifts according to the decisions of the Court of Chancery: (i) gifts which are the result of influence expressly used by the donee for the purpose, and (ii) gifts where the relations between the donor and the donee have, at or shortly before the execution of the gift, been such as to raise a presumption that the donee had influence over the donor. The first class of gifts goes down on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. For the second class, the principle to remember is: The Court interferes not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy and to prevent the relations which existed between the parties and the influence arising therefrom being abused. Not that the Court sets aside such voluntary gifts invariably. No, it does not; the Court does set aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will: just what has been held above (paragraph 63) about Muktalal's impugned gift. Therefore, nothing like any irrebuttable presumption is to be found in the law laid down by this Privy Council decision.

76. What goes in the preceding paragraph demonstrates that the taking of a gift by a solicitor from his client does not give rise to an irrebuttable presumption of undue influence and that the Court has the complete freedom to find, upon all matters before it, rebuttal of such influence: just the first two reasons (paragraph 74) which lead me to hold that the rule about an irrebuttable pre-

umption is not so inflexible as the appellants take it to be. And when I come to the third reason: absence of any statutory provisions ordaining it so (paragraph 74), as I do now, the stance of the appellants, making the presumption of undue influence irrefutable, gets weaker still.

77. To Section 111 of the Evidence Act first. In terms thereof, Manmatha, the pleader, does stand in a fiduciary relation to Muktalal, his client, whose interests he is in duty bound to protect. Therefore, the burden of providing the good faith of the transaction: the gift dated 7th February, 1951: is on him. That is Section 111, and no more. And this burden has been discharged, for reason stated in the foregoing lines and summarised in paragraph 63.

78. Now, to Section 16 of the Contract Act, 10 of 1872. Sub-section (1) lays down the principle in general terms. The relations subsisting between the parties are such that is one in a position to dominate the will of the other? More, does the one in a dominating position use such position to obtain an unfair advantage over the other? If both these questions are answered in the affirmative, undue influence is there plain to be seen. Sub-section (2) is a "deeming" provision, providing for a presumption when one shall be taken to be in a position to dominate the will of another, e.g., when one stands in a fiduciary relation to the other, as Manmatha does in relation to Muktalal. Sub-section (3) lays down the following propositions, one following the other in strict order, any change in which (in such order) is almost sure to make for an error:

One, the relations between the parties to each other must be such that one is in a position to dominate the will of the other.

Two, once it is so substantiated: that one is in a position to dominate the will of the other, the second stage has been reached, — namely, the issue whether the transaction has been induced by undue influence or not.

Three, upon the determination of this issue, a third point emerges, which is that of the onus probandi. Transaction unconscionable? Then, the burden of proving that the transaction was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

In analysing Section 16 so, I am doing no more than paraphrasing what has been laid down by the Supreme Court in *Ladli Parshad v. Karnal Distillery Co. Ltd.*, AIR 1963 SC 1279, and by the Privy Council in *Raghunath Prasad v. Sarju Prasad*, 51 Ind App 101 = (AIR 1924 PC 60). In the last mentioned case, the terms of the mortgage were high, so much so

that the original debt of Rs. 10,000 had swollen to Rs. 1,12,885, by the time the High Court entered its decree, leading to the error of the unconscionableness of the bargain having been the first thing considered, instead of having been the last thing in the order given above.

79. Translate these three propositions, to the facts of this case, in the very order in which they have been enunciated. Upon evidence, can it be said that Proposition One is well met here? The relations between Manmatha and his client Muktalal having been what they were, can it be said that Manmatha was in a position to dominate the will of Muktalal? Even it can be so held only as a matter of law, in the realm of facts there may well be cases where domination is the other way about. Be that as it may, the position here is this: Charged to tend the plainest of plain ejectment suits, with paltry rents, made so much the easier by the tenants suffering the decrees to be entered against them, by consent, what amount of influence could Manmatha exercise over Muktalal, the shrewd man of business, and a miser, on top of that as I size him to be, upon the whole of the evidence? Not much. To the Pisani case, (1874) 5 PC 516 again (paragraph 72). The amount of Pisani's influence upon Miss Porro was estimated in the light of all that evidence disclosed; not much influence had been acquired either. That is what is found here too. Coming to Proposition Two, if I am right in the findings I have come to, and summarised in paragraph 63, it becomes impossible to say that the transaction of 7th February, 1951, has been induced by undue influence. It represents the pure, voluntary and well-understood act of Muktalal's mind. Proposition Three remains. But the manner in which the two preceding propositions have been found furnished the answer to this one too. In the spontaneous gift by Muktalal, not ridding himself of all he had, but keeping plenty for him, it is difficult to see anything which is not conformable to one's conscience, and, therefore, unconscionable. That apart, Manmatha has discharged the burden that the transaction was not induced by undue influence. Thus, there appears to be nothing in Section 16, or the principle thereof, which can stand between the respondents and the impugned gift.

80. By parity of reasoning, Section 89 of the Trusts Act 1882 cannot be reckoned against them. To Manmatha and Ashalata, the gifted house has undoubtedly been a windfall. But to say so is not to say that they have gained an advantage by exercise of undue influence. In view of facts found, no exercise of undue influence is there and S. 89 eliminates itself.

81. So does Section 88, which consists of two parts. Say,— and this may be said, — Manmatha, the pleader, is bound in a fiduciary character to protect the interests of Muktalal, his client. Say also, — and this may be said too, — he has had a windfall in getting the house as a gift. But can it be said that he gains for himself the pecuniary advantage in the gift of the house, by availing himself of such fiduciary character? That cannot be said, the gift having been what it is: a voluntary, spontaneous and deliberately conceived intention of Muktalal, nothing to say of the fact that no dealings with a third party are seen here. And the very words "by availing himself of his character" seem to imply dealings exactly with such a one. Illustrations (c), (d) and (e) to Section 88 illustrate just that.

82. The second part of Section 88 does not reach either, the facts of the present case. The circumstances, in which the interests of Manmatha are, or may be, adverse to those of Muktalal, are missed here. Before, or even at the time of, the gift, — and that is the time that counts, — the interests in the house gifted are the interests of Muktalal alone. It is so unlike the interests of A, an executor to quote from illustration (a), for example, to Section 88, who buys at an undervalue from B, a legatee, his claim under the will, B being ignorant of the value of the bequest. Sure enough, the interests of A are adverse to those of B at the time, and before such time too, when A buys at an undervalue from B. Say this of Manmatha and Muktalal? To say so is to say the unsayable. Illustrations (b), (g) and (h) to Section 88 appear to indicate as much.

83. The authorities cited do not show anything different either. The Privy Council case of Nagendrabala Dassi v. Dinanath Mahish, decided on 29-11-1923 and come into the reports in 51 Ind App 24=29 Cal WN 491=ILR 51 Cal 299=(AIR 1924 PC 34), reveals, amongst other things, purchase, by Nagendrabala, the wife of the pleader who had appeared and acted for the mortgagor-defendants, of the mortgage-decree, not fully executed yet, for Rs. 11,500, execution of the decree, so purchased, by Nagendrabala, and ultimately the purchase by her of some of the properties in Court-sale, after having obtained leave to bid, but without telling the Court that she was the benamdar of the pleader. That led to a suit by some of the judgment-debtors for a declaration that such purchase by the pleader, concealing that he was the real purchaser, was bad. The Subordinate Judge directed reconveyance of the unexecuted decree by Nagendrabala to the plaintiffs on payment of Rs. 13,750. The High Court, on appeal, confirmed

that and directed reconveyance too of the properties purchased by her at the sale in execution of the decree. An appeal was taken to the Privy Council. The argument on behalf of the appellants, Nagendrabala and her husband, the pleader, was:

We admit, we are bound to surrender the unexecuted decree at a price we paid for it. But at the time of the sales in execution the pleader appellant had long ceased to be a pleader for the respondents who were represented by other pleaders. It is not said that any knowledge the pleader appellant had obtained while he acted as pleader was conducive in any way to his buying the properties through his wife when they were on sale in execution of the decree. Ergo, the reconveyance of such properties purchased by Nagendrabala at the sale in execution of the decree, as directed by the High Court, may go out of the decree.

Lord Dunedin, delivering the judgment of the Board, repelled it:

"This argument is not good. Had the purchase of the properties been open and above board by the pleader appellant, the result might have been otherwise."

In other words, the argument might have been good. Herein, therefore, lies the key to the decision. Be it Section 88 or the ordinary equitable conditions which lie behind it — Section 88 did not then apply to this part of India — a person in confidential position shall not make use of that position to obtain an advantage over the person with whom he is in confidentiality. Now, there is no more certain way of taking advantage than the way of concealment. Nagendrabala's husband, a quondam pleader for the mortgagors, concealed his identity twice, first in having purchased the unexecuted decree, and, secondly, in having allowed his wife to get leave to bid, and thereafter to purchase. Nothing like this can be predicated of Manmatha. The gift to his wife, Ashalata, was open and above board. Law no doubt, regards such gift as a gift to Manmatha himself. That is another matter. Not that Manmatha did get the gift in the benami of his wife, as Nagendrabala's husband got the purchases in the benami of Nagendrabala. So, if anything, this Privy Council decision favours the respondents, the gift by Muktalal to Ashalata, his second mother, having been open, with no concealment anywhere.

84. In Amrita Lal v. Pratap Chandra, 52 Cal LJ 492=(AIR 1931 Cal 144), a pleader, himself a plaintiff (No. 4), qua lessee from Jagatrani, plaintiff No. 1, acted as a pleader for the Baishya defendants, the purchasers from Jagatrani's husband's brother, defendant No. 1. The

allegation was that he used information he had derived in the course of such professional capacity, in having secured the lease from Jagatrani. It was held that, a pleader though he was, as alleged, of the Baishya defendants, no advantage he had obtained over them, his clients, by having used his confidential position, thereby precluding the application of Section 88. More, because of no such advantage having been taken, and of the pleader having never encouraged the Baishyas to go in for the purchase, there having been no question at any time of any negotiation on their behalf with Jagatrani, the case, it was held, would fall outside the dictum of the House of Lords in Carter v. Palmer, (1841) C & F 657, where the facts were:

"Carter acted not merely as counsel for Palmer, he was his legal adviser too. Indeed, Palmer was acting under the advice of Carter. Necessarily, Carter had full information of the nature of securities held by one Mackmurdo, and also the means Palmer could command for discharging such securities. What is much more, he himself had been engaged for Palmer in the negotiation for the compounding of these claims. Thus, fully aware that the claims might actually be bought up for much less than their nominal amount and their actual worth, he himself purchased them from Mackmurdo for a sum little more than one-third of their actual value. So he could do, only because of the information he had acquired as agent or counsel for Palmer." Upon such facts, it is plain to be seen — and so it was held — that Carter had been incapacitated, by the very character of his employment, or, to put it, in the words of Section 88, by availing himself of his character, from purchasing, for his own benefit, these securities upon his employer's property: such incapacity continuing at the time of his purchase. Consequently, his purchase was considered as a purchase for the benefit of his employee, Palmer.

85. This is Section 88 in action. Or, to put it in another way, Section 88 of the Trusts Act 1832, by its first part, does no more than embody the ratio of this case of 1841. No matter how it is put, Manmatha comes nowhere near. It has been stated why (paragraph 81).

86. Vaughton v. Noble, (1861) 30 Beav 34=54 ER 801, and Sri Sri Gopal Jew v. Baldeo Narain Singh, (1947) 51 Cal WN 383, dealing with trustees and turning on their own facts, cannot be assimilated here. In the former, the trustee bargained with the beneficiary, and both of them agreed to divide the trust fund. But no manner of legerdemain or shuffling of the cards could give the trustee any interest in the fund, which was no more

than any stranger's, agreement or no agreement. The transaction could not therefore stand. In the latter, the trustees had deliberately entered into a settlement by which they gained a personal advantage. In the circumstances, it was said, the Court would not inquire further or look into the good faith of the transaction. This hardly bears any comparison with the voluntary and well-understood gift by Muktalal to Ashalata, or, for the matter of that, to Manmatha, of which it may truly be said, upon evidence such a gift is there, not because of the relation of pleader and client, but independently of that; and if it is there because of such relation, it is there as the voluntary and deliberately conceived intention of the donor untrammelled by anything done by the donee as pleader.

87. Another case cited remains to be noticed: Kotaiah v. Venkata Subbaiah, AIR 1962 Andh Pra 49 (FB), the ratio of which appears to be this: Section 66 of the Code of Civil Procedure bars a suit against the certified purchaser acting as the plaintiff's agent even prior to the purchase in dispute, in Court sale for benefit of the plaintiff, Section 82 of the Trusts Act keeping Section 66 of the Code unfettered, and Section 88 envisaging a fiduciary acquiring property for himself, and, therefore, not covering benami purchases. It has thus little to contribute here.

88. Having regard to the foregoing considerations, the conclusion reached is that Muktalal's gift stands. It stands, because the law now is not: a pleader shall not take a gift from his client, irrespective of facts and circumstances, which must necessarily vary in individual cases. It stands, because the law is: the presumption of undue influence in the case of a gift by a client to his pleader is not irrebuttable, such presumption here having been rebutted by the whole of the evidence. It stands, because none of the leading statutory provisions on the point, referred to above, stand between the gift and the donee.

89. So far then the gift by Muktalal to Ashalata has been treated as a gift which indeed it purports to be. Is it anything less or different? Does the annuity bond or deed of agreement, as it has been called, of February 7, 1951, make it less than, or different from, a gift? The evidence of Manmatha on this point bears inter alia:

"Rs. 40/- as mentioned in the deed as monthly maintenance of Muktalal was only for the purpose of stamp duty and not that we would have to pay him that amount monthly. The question of paying him in cash does not arise. Nothing was intended to pay Muktalal in cash. It is written in the document what we

were to pay him in kind and not in cash." Strictly speaking Manmatha appears to be wrong, in so far as he says that nothing was to be paid to Muktalal in cash in terms of the deed of agreement, which clearly provides:

"If the first party (Ashalata) or any of her heirs and legal representatives be in any way negligent in the matter of the aforesaid maintenance, medical treatment, and pilgrimage, then in lieu thereof the first party remains bound to pay to the second party the sum of Rs. 40/- per month on account of the money value of such maintenance, medical treatment, and pilgrimage etc."

But he appears to be plainly right when he says that the specified sum of Rs. 40/- was incorporated, as indeed it had to be, for the purposes of Stamp Duty. See the definition of bond in Section 2, sub-section (5), of the Stamp Act, 2 of 1899, and Article 15 in Schedule I thereto. This fosters the contention on behalf of the appellants that what is provided for in the annuity bond is being disowned, with the result that the other transaction becomes a hundred per cent gift. That it is. The whole of the evidence discussed above points to the same conclusion. Though both the transactions are on one and the same day, one is not a consideration for the other. Muktalal is out to make a gift and does make the gift voluntarily, annuity bond or no annuity bond, understanding well enough that it is a gift. So he does as a token of gratitude to his second mother for all she has done, and has been doing for him. Ashalata, in turn, as a token of affection, provides, in writing, for Muktalal's amenities, most of which, indeed, she has been attending to all along. So that Muktalal may not be without a roof over his head, she provides for much more too, by writing: that Muktalal shall have the right to live in any part of the house so gifted to her. Upon evidence, it is impossible to say that Muktalal has been after a quid pro quo: 'If you maintain me and allow me to stay in the house I give you, I make the gift; otherwise not.' He has been after a deed of gift, without any consideration of the kind. The deed of agreement is not the cause of the gift which it only follows.

90. (1855) 3 Drewry 306, noticed in paragraph 70: 7, shows a real gift, though in the garb of a conveyance, the nominal consideration of £ 100 having been put in the deed to save Stamp Duty. Here also what is seen is a gift, the annuity bond notwithstanding.

91. Such being the conclusion, three things eliminate themselves. One is the annuity bond which can produce little effect on the fortunes of this litigation. The second is the legal consideration

when and how far an agreement to pay maintenance, falling short of creating a charge on any specific property, creates a contractual obligation. The third — a necessary corollary to the first two — is no need whatever of competent independent advice, with the annuity bond gone, and only the simplest of a simple gift remaining (paragraphs 61-63).

92. It therefore becomes hardly necessary to examine the class of cases, cited at the bar, touching Section 40 of the Transfer of Property Act and the like, such as Mohini Debi v. Purna Sashi Gupta, 36 Cal WN 153=(AIR 1932 Cal 451), which decides *inter alia* that an agreement for maintenance, creating no charge within the meaning of Section 100 of the Transfer of Property Act, attracts the second paragraph of Section 40 thereof, and makes the contractual obligation, so created, not enforceable against a purchaser without notice, Ali Hussain Mian v. Rajkumar Haldar, 47 Cal WN 557=(AIR 1943 Cal 417) (FB), where a Full Bench of this Court decides that a covenant for pre-emption of land, unrestricted in point of time, and expressed to be binding on parties, their heirs and successors, does not offend the rule against perpetuity, but creates the benefit of an obligation favouring the other party, though no interest in land, becoming thereby attached to the property, and, therefore, enforceable under Section 40 against two classes of transferees — gratuitous and with notice, — and Sital Chandra Koley v. Mihilal Koley, 58 Cal WN 1001=(AIR 1955 Cal 21), where my learned brother, sitting with S. K. Sen, J., extends the scope of Section 40, by applying its principle to the case of an involuntary transfer under Section 26F of the Bengal Tenancy Act.

93. Equally barren will it be to deal at length with the topic of competent, independent advice from a lawyer, the finding that has been come to in paragraphs 61-63 being what it is, on the basis of the Privy Council decision in the Inche Noriah case, 1929 AC 127=(AIR 1929 PC 3)=1929 Mad WN 105: that, the spontaneity of a simple gift, without any complication anywhere, having been proved by the whole of the evidence, there is no reason for disregarding such evidence, merely because it does not include competent, independent advice of a lawyer, or, as obtains here, merely because the advice of the lawyer taken is an apology for advice. Where the deliberately conceived intention of the giver to make the gift is proved (as here) by facts and circumstances established by evidence, there can be no difference in principle between absence of advice from a lawyer and the taking of such advice which is found to be neither independent nor competent. Were it necessary for

this Court to rely upon competent, independent and legal advice as an indispensable condition to the validity of the impugned transaction, the advice, Pleader Radhakrishna Patra gave to Muktalal, would fall far short of the minimal requirements, some of which may be summed up and dealt with, in the context of facts here, as follows:

One, is the pleader, who advises, independent of the pleader who takes? Upon evidence, appearances are in favour of Radhakrishna, a junior lawyer, the one who advised, having been a nominee, if not a creature, of Manmatha, the one who took. So, "independence" of "independent legal advice" is gone.

Two, in order to earn competence to give proper advice, one who advises must be in possession of full facts — all that is worth knowing in the matter. In 1903-1 Ch 27=72 LJ Ch 138=51 WR 196 (supra), Almy and Tarbet, Solicitors both, could not pass this test, as they knew next to nothing about the detail of the four deeds, two of 1900 and two of 1901, though, by the first two, gift and settlement by Wright to Carter, his solicitor, was patent. Here also Radhakrishna cannot pass the test, as, on his own admission, he cared not to ascertain all the circumstances, or any one of them, in absence of which it would be impossible for any honest adviser to advise in the matter.

Three, one who advises must give real advice. Radhakrishna lays himself open to the charge of scamping and gross failure of duty in having not advised to get some property — why not the gifted one? — charged for payment of Muktalal's maintenance. Merely asking Muktalal: Why such gift is not to do duty expected of an advising lawyer of all persons.

94. Nothing more need be said on a matter which has ceased to be relevant. Upon all that goes before, the two points raised upon this appeal (paragraph 7) are found as under:

One, undue influence neither taints nor infects the impugned deed of gift. And once the gift, the great document, stands, incapable of being impeached and unsuccessfully impeached too, the annuity bond, so small a document compared to the great one, which even the plaintiff wants to be struck down, if necessary, ceases to be of any consequence.

Two, the deed of gift to the first defendant Ashalata may well be regarded as a gift to her husband and Muktalal's pleader, the second defendant Manmatha, who, however, is not incapacitated, by Section 88 of the Trusts Act, from holding it, for his own benefit. (paragraphs 81-88).

95. In the result, the appeal fails and be dismissed, each party bearing its costs here and below, in all circumstances of the case.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 CALCUTTA 132 (V 56 C 22)

N. C. TALUKDAR, J.

Gopal Khaitan and others, Appellants
v. The State and others, Respondents.Criminal Appeal No. 722 of 1966, D/
12-7-1968.(A) Companies Act (1956), Ss. 162,
168, 210, 220 (3), 614A (2) — Offence
under Act — Mens rea, whether essential.

The offences laid down under the Companies Act are of two kinds. The first group consists of offences under Ss. 162, 168, 210, 220 (3) and such similar sections where the language used by the legislature is either "officer who is in default" or a person who "fails to take all reasonable steps". In the second group falls an offence under S. 614A (2) of the said Act where the language used is "fails to comply". The concept of mens rea or a blameworthy mind is not applicable to the second group of offence, as catalogued above.

(Para 6)

As regards the first group of offences as mentioned above S. 5 of the Companies Act, 1956 defines an "officer who is in default" and lays down inter alia that the said expression means any officer of the company who is knowingly guilty of the default, non-compliance etc. or who knowingly and wilfully permits such default, non-compliance etc. Even in such cases the directors who have got duties imposed upon them by law which cannot be observed in their breach and it is no defence for the directors to say that the Managing Director alone was responsible for non-compliance of the requirements of the statute. The further contention that the non-compliance is in fact due to inadvertence and as such there is no mens rea on their part, is not also tenable in law for so far as this particular field of criminal liability is concerned, negligence or blameful inadvertence or failure to supervise may properly be designated as mens rea. Case law discussed.

(Para 7)

As regards the second group of offences, the position is entirely different from that in the case of the first group of offences considered above. The language used by the legislature in S. 614A (2) is quite significant. It is to be observed that the language used in S. 614A (2) is "fails to comply" and not "every officer of the company who is in default". Section

614-A of the Companies Act, 1956, has been introduced by the Companies Amendment Act LXV of 1960 because S. 614 of the said Act neither provides for any punishment for disobedience of the Court's order nor contains any provision for compelling the performance of the duty of filing the returns, accounts or other documents even where a prosecution results in a penalty for breach of statutory duties. It is in this context that the provisions of the said section should be approached and enforced. The offence under S. 614-A (2) of the Act is really a statutory offence requiring no mens rea. The offence is established ipso facto on proof of contravention as in the case of the company in offences under Ss. 162 (1), 168, 220 (3) etc., of the Act. The remedy available in a bona fide case is to take proper steps in time by applying to the Court for extension of the time mentioning the genuine difficulties.

(Para 8)

(B) Companies Act (1956), S. 1 — Scope and object — Act must prevent snowballing of finance or must not affect economy of a Welfare State — Protection of shareholder is also one of the objects — "Organic Theory" meaning of — Provision in Act relating to directors must be strictly enforced.

There appears to be some misapprehension as to the object underlying the provisions of the Companies Act. The definite duties imposed on all "officers" as defined in the Act, are not without their purpose. The Act has been enacted to prevent, amongst others, the snow-ballng of finance as also the formation of bubbles and the consequent effect thereof upon the economy of a Welfare State. The provisions of the Act are indeed like sentinels on duty at the threshold of graver offences under other Acts and the continued defaults and non-disclosures under the Act are, in many cases, but attempts to draw a red-herring across the trail for preventing the detection of more serious offences. A reference in this connection may be made to what is known as the "Organic Theory", a theory which treats certain official as the organ of the company, for whose action the company is to be liable just as a natural person is for the action of his limbs. It is incumbent in the interest of the public that the provisions of the Companies Act relating to the directors should be strictly enforced and not observed in their breach. AIR 1948 Cal 42, Rel. on. (1932) 2 KB 309, Ref.

(Para 11)

(C) Penal Code (1860), S. 53 — Punishment — Law is good but justice is better — Quantum of punishment should not exceed the interests of justice. (Para 12)

Cases Referred:	Chronological Paras	
(1968)	AIR 1968 Cal 79 (V 55)=	
72 Cal WN 312, Madan Gopal Dey v. State		7
(1965)	Criminal Revn. Cases Nos. 305-322 of 1965, D/- 25-9-1965 (Cal), Great India Steam Navigation Co. Ltd. v. Asstt. Registrar of Companies, West Bengal	10
(1963)	1963 (1) Cri LJ 521=66 Cal WN 852, Dulal Chandra Bhar v. State of West Bengal	7
(1962)	1962-32 Com Cas 341 (Punj), Ramkrishna Dalmia v. Registrar, Joint Stock Co., Delhi	10
(1961)	AIR 1961 SC 186 (V 48)= 1961 (1) Cri LJ 319, State of Bombay v. Bandhanram Bhandari	7
(1957)	AIR 1957 Mad 675 (V 44)= 1957 Cri LJ 1279, In re Arcot Citizen Bank Ltd., Arcot	7
(1948)	AIR 1948 Cal 42 (V 35)= 48 Cri LJ 236, Bhagirath Chandra Das v. Emperor	7, 11
(1935)	39 Cal WN 1152, Ballav Dass v. Mohanlal Sadhu	7
(1932)	1932-2 KB 309=101 LJ KB 641, Fanton v. Denville	11
(1915)	1915 AC 705=84 LJKB 1281, Lennard's Carrying Co. v. Asiatic Petroleum Co., Ltd.	11

J. Nag, Chinmoy Chaudhuri, for Appellants; Madhusudan Banerjee, for the Asstt. Registrar of Companies. Anil Kumar Sen, for the State.

JUDGMENT:— This Appeal is against an order dated the 23rd November, 1966 passed by Shri A. Sen Gupta, Presidency Magistrate, 5th Court, Calcutta in case no. C/1452 of 1966 convicting the three accused — appellants under Section 614A (2) of the Companies Act, 1956, and sentencing them to pay a fine of Rs. 300/- each, in default to undergo simple imprisonment for six weeks each, with the further direction under Section 626 of the Companies Act, 1956 that one-tenth of the fine, if realised, is to be applied towards the payment of the costs of the proceedings.

2. The facts can be put in a short compass. The three accused-appellants, viz., Sri Gopal Khaitan, Sri Dhan Raj Khaitan and Sri Shew Bhagwan Maheswari are the Directors of M/s. Khaitan Finance Corporation (Private) Limited, a company registered under the Companies Act. Two cases being cases Nos. C/380 and C/381 of 1965 were started against them under Sections 162 (1) and 220 (3) respectively of the Companies Act, 1956, by the Registrar of Companies before the Chief Presidency Magistrate, Calcutta, for failure to submit the Annual Return of the Company for the year ending the 31st December, 1963, and also three copies of the balance-sheet for the same period. As a result of the trial,

the accused-appellants were convicted on 29-4-65 of the offences charged and sentenced in each case to pay a fine of Rs. 100/- each, with a further direction on them under Section 614A (1) of the Companies Act, 1956, to file the requisite documents and papers, within six months from the date of the said order, that is, within 28-10-65. After the abovementioned conviction a notice by registered post was sent on 14-5-64 by the Registrar of Companies (Ext. 2) for submission of the returns as directed in due time and the same was acknowledged duly by the accused persons (Ext. 3 collectively). The accused-appellants, however, did neither reply to the said notice (Ext. 2) nor comply with its directions. On 22-6-65, however, it appears that the accused-appellant No. 1, Sri Gopal Khaitan made over some documents to the Income Tax Officer as per receipts (Exhibit B). The documents concerned are some files relating to vouchers, bills, receipts, confirmation, income-tax notices, the party's confirmation, and also some Rokar Khatas for 1960-1962. No Rokar Khatas for 1963 as well as no account books were made over to the Income-tax Authorities. After the expiry of the period of six months, the Assistant Registrar of Companies filed on 16-4-66 the present two complaints dated 13-4-66 under Section 614A (2) of the Companies Act, 1956 for the failure on the part of the accused-appellants to comply with the order of the Court passed in case Nos. C/380 and C/381 of 1965 under Section 614A (1) of the said Act. On the prayer of the prosecution and in the absence of any objection on the part of the defence, the two cases Nos. C/1452 and C/1453 of 1966 were tried jointly by Shri A. Sen Gupta, Presidency Magistrate, 5th Court, Calcutta. The defence case inter alia is that the accused-appellants are not guilty; that it is the Managing Director who is responsible for submitting the returns and the compliance of the directors and the other Directors having not knowingly defaulted or non-complied, have no mens rea, and are not consequently 'officers in default' within the meaning of the Act; and that in any event the accused-appellants could not comply with the Court's order passed under Section 614-A (1) of the Companies Act, 1956, due to circumstances beyond their control inasmuch as in the meanwhile the relevant books of account and other papers of the company were taken away by the Income-tax Authorities and are so lying with them since 22-6-65.

3. The prosecution in this case examined one witness, P. W. 1, Mahaprabhu Roy, Assistant Officer under the Registrar of Companies, Calcutta, to prove its case while the defence examined D. W.

1. Sunil Kumar Mazumdar, an Inspector of the Income-tax Department, attached to the Special Investigation Branch, to prove the defence version of affairs and as a result of the trial the trying Magistrate by his judgment dated 23-1-66 convicted and sentenced the three accused-appellants as mentioned above. It is the said order of conviction and sentence that has been impugned and forms the subject-matter of the present Appeal.

4. Mrs. Jyotirmoyee Nag Advocate (with Mr. Chinmoy Chowdhury, Advocate) appearing on behalf of the accused-appellants has made a three-fold submission. The first submission made by Mrs. Nag is that there has been no contravention of the provisions of Section 614A (1) of the Companies Act, 1956, as alleged or at all, and the evidence on record at its highest only gives rise to a benefit of doubt. The second contention advanced on behalf of the accused-appellants is that even if there was such a contravention, it was due to the Managing Director who is responsible for submitting the returns and carry out the directions and the other Directors had not knowingly defaulted and consequently they have no mens rea and are not 'officers in default' within the meaning of the Act. The third and the last contention of Mrs. Nag is that in any event the default on the part of the accused-appellants in complying with the Court's order passed under Section 614A (1) of the Companies Act, 1956 is bona fide due to circumstances beyond their control because the relevant books of account and other papers of the company were taken away by the Income tax Authorities and had been lying with them since 22-6-65. Mr. Madhusudan Banerjee, Advocate appearing on behalf of the Assistant Registrar of Companies has submitted that the evidence on record clearly establishes the requisite non-compliance on the part of the accused-appellants. Mr. Banerjee next contended that the accused had wilfully and knowingly failed to carry out the duties imposed upon them by law and had the requisite mens rea. Mr. Banerjee had further urged that the plea of seizure of the relevant books of account and other papers by the Income-tax Authorities, resulting in a consequent inability on the part of the accused-appellants to comply with the directions under Section 614A (1) of the Companies Act, 1956, is wholly unfounded and even ruled out by the evidence on record. Mr. Anil Kumar Sen, Advocate, appearing on behalf of the State has in the first place adopted the arguments advanced by Mr. Banerjee on behalf of the Assistant Registrar of Companies, West Bengal. He further contended that the Directors of a Company have definite duties imposed upon them under

the Companies Act, the provisions whereof have been enacted to protect the shareholders and the general public and that the present flagrant violation of the directions given by the Court should not be condoned.

5. I will now proceed to determine the points at issue in the light of the respective contentions put forward by the learned Counsel appearing on behalf of the different parties and on the evidence adduced in this case. The first submission made by Mrs. Nag regarding the non-contravention of Section 614A (1) of the Companies Act, 1956 is clearly unfounded. It would appear from the evidence of P. W. 1, Mahaprabhu Roy, Assistant Officer in the office of the Registrar of Companies Calcutta, that the certified copy of the Court's order in cases Nos. C/380 and C/381 of 1965 (Exhibit 1) was produced duly proving that the present accused-appellants were convicted and sentenced previously on 29-4-65 of the relative offence charged and that directions were passed on them under Section 614A (1) of the Companies Act, 1956. Although the same was to be complied with within six months, that is by 28-10-65, it was not so done even on 26-9-66 and that in spite of the notices sent by registered post to the accused-appellants on 14-5-66 (Exhibit 2) and duly acknowledged by them (Exhibit 3 collectively). The accused even did not reply to the same. These facts go unchallenged and there is even no cross-examination on the point. The failure to comply with the mandatory provisions of Section 614A (1) of the Companies Act, 1956 is thus established clearly and conclusively and the contention advanced by Mrs. Nag in this behalf accordingly fails.

6. The second contention put forward by Mrs. Nag that even if there was such a contravention the same was due to the Managing Director who was responsible for the returns and the compliance and not the other Directors, who having not knowingly non-complied, have no mens rea and as such are not "officers in default", appears also to be a belated one and not ultimately borne out by the evidence on record. There is neither any line of cross-examination on this point when P. W. 1 was examined nor any averment thereof in the evidence of the only defence witness examined in this case. There is even no statement to that effect in the examination of the accused persons under Sections 242 and 342 of the Code of Criminal Procedure. The said contention is also not sustainable in law. There cannot be any such unqualified proposition as propounded by Mrs. Nag in her present submission. The offences laid down under the Companies Act are of two kinds. The first group consists of

offences under Sections 162, 168, 210, 220 (3) and such similar sections where the language used by the legislature is either "officer who is in default" or a person who "fails to take all reasonable steps". In the second group falls an offence under Section 614A (2) of the said Act where the language used is "fails to comply". The concept of mens rea or a blameworthy mind, as contended by Mrs. Nag, is not applicable to the second group of offence, as catalogued above.

7. As regards the first group of offences as mentioned above, Section 5 of the Companies Act, 1956 defines an "officer who is in default" and lays down inter alia that the said expression means any officer of the company who is knowingly guilty of the default, non-compliance etc., or who knowingly and wilfully permits such default, non-compliance etc. Even in such cases the directors have got duties imposed upon them by law which cannot be observed in their breach and it is not the duty of the Managing Director alone, even if any, to comply with the requirements of the statute. A reference in this context may be made to some cases laying down the principles governing the point at issue. In the case of Bhagirath Chandra Das v. Emperor, a case under the Companies Act, 1913, reported in AIR 1948 Cal 42. Mr. Justice Lodge observed at p. 43 that

"It is clearly the duty of all the Directors to see that the particular returns, the list and summary under Section 32 and the copies of the balance sheet and profit and loss account are submitted under Section 134. If Directors who are responsible for the management of a Company and who presumably know the duty imposed upon them by law, make no attempt to see that those duties are carried out, there is justification for holding, in my opinion, that they have wilfully and knowingly permitted the Company to fail to carry out those duties. The suggestion that these various Directors were mere figure-heads not taking any active part in the control of the Company, is in my opinion not worthy of serious consideration." In the case of In Re Arcot Citizen Bank Ltd, Arcot by A. E. Chandrasekhara Nayagar, Arcot, reported in AIR 1957 Mad 675, Mr. Justice Remaswami approved of the view expressed in the case reported in AIR 1948 Cal 42 and observed at p. 678 that

"We find that the prosecution has brought home to these revision petitioners by circumstantial evidence knowing and wilful non-compliance. The revision petitioners knew what they had to do and deliberately refrained from complying with those obligations and that too in spite of repeated reminders from the

Registrar on pretexts which cannot bear scrutiny".

A reference in this context may also be made to the case of Dulal Chandra Bhar v. State of West Bengal, reported in 66 Cal WN 852=(1963 (1) Cri LJ 521) wherein Justice Amarend Roy referred to and agreed with the decision by Mr. Justice R. C. Mitter in the case of Ballav Dass v. Mohanlal Sadhu, reported in 39 Cal WN 1152 and ultimately held that

"Offences under Sections 162, 168 and 200 of the Companies Act may be committed not only when the particular officer knowingly and wilfully authorised or permitted the defaults in question but the offence is also complete if the said officer knew of the said defaults and permitted the defaults to take place by not taking any step to have the requirements under the Companies Act complied with". In a more recent decision viz., in the case of State of Bombay (now Maharashtra) v. Bandhanram Bhandari, reported in AIR 1961 SC 186 the Supreme Court held that a person charged with an offence could not rely on his own default as an answer to the charge. In the case under consideration the accused-appellants had voluntarily handed over the relevant books of account and other papers of the company to the Income-tax Authorities on 22-6-65 about 2 months after the order of their conviction in the original trial without complying with the directions as given therein under Section 614-A (1) of the Companies Act, 1956 in spite of the sufficient time they had at their disposal and now they cannot take advantage of the said delay and default. In the case of Madan Gopal Dey v. State, reported in 72 Cal WN 312=(AIR 1968 Cal 79), Mr. Justice T. P. Mukherji has held that

"any Director of the Company who is knowingly guilty of the default, or who knowingly or wilfully authorises or permits such defaults is an officer who is in default under Section 2 (3) of the Companies Act, 1956. The offence is complete if the officer of the company knew of the defaults and permitted the same".

I agree with the said observations made in the abovementioned cases. Mrs. Nag's further contention in this context that the non-compliance on the part of the accused-appellants is in fact due to inadvertence and as such there is really no mens rea on their part, is not also tenable in law. As has been observed by Mr. Justice Ramaswami in the case of In Re: Arcot Citizen Bank Ltd. Arcot by A. E. Chandrasekhara Nayagar, Arcot, AIR 1957 Mad 673 that

"It is possible to argue that although inadvertence involves the negative form of absence of realisation or foresight of consequences, it too can justifiably be termed a state of mind and therefore as

forming in certain conditions part of the doctrine of mens rea".

A reference in this context may also be made to the Monograph on Mens Rea in Statutory Offences (English Studies In Criminal Science Series, Vol. 8, page 205 and Foll.) wherein Prof. Edwards has pointed out a wide range of judicial dicta wherein the view is expressed that "if a statutory offence is based upon proof of knowledge, such crimes can be committed negligently". I entirely agree with Prof. Edwards' conclusion at page 206 of that Monograph that so far as this particular field of criminal liability is concerned, "negligence or blameful inadvertence or failure to supervise may properly be designated as mens rea."

8. As regards the second group of offence, which is the subject-matter of the instant case, the position is entirely different from that in the case of the first group of offences considered above. The language used by the legislature in Section 614-A (2) is quite significant. It lays down that "any officer or other employee of the company who fails to comply with an order of the Court under sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or with fine or with both." It is to be observed that the language used in Section 614-A (2) is "fails to comply" and not "every officer of the company who is in default". Section 614-A of the Companies Act, 1956, has been introduced by the Companies Amendment Act LXV of 1960 because Section 614 of the said Act neither provides for any punishment for disobedience of the Court's order nor contains any provision for compelling the performance of the duty of filing the returns, accounts or other documents even where a prosecution results in a penalty for breach of statutory duties. It is in this context that the provisions of the said section should be approached and enforced. The offence under Section 614-A (2) of the Act is really a statutory offence requiring no mens rea. The offence is established ipso facto on proof of contravention as in the case of the company in offences under Sections 162 (1), 168, 220 (3) etc., of the Act. The remedy available in a bona fide case is to take proper steps in time by applying to the Court for extension of the time mentioning the genuine difficulties. No such steps having been taken, I hold that the accused-appellants have not complied with the mandatory provisions of Section 614-A (2) of the Companies Act, 1956. The second contention of Mrs. Nag accordingly fails.

9. The third and the last submission of Mrs. Nag that the purported default in complying with the direction under Section 614-A (1) of the Companies Act,

1956, is through no fault of the accused-appellants but bona fide due to circumstances beyond their control, is also untenable upon ultimate analysis. It is neither borne out by the evidence on record nor even sustainable in law. The accused-appellants were convicted and sentenced on 29-4-65 in the two earlier cases for not complying with the relevant provisions of the Companies Act by 31-12-63. The direction under Section 614-A (1) of the Companies Act given by the trying Magistrate on 29-4-65 was to make the compliance within six months or by 28-10-65. All the books of account and relevant papers were with the accused-appellants but nothing was done. Ultimately on 14-5-65 registered notices (Exhibit 2) were sent to the accused-appellants for submission of the returns as called upon by the Court and the same were acknowledged by them only (Exhibit 3 collectively) but the accused-appellants had neither any time to comply with the requirements nor even to reply to the notices. Ultimately on 22-6-65, as is borne out by the relevant receipt (Exhibit B), certain files of the company which did not include the Rokar Khata for the year 1963 and the account books, were handed over to the Income-tax Department voluntarily. D. W. 1, Sunil Kumar Mazumdar, an Inspector of the Income-tax Department attached to Special Investigation Branch, proved the receipt dated 22-6-65 (Exhibit B) granted by Mr. Ramaswami, Income-tax Officer to the Khaitan Finance Corporation. In cross-examination the said witness significantly stated that "the accused are allowed to take notes from the A/C books lying with the Income-tax Department after due application". It would therefore appear from the evidence on record that the relevant account-books required for the compilation of the company's annual return and the balance-sheet for the year ending 31-12-63 were in the possession of the company and as a matter of fact all the documents were with the accused at least until 22-6-65 and it is futile to argue on the basis of Ext. B that the said annual return or balance-sheet could not be submitted to the Registrar of Companies, West Bengal for any purported non-availability thereof. It will be found, moreover, that the accused-appellants were sitting on the fence until 22-6-65 which is about two months from the date of the order of conviction and the direction under Section 614-A(1) of the Companies Act, 1956. If really they had the intention to comply with the same and were reasonably diligent, the said compliance could have been made duly by that time. Exhibit B does not prove again that the files and vouchers as mentioned therein were seized by the income-tax department as alleged or at all

but merely proves that the accused-appellant No. 1, Sri Gopal Khaitan himself made over the documents to the income-tax officer on 22-6-65. No requisition or ultimatum by the income-tax department has been proved and even if there was any, the accused-appellants could have asked for an extension of the time because of the relevant order passed by the Chief Presidency Magistrate, Calcutta on 29-4-65. It is also significant to note that even after the delivery of the documents to the income-tax department, the accused persons could have applied to the department for a temporary return or for permission to take inspection of the documents and files handed over, if at all those were relevant for the purpose of compilation of the annual return and the balance-sheet. The evidence on record rules out any such attempt on the part of the accused-appellants for complying with the directions given by the court. It therefore appears that this is a belated attempt on the part of the accused-appellants to make out a case of a bona fide inability to comply with the directions due to circumstances beyond their control.

10. In law again this proposition is not tenable. In the case of Ramkrishna Dalmia v. Registrar, Joint Stock Co., Delhi, reported in (1962) 32 Com Cas 341 (Punj) Chief Justice G. D. Khosla and Mr. Justice Shamsher Bahadur have held that the primary responsibility to prepare the balancesheet as also the profit and loss account is on the directors and not the auditors. The plea that was raised in that case was that the account books of the company having been seized by the special police establishment under a Magistrate's warrant, and being in the custody of a Commission of Enquiry, the accused therein were prevented by reasons beyond their control to prepare the balancesheet and the profit and loss account as required by law. In that case the accused had approached the special police establishment as also the Commission of Enquiry that the books may be made accessible to their auditors, which fact however is completely non est in the instant case. The auditors having written back that they are unable to prepare the balance-sheet and the profit and loss account for reasons mentioned therein, the accused in R. K. Dalmia's case could not comply with the statutory requirements. Their Lordships held at page 343 that

"It seems to us that the petitioners had ample time for preparation of balance-sheet and profit and loss account which primarily is the concern of the company and not the auditors As stated in Section 215 of the Companies Act every balancesheet and profit and loss account has to be authenticated by the directors. It follows that it is the primary responsibility of the directors to have these do-

cuments preparedThere is no conceivable reason why the balancesheet and profit and loss account could not be prepared without assistance of the books which are with the Commission of Enquiry".

I respectfully agree with the said observations and hold that the conduct of the accused-appellants in this case is still worse. They did not even apply to the income-tax department for making an inspection and did not even inform the Registrar of Companies, West Bengal about their purported difficulty in this respect. This submission therefore is quite unfounded. A reference in this context may also be made to an unreported decision D/-25-9-1965 by Mr. Justice T. P. Mukherji in Criminal Revision Cases Nos. 305-322 of 1965 (Cal), Great India Steam Navigation Co. Ltd. v. Assistant Registrar of Companies, West Bengal, wherein it has been held that

"regarding the directors it would appear from the evidence as well as from the judgment of the learned magistrate that ample opportunities were given to the officers of the company in the matter of inspection and examination of books of accounts and other papers that had been seized by the police and that as a matter of fact those books and papers were examined and inspected on several occasions by the officers of the company. If in spite of that it is urged that it was physically impossible for the balance-sheet and the profit and loss account to be prepared, the authority of the Dalmia case is there for the purpose of negativing that contention." I agree with the said observations and hold that in this case also the said argument is not sustainable in law. The third and last submission also of Mrs. Nag therefore fails.

11. There appears to be some misapprehension as to the object underlying the provisions of the Companies Act. The definite duties imposed on all "officers" as defined in the Act, are not without their purpose. The Act has been enacted to prevent, amongst others, the snowballing of finance as also the formation of bubbles and the consequent effect thereof upon the economy of a Welfare State. The provisions of the Act are indeed like sentinels on duty at the threshold or graver offences under other Acts and the continued defaults and non-disclosures under the Act are, in many cases, but attempts to draw a red-herring across the trail for preventing the detection of more serious offences. As has been observed by Mr. Justice Lodge in the case of AIR 1948 Cal 42 at p. 45 that "These provisions of the Companies Act have been deliberately enacted to protect shareholders and, in some cases, to protect the general public and then impose a definite duty upon directors."

A reference in this connection may be made to what is known as the "Organic Theory", a theory which treats certain official as the organ of the company, for whose action the company is to be liable just as a natural person is for the action of his limbs. The theory mainly sprang from the well-known judgment of Lord Haldane in Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., reported in 1915 AC 705, H. L. The Lord Chancellor in delivering the judgment of the House said at pp. 713-714 that

"a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation".

This new conception of an organic relationship between the company and its managers was adopted in a number of cases and as L. C. B. Gower observed in his "Modern Company Law" (2nd Edn.) at p. 136 that

"the negligence of the company's governing body, directors, managing directors, or general manager was said to be the negligence of the company itself." Lord Justice Greer observed in the case of Fanton v. Denville, reported in (1932) 2 KB 309 at p. 329 that

"It has, of course, to be remembered that in actions against companies a general manager of the business is deemed to be the alter ego of the company, and it would be responsible for his personal negligence".

It is therefore incumbent in the interest of the public that the provisions of the Companies Act relating to the directors should be strictly enforced and not observed in their breach. Mrs. Nag's arguments really overlook the duties imposed on the directors under the Companies Act and their liabilities thereunder.

12. In the facts and circumstances of the case and the evidence on record, I hold that the Ingredients of an offence under Section 614-A (2) of the Companies Act, 1956 have been fully established against the accused-appellants and accordingly the order of their conviction must be upheld. But in view of the facts and circumstances of the case and the nature of the offence, the quantum of sentence, in any event, appears to be severe. The learned Advocates appearing on behalf of the respondents have in their fairness left the matter of sentence entirely to the Court. Law is good but justice is better and it is expedient in the interests of justice that the sentence as passed in this case should reasonably be reduced, in the exigencies of the case.

13. In the result, I uphold the order of conviction dated the 23rd November, 1966, passed by Sri A. Sen Gupta, Presidency Magistrate, 5th Court, Calcutta, in Case No. C/1452 of 1966, on the three accused appellants under Section 614-A (2) of the Companies Act, 1956; but I reduce the sentence of fine as passed thereunder to a fine of Rs. 100/- each, in default to suffer simple imprisonment for two weeks each; and I further direct under Section 626 of the said Act that one-third of the fine if realised, shall be applied towards the payment of the costs of the proceedings.

13. The Appeal is disposed of accordingly.

JHS/D.V.C.

Sentence reduced.

AIR 1969 CALCUTTA 139 (V 56 C 23)

P. B. MUKHARJI AND K. L. ROY, JJ.

Mrs. Shamsun Nehar Mansur, Applicant v. The Commissioner of Estate Duty, W. B. I., Respondent.

Matter No. 19 of 1965, D/- 3-4-1968.

(A) Estate Duty Act (1953), Ss. 6, 10 and 2 (15) — "Property passing or deemed to pass on his death" — Wife of X purchasing house in her own name and with her own funds under a registered sale-deed executed by owner 12 years before her husband's death — Title deed cannot be called *benami* — Wife living in house along with husband since date of purchase — No legal evidence to show that purchase money was advanced by husband or that he used house as his own dwelling house — House held could not pass or be deemed to pass on husband's death so as to be included in estate of deceased for purposes of estate duty.

Certain house property was purchased by the wife of X in her own name twelve years before X's death under a registered sale-deed executed in her favour by one H, the owner of the property. The deed recited that the whole of the consideration money was paid 'with her own money and for her own benefit and enjoyment' and her husband X had absolutely no connection with the transaction. Since the date of the purchase the wife had been living with her husband in the house. Consequent on the death of the husband the question arose whether the value of the house could be included in the principal value of the estate of the deceased "as property passing or deemed to pass on his death" for purposes of estate duty. There was no legal evidence before the taxing authorities that the money required for the purchase of the house was advanced by the husband or

that since the purchase he used the house as his own dwelling house.

Held (i) that on the facts and circumstances of the case the value of the house could not be included in the principal value of the estate of the deceased as property passing or deemed to pass on his death under the provisions of Ss. 2 (15), 6 and 10 of the Estate Duty Act.

(ii) that the sale deed being in the name of the wife and there being no legal evidence to show that purchase money was provided by the husband the title deed could not be called *benami*. The husband had no disposing power over the property at the time of his death and, therefore, the property could not be deemed to pass on his death within meaning of S. 6. (1964) 51 ITR (ED) 1 (Andh Pra), Rel. on. (Paras 5, 7, 11)

(iii) that even assuming that there was a gift by the husband of the money with which the wife purchased the property and that S. 10 was applicable, the facts were such that they did not permit the inclusion of this house in the estate of the deceased. AIR 1967 SC 849 and (1911) 2 KB 688 and 1958 AC 435=37 ITR 89, Discussed and Distinguished. 1952 AC 15, Ref. to. (Para 31)

(B) Estate Duty Act (1953), S. 10 — Scope and interpretation — Property taken under gift — When deemed to pass on donor's death — Conditions for — Possession and enjoyment of property by donor should be in proprietary right and not in virtue of marital rights.

What will be deemed to pass under S. 10 would be (1) property whose bona fide possession and enjoyment were not immediately assumed by the donee, and (2) whose retention thenceforward was not to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The language and the words of Sec. 10 indicate that it is the possession and enjoyment of the property which are the target. If they are not immediately assumed by the donee and if the donor is not entirely excluded from them, it is then that the property will be deemed to pass, on the death of the donor within the meaning of S. 10. (Para 18)

When a husband makes a gift of a house to his wife and goes to his wife for coverture or consortium, he does not go to the property but goes to the wife. In such a case the husband's going to the house is not making use of or enjoying the property in question. The exclusion under S. 10 has to be exclusion from the proprietary right in respect of use and enjoyment and retention of the gifted house and not exclusion from the marital rights between husband and wife. Principles laid down by Supreme Court in De Costa's Case, AIR 1967 SC 849, Reiterated and Applied. (Paras 15, 17, 18 and 25)

(C) Estate Duty Act (1953), S. 2 (15)
— Property of deceased — 'Converted from one species into another by any method' — Meaning of — 'Conversion contemplated by section indicated.'

The conversion intended under S. 2(15) is conversion by the donor or the deceased himself during his lifetime or by such well-known processes as by the Courts during the process of administration by executors or administrators or otherwise. But if before the conversion takes place a gift had already been made, then the donee's utilisation of the gift to transform it to some other property will not come within the definition of S 2(15). It is possible to contemplate a kind of conversion in the case of a gift where the donor hands over a specific sum of money with a specific direction and obligation that the donee must buy a house in which case the conversion really is being made by the donor or the deceased although through the agency of the donee. But where such is not the case there cannot be any conversion. (Para 21)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 849 (V 54)=
(1967) 63 ITR 497, George De
Costa v. Controller of Estate Duty,
Mysore 14, 26, 29
(1964) 51 ITR (ED) 1 =ILR (1965)
Andhra Pra 1, Shantabai Jadhav v.
Controller of Estate Duty 11
(1958) 1958 AC 435=(1959) 37 ITR
89, Chick v. Commr. Stamp
Duties, New South Wales 22, 23
(1952) 1952 AC 15=1951-2 All ER
473, St. Aubyn v. Attorney General 25
(1911) 1911-2 KB 688=80 LJKB
913, Attorney General v. Seccombe
22, 27, 28, 29

J. C. Pal with A. K. Motilal, for Applicant; B. L. Pal with D. Gupta, for Respondent.

P. B. MUKHARJI, J.:— This is a problem in Estate Duty, under the Estates Duty Act. The reference is made under Section 64 (1) of the Estate Duty Act by the Central Board of Direct Taxes and raises the following question to be answered by the Court:—

"Whether on the facts and in the circumstances of the case, the value of the house property No. 33 Apcar Garden, was correctly included in the principal value of the estate of the deceased, as property passing or deemed to pass on his death?"

2. The property is a house property No. 33 Apcar Garden, Asansol. The title deed of this property, a copy of which has been produced by the Revenue Authorities and which is directed to be kept as part of the records of this proceeding, is an Indenture of Conveyance dated the 21st February, 1947. At the outset it must be said, this is not at all

or by any means or by the remotest suggestion a Deed of Gift by the husband to the wife. This is a document of sale where the vendor Henry Ernest Cecil Grant of Asansol was selling this property to Begum Shamsun Nehar Mansur. This Deed of sale recites the consideration to be Rs. 20,000/- It also states clearly that the whole of this money or consideration of Rs. 20,000/- was paid "with her own money and for her own benefit and enjoyment." The husband Abul Mansur had nothing to do with this document, either its purchase or its execution or as an attesting witness or even as any confirming or other party to this deed.

3. The whole question or controversy in this case is, did this property form part of the estate of the deceased Abul Mansur, the husband of the wife. Abul Mansur, the husband died on the 11th April, 1959, that is a period of twelve years after this conveyance.

4. The accountable person in these proceedings was this wife Mrs. Shamsun Nehar Mansur, widow of Abul Mansur.

5. Looking at this Deed of conveyance the only material document for this purpose, one should have thought that the simple answer to the question asked would be in the negative because such a property could not be regarded as property passing or deemed to pass on the death of Abul Mansur on a plain reference to Section 6 of the Estate Duty Act which provides, "property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death". Obviously the property under this Deed of sale by Henry Ernest Cecil Grant to Mrs. Shamsun Nehar could not pass on the death of Abul Mansur because he could not dispose of this property as such, the registered title deed being in favour of Mrs. Shamsun Nehar.

6. But this simple question has been beset with many circumstances of difficulty, both factual and legal in this case. We therefore will have to consider these problems. The Assistant Controller of Estate Duty makes the following observations in his assessment order dated the 7th March, 1960:—

"The title deed of the property was produced. It is seen that the property was purchased on 21-2-47 for Rs. 20,000/- in the name of the deceased's wife. On enquiry, it is found that the property was used as his dwelling house by the deceased till the date of death. I am, therefore, unable to accept the accountable person's contention that the deceased had no beneficial interest in the property. It is also not denied that the deceased provided the purchase consideration. Thus, it is clear that the deceased was the real owner and the only convey-

ance was taken in the name of his wife. Even though it is assumed that the deceased made a gift of purchase consideration, it is evident that he was not entirely excluded from bona fide possession and enjoyment of the property or benefit therefrom. Hence, I include this property within the estate of the deceased."

7. Two points are clear from this order. One is that the title deed did not show that the purchase was "in the name of the deceased's wife". The title deed does not show that it was a name lending transaction at all. It is, therefore, not appropriate to consider the Title deed and say that it was in the name of the wife in the sense that it was a Benami. There is no such evidence to prove Benami. The second point about this order is that some kind of enquiry was supposed to have revealed that the property was used as the dwelling house of the deceased on the date of his death. There is really no legal evidence to support this. There is no evidence to show that this property was used as "his" dwelling house. There is no beneficial interest in the title deed itself. The husband had no interest, direct or indirect, of any kind so far as the deed of conveyance is concerned. It reserved no "benefit" "by contract or otherwise" within the meaning of Section 10 of the Estate Duty Act.

8. The Board perhaps realised the unsatisfactory position regarding these facts. The present appellant who appealed to the Board on this point did not succeed. By its order dated November 26, 1960, the Board decided as follows:—

"The only contention is against the inclusion and valuation of house property No. 33 Apcar Garden, Asansol valued at Rs. 40,000/- by the Assistant Controller. This property was purchased on 21-2-47 for Rs. 20,000/- in the name of the deceased's wife with funds provided by the deceased. The deceased was living in this property all the time since its purchase till the date of death. Even if the property was not Benami purchase of the deceased and belonged to the wife as a result of the gift by the deceased, Section 10 would be applicable inasmuch as the donor was not entirely excluded from possession and enjoyment of the property till the date of the death. Whether or not he had a legal right to residence is immaterial. As such, the Assistant Controller was correct in including the value of the property in the estate of the deceased."

9. Now, here again, there are certain features of the Appellate Order which require careful consideration. The alleged fact that the wife purchased this property with the funds provided by the

husband appears to have been almost assumed without any legal evidence or legal materials to support it. The title deed or the deed of conveyance does not say that the husband advanced this money through the wife to purchase this property. This must be clearly understood. In fact, the deed, already quoted, expressly used the words "with her own money and for her own benefit and enjoyment."

10. Reference in this connection was made by Mr. Balai Pal, learned Counsel for the Revenue, to the correspondence that passed between the Appellant's lawyer Mr. S. D. Ghosh and the Taxing Authorities. Two such letters, one dated February 22, 1960, and the other dated March 7, 1960, were referred to. They are printed in the Paper Book. We do not find that the learned Advocate Mr. Ghosh, for the Appellant, in these two letters anywhere conceded the fact that the money for purchasing this property was provided by the husband for the wife. Incidentally, it should be mentioned here that in the wealth tax proceedings and the order made therein, it appears that this property was excluded from computation of the net wealth of the deceased in the Wealth Tax assessment. No doubt that was largely on the ground that this document was executed prior to April 1, 1956 and it was only on that ground of date that the exclusion was allowed from the Wealth Tax assessment of the husband. It will thus appear that neither the two letters of Mr. S. D. Ghosh, learned Advocate for the Appellant, before the Taxing Authorities nor the Wealth Tax proceedings nor the document of title of the conveyance shows that this property was purchased by the wife with the money provided by her husband.

11. It is, therefore, difficult to see what legal evidence or what legal material there is to support such a statement unless, of course, it is said that in the grounds of appeal before the Taxing Authorities, this point was not challenged and the Statement of the case does not indicate it. But that does not prove a fact of such crucial nature in a proceeding for which this fact is so material. To hold a document really to be a Benami, for that is the purpose of this contention that the money was provided by the husband, legal evidence is required. It was pointed out by the Andhra Pradesh High Court in Smt. Santa Bai Jadhav v. Controller of Estate Duty, (1964) 51 ITR (E.D.) 1 (Andh Pra) at p. 3 that

"even if the purchase money had come from the husband, it did not follow that the beneficial interest vested in the deceased; at any rate, so long as the title deed stood in the name of the wife, it

was not competent for the deceased to dispose of the property and under Section 6 of the Estate Duty Act such property could not therefore be deemed to pass on his death, and Estate duty was not leviable on the value of such property."

12. Because the Board in its Appellate Order was not sure of the fact that the husband provided the funds to the wife to purchase the property, that is perhaps the reason why the Appellate Order went on to consider the case under Section 10 of the Estate Duty Act after observing that "even if the property was not Benami purchase of the deceased and belonged to the wife as a result of the gift by the deceased."

13. We, therefore, hold that there is no legal evidence or legal material to support the statement in the order, either of the Board or of the Assistant Controller, that the money was provided by the husband to the wife to purchase the property in this case.

14. The next question is what was the character and nature of the alleged use by the husband of this property. Apparently, the Board is in conflict with the Assistant Controller on this point. The Assistant Controller appeared to think that the husband used this property as "his" dwelling house. The Board did not say so or hold so. The Board says that the deceased was living in this property all the time since its purchase. The question then is: what is the legal character and incident when the husband goes to the wife who lives in the property of which the husband has made a gift to her. In plain language does the husband's going to his wife, mean his going to the property or making or using or enjoying the property? The question sounds odd but that in substance is the effect of the argument advanced by Mr. B. Pal on behalf of the Revenue on the strength of the leading decision of the Supreme Court in George Da Costa v. Controller of Estate Duty, Mysore, (1967) 63 ITR 497=(AIR 1967 SC 849).

15. It will be necessary to analyse in detail the principles laid down by the Supreme Court in that case in the light of the facts which were presented before the Supreme Court. The Supreme Court decides that the crux of Section 10 of the Estate Duty Act lies in two parts, namely, (1) the donee must bona fide have assumed possession and enjoyment of the property which is the subject-matter of the gift to the exclusion of the donor immediately upon the gift, and (2) the donee must have retained such possession and enjoyment of the property to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Both these conditions are cumulative. Unless each of these conditions is satisfied the property would be liable to Estate Duty under Section 10 of the Act. See the observations of Ramaswami, J., who delivered the judgment of the Supreme Court at page 501 of that report (ITR)=(at p. 851 of AIR). The Supreme Court further lays down the principle of construction of Section 10 of the Estate Duty Act by observing that the second part of Section 10 has two limbs. The deceased must be entirely excluded (1) from the property, and (2) from any benefit by contract or otherwise. The words "by contract or otherwise" in the second limb of the section will not control the words "to the exclusion of the donor" in the first limb. The first limb may be infringed if the donor occupies or enjoys the property or income even though he has no right to do so which he could legally enforce against the donee. In other words, in order to attract the section it is not necessary that the possession and enjoyment of the gift must be referable to some contractual or other enjoyment enforceable in law or in equity. Even if the donor is content to rely upon the mere filial affection of his sons with a view to enable him to continue to reside in the house which he has given to them, it cannot be said that he was "entirely excluded from possession and enjoyment" within the meaning of the first limb of the section and therefore the property will be deemed to have passed on the death of the donor and will be subject to levy of Estate Duty. The Supreme Court construed the word "otherwise" ejusdem generis and held that it must be interpreted to mean some kind of legal obligation or some transaction enforceable at law or in equity which though not in the form of a contract may confer a benefit on the donor. See the observations of Ramaswami, J., at pages 501-503 (of ITR)=(at pp. 851-852 of AIR).

16. Apart from these principles of construction of Section 10 of the Estate Duty Act are binding, the facts on which this construction was rendered would be relevant for our present purposes. There the property was purchased by the father in the joint names of himself and his wife and the parents made a gift of the house to their two sons. The document recited that the donees had accepted the gift and had been put in possession. But the parents continued to be in possession of the house though the municipal tax was paid thereafter in the names of the sons. The deceased died more than four years after the gift.

17. The distinguishing features of the Supreme Court decision in (1967) 63 ITR 497=(AIR 1967 SC 849) from the present reference before us can be stated out-

right and broadly. The Supreme Court case was a father and son case and not a husband and wife case. Filial love may not make joint residence between the parents and the children in the house essential or necessary. Marital love might make that not only essential and fundamental but sensible, reasonable and practical. No construction should be put on the Estate Duty Act so as to be against the public policy to the extent that whenever a husband makes a gift of a property to his wife he should lose both the property and the wife. In such circumstances the fundamental point for consideration is that a husband's going to the wife for consortium or coverture is not a proprietary right in respect of the house gifted.

18. It will be appropriate here to keep the actual language of the statute in front of us. The language of Section 10 of the Estate Duty Act is in these words:—

"Property taken under any gift, whenever made, shall be deemed to pass on the donor's death, to the extent that bona fide possession and enjoyment of it was not immediately assumed by the donee and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

It is followed by a proviso with which we are not concerned. A plain look at the section indicates that what will be deemed to pass would be (1) property whose bona fide possession and enjoyment were not immediately assumed by the donee, and (2) whose retention thenceforward was not to the entire exclusion of the donor or of any benefit to him by contract or otherwise. We shall avoid using the word "limb" in case it creates any confusion. That is the main structure of this section. The idea is plain. First, the bona fide possession and enjoyment must be immediately assumed by the donee, the second is that the retention of the possession and enjoyment of the property must be to the entire exclusion of the donor or of any benefit to him by contract or otherwise. But the significant point for decision in the present reference before us is, does this involve or affect the marital right of a husband for coverture and consortium with the wife only on the ground that the husband had made a gift to his wife of a house where she lives? The plain contention of the Counsel for the Revenue is that once a husband has made a gift of a house to his wife he cannot go to that house any more for any purpose. We feel it a little difficult to accept such an unqualified submission. The language and the words of Section 10 of the Estate Duty Act quoted above indicate that it is the possession and en-

joyment of the property which are the target. If they are not immediately assumed by the donee and if the donor is not entirely excluded from them, it is then that the property will be deemed to pass on the death of the donor within the meaning of Section 10 of the Estate Duty Act. But then it is the proprietary right. We have already stated as a fact in this case that the title deed or the Deed of conveyance reserves no right for the husband and not even mentions his name. There is in fact no contractual or other right in law or in equity in respect of the property, or its use and enjoyment in favour of the husband. When a husband goes to his wife for coverture or consortium, he does not go to the property but goes to the wife. In such a case the husband's going to the house is not making use of or enjoying the property in question. It is this proprietary element in respect of the house gifted which must be emphasised and borne in mind in applying the principles laid down by the Supreme Court in Da Costa's case. These considerations are more vitally germane to the case of a husband and wife than normally to a case of parents and their sons.

19. The second significant fact in the Supreme Court was that there the father purchased the house with his own money and then both the parents made a gift of the house to their two sons. Such is not the fact in the present reference before us. It is not a fact established in this reference that the husband in this case advanced any money to the wife for purchase of this property. In any case it is not a fact and it is not the present case that the husband made a gift of this house itself to the wife. If anything was at all of a gift, the best that could be said was that the money or the sum of Rs. 20,000/- was gifted by the husband to the wife, a fact which was attempted to be proved by the Revenue but which, as we have shown, has not been established by any legal evidence or legal material.

20. This leads to a major difference between the Supreme Court decision in George Da Costa's case and the present reference. The gift in the Supreme Court case was a gift of the house itself. The gift in the present case is not of the house. Mr. Balai Pal for the Revenue realized this difficulty and therefore he tried to meet this objection by drawing our attention to Section 2 (15) of the Estate Duty Act which provides:—

"Unless the context otherwise requires, property includes any interest in property, moveable or immoveable, the proceeds of sale thereof and any money or investment for the time being represent-

ing the proceeds of sale and also includes any property converted from one species into another by any method." The foundation of this argument is that the money was the husband's and the husband's money has been converted into this house. This argument really is no longer available to Mr. Pal for the Revenue on the ground that we have held that there is no legal evidence or material to support that the husband advanced his money. But even assuming that it is so, Mr. Pal for the Revenue contends that this means that the property could be converted from one species into another even by the donee after the gift is made.

21. We are unable to accept this interpretation without any qualification. What is being defined in Section 2 (15) of the Estate Duty Act is the property of the deceased. Change of title or ownership cannot be covered by this extended meaning of conversion in Section 2 (15) of the Estate Duty Act. The conversion intended under Section 2 (15) of the Act is conversion by the donor or the deceased himself during his lifetime or by such well known processes as by the Courts during the process of administration by executors or administrators or otherwise. But if before the conversion takes place a gift had already been made, then the donee's utilisation of the gift to transform it to some other property will not come within the definition of Section 2 (15) of the Estate Duty Act. It is possible to contemplate a kind of conversion in the case of a gift where the donor hands over a specific sum of money with a specific direction and obligation that the donee must buy a house in which case the conversion really is being made by the donor or the deceased although through the agency of the donee. But such is not the case and such is not the conversion in the facts of this reference.

22. The next part of the Supreme Court decision in George Da Costa's case to which attention has to be drawn is where it dealt with the case of Attorney General v. Seccombe, (1911) 2 KB 688 and Chick v. Commr., Stamp Duties, New South Wales, 1958 AC 435, a decision of the Privy Council. The Supreme Court observed at page 502 of the report (ITR)=(at p. 851 of AIR) already quoted that the view taken by Hamilton, J., in (1911) 2 KB 688 was not consistent with the opinion of the Judicial Committee in 1958 AC 435. It will be therefore essential to have a look at these two decisions.

23. We can take up the Privy Council decision in 1958 AC 435 also reported in (1959) 37 ITR 89. The statute which fell to be construed by the Privy Council

was Section 102 of the New South Wales Stamp Duties Act, 1920 — 56 which was in these terms:—

"For the purposes of the assessment and payment of death duty the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

(2) (d): Any property comprised in any gift made by the deceased at any time of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased."

What happened in that case was that a father transferred by way of gift to one of his sons a pastoral property, the gift being made without reservation or qualification or condition. Within 17 months after the gift, the father, the donee son and another son entered into an agreement to carry in partnership the business of graziers and stock dealers. This agreement provided, inter alia, that the father should be the manager of the business and that his decision should be final and conclusive in connection with all matters relating to his conduct, that the capital of the business should consist of the livestock and plant then owned by the respective partners, that the business should be conducted with the respective holdings of the partners and such holdings should be used for the purposes of partnership only, that all lands held by any of the partners on the date of the agreement should remain the sole property of such partners and not on any consideration be taken into account as or deemed to be an asset of the partnership and any such partner should have the sole and free right to deal with it as he might think fit.

24. Now each of the three partners owned a property, that of the donee son being that property which had been given to him by his father and each partner brought into the partnership livestock and plant and their three properties were thenceforth used for depasturing of the partnership stock. This continued till the death of the father. It was held by the Privy Council that on those facts the value of the property given to the son was to be included in computing the value of the father's estate for the purposes of Death Duty on the strength of the section quoted above. While it was not disputed that the son had assumed bona fide possession and enjoyment of the property immediately upon the gift to the entire exclusion of the father, yet he had not on the facts thenceforth retained it to the father's entire exclusion, for under the partnership agreement, and whatever

force and effect might be given to that part of it which gave a partner the sole and free right to deal with his own property, the partners and each one of them were in possession and enjoyment of the property so long as the partnership subsisted. The Privy Council observed that where the question whether the donor had been entirely excluded from the subject-matter of the gift, that was the single fact to be determined and if he had not been so excluded, the eye need look no further to see whether his non-exclusion has been advantageous or otherwise to the donee. Mr. Balai Pal for the Revenue has been anxious to remind us and he himself has tried in his own way to shade our eyes as completely as possible so that our eyes did not look beyond and observed the limits enjoined by the Privy Council. Here, however, there was no question of the non-exclusion being advantageous or otherwise to the donee in the present case before us.

25. The Privy Council facts were so entirely different. The father who made a gift of his house to his son came in again to the use and enjoyment of this very property itself by way of a partnership agreement. There could be no further difficulty at all on the section itself. Obviously this could not bring the father within the entire exclusion clause mentioned in the section of the statute. Here we are not concerned in this reference whether the donor is coming back to the use and enjoyment of the property by means of a partnership arrangement under the Partnership Act. Here is a case of marital relationship between husband and wife, who no doubt can be called loosely partners but it is their partnership in life and not under the Partnership Act. It is not a proprietary right which is involved here. It is marital rights that come up for consideration. On the construction that we have put on Section 10 of the Estate Duty Act the exclusion under it has to be exclusion from the proprietary right in respect of use and enjoyment and retention of the gifted house and not exclusion from the marital rights between husband and wife. Viscount Simonds at page 97 of the Tax Report in Clifford John Chick v. Commr. of Stamp Duties noticed the decision in St. Aubyn v. Attorney General, 1952 AC 15 at page 21 and after doing so observed:—

"But the question may arise and having arisen may lead to a difference of opinion as to what is the subject-matter of the gift."

What is the subject-matter of the gift is certainly a very important and crucial question. The house and the wife both or the one and not the other? Viscount Simonds at p. 98 of that Report negat-

ed the argument put forward on the basis of commercial transaction and for (sic) full consideration and observed: "Their Lordships see no reason why a gloss should be put upon the plain words of the sub-section by excluding from its operation such transactions." See also further observations of Viscount Simonds at pp. 99 and 100.

26. The Supreme Court in George Da Costa's case, (1967) 68 ITR 497 at p. 502 = (AIR 1967 SC 849 at p. 851) stated as follows:—

"It was observed by Hamilton, J., that there was no legally enforceable arrangement permitting the deceased to reside in the house and the deceased was simply the guest of the donee and was fully content to rely upon the affection which the donee bore towards him. It was, therefore, held in that case that estate duty was not payable. It was stated by Hamilton, J., in the course of his judgment that the exclusion of the deceased from the property itself (the first limb of the condition) would, like his exclusion "from any benefit by contract or otherwise" (the second limb), be achieved unless he had "some enforceable right". The view taken by Hamilton, J., on this particular point is, however, not consistent with the opinion of the Judicial Committee in Chick v. Commissioner of Stamp Duties of New South Wales, (1959) 37 ITR (ED) 89".

27. It may be noticed here that the observation of Hamilton, J., in (1911) 2 KB 688 was not discussed by the Privy Council nor was that case referred to by the Privy Council.

28. It will be good to recall the facts in the case of (1911) 2 KB 688 which again was not a case of husband and wife. There, the owner of a farm and dwelling-house by a deed of gift, in consideration of natural love and affection, conveyed and assigned the farm, with the dwelling-house and other buildings to the defendant, his great-nephew, who resided with him and who had in the preceding year taken over the management of the farm. The donor in that case had no property other than that included in the deed except an annuity of £ 15. After the execution of the deed the donor continued to reside in the house until his death and was maintained by the defendant out of the annuity which was sufficient to meet the cost of his maintenance. There was no agreement or understanding however between the donor and the defendant that the former should be permitted to remain in the house or be maintained by the defendant. Upon the death of the donor, the Crown there claimed Estate Duty on the value of the property comprised in the deed upon the ground that bona fide

possession and enjoyment of the property were not assumed by the donee and thenceforward retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." The Court there decided that "though the donor was permitted by the donee to and did in fact reside in the house from the date of the deed until his death, there was no entire exclusion of the donor from the possession and enjoyment of the property or of any benefit to him by contract or otherwise, within the meaning of the section, and that therefore Estate Duty was not payable." It was also decided by the Court that "the words, 'or otherwise' in the sentence 'or of any benefit to him by contract or otherwise' must be read as meaning some arrangement *eiusdem generis* with contract, that is to say, an enforceable arrangement."

29. Lastly, this case is different from the case decided by the Supreme Court in (1967) 63 ITR 497=(AIR 1967 SC 849) on one more significant point. All these cases which we have been considering were cases where there was some kind of previous right, possessory or otherwise, of the donor in respect of the property gifted. In Da Costa's case, for instance, the property had already been purchased by the father both in his name and in the wife's name and the parents ultimately making gift of the house to the sons. Again, in 1911-2 KB 688 the grand-uncle was formerly living in the very house which he made a gift of to his grand-nephew. Also in Clifford John Chick's case, the father was making a gift of the house where he had possessory and legal rights to his son before he made a gift of it. It is in such a context, a meaning has to be given to the expression, "entire exclusion of the donor." Normally, therefore, it means to exclude a pre-existing right which was otherwise included or would have been included but for the gift. But here in respect of this property No. 33 Apcar Garden, Asansol, the husband had no pre-existing right at all. At the moment when title begins in this case in 33 Apcar Garden, it is a sole title by Mrs Shamsun Nehar Mansur. The whole context of such expressions as "bona fide possession and enjoyment of it was not immediately assumed by the donee" and "thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise" under Section 10 of the Estate Duty Act appears to exclude a person whose right is already there to the use and enjoyment of the property but here there is no such right of the husband either to the use or enjoyment of the property No. 33 Apcar Garden in the present Reference. Therefore, we are unable to hold that the

doctrine of "exclusion" as laid down in Section 10 of the Estate Duty Act and as interpreted by the Supreme Court has any application to the facts of this Reference.

30. In conclusion, we need only refer to the fact that our attention has been drawn to the amendment of Section 10 in 1965 by introduction of the proviso "provided further that a house or part thereof taken under any gift made to the spouse, son, daughter, brother or sister shall not be deemed to pass on the donor's death by reason only of the residence therein of the donor except where a right of residence therein is reserved or secured directly or indirectly to the donor under the relevant disposition or under any collateral disposition." The Supreme Court in Da Costa's case held that this amendment was not retrospective and further we are not concerned with this amendment and its scope. The amendment only means that such problems would not arise in future. The Finance Minister's observations in introducing this amendment has been placed before us to say that it was "on the ground of causing hardship". See the observations reported in 55 ITR 129 (Sic.).

31. For the reasons discussed above and on the authorities, we hold that in the facts and circumstances of the case, the value of the house property, No. 33 Apcar Garden, Asansol cannot be included in the principal value of the estate of the deceased as property passing or deemed to pass on his death firstly because it was not a part of his estate and on the title deed and secondly, because that even if Section 10 of the Estate Duty Act applies, the facts in this case are such that they do not permit the inclusion of this property in the estate of the deceased.

32. We, therefore, answer the question asked in the negative. Having regard to the decisions and the state of law, there will be no order as to costs.

33. K. L. ROY, J.—I agree.
KSB
Answered in the negative.

AIR 1969 CALCUTTA 146 (V 56 C 24)
BIJAYESH MUKHERJI, J.

Textile Machinery Corporation Ltd,
Petitioner v. Nalinbhai B. Munshaw.
Opposite Party.

Civil Revn. Case No. 1150 of 1968.
D/- 23-7-1968.

(A) Arbitration Act (1940), S. 9 (a) —
Scope — Essential conditions for the application of S. 9 explained.

A party to an arbitration can appoint a new arbitrator, in terms of Section 9.

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clause (a), only if the following ingredients are present:—

1. The agreement itself provides that a reference shall be to two arbitrators.

2. The agreement further provides that, of the two arbitrators, one has to be appointed by each party.

3. One, in fact, has been appointed by each.

4. An arbitrator, so appointed, has refused to act.

5. The agreement expresses no intention that a new arbitrator has not to be appointed.

The first two ingredients are basic ingredients upon which depend the remaining three ones.

In a case where the parties, even in the absence of any terms in the agreement to refer the case to two arbitrators and permitting each party to appoint one arbitrator, appoint an arbitrator for each side, the agreement is incapable of being pressed into service under S. 9 (a). AIR 1929 Cal 177, Rel. on. (Paras 3, 4)

(B) Arbitration Act (1940), Ss. 9 (a), 28 — Question in issue, whether S. 9 (a) covers the arbitration agreement and not the validity of the agreement — Previous order of Court extending time for making award — Order cannot operate as res judicata on the issue. AIR 1962 SC 378 and A. F. O. O. No. 190 of 1965 D/-8-9-1966 (Cal), Disting. (Paras 7, 8)

Cases Referred: Chronological Paras

(1966) A. F. O. O. No. 190 of 1965,
D/- 8-9-1966 (Cal), John Patterson
& Co. Ltd. v. Soorajmull Nagarmull

7

(1962) AIR 1962 SC 378 (V 49)=
(1962) 3 SCR 769, Jawaharlal
Burman v. Union of India

7

(1955) AIR 1955 SC 53 (V 42)=
1955 SCR 862, Anderson Wright
Ltd v. Moran & Co.

7

(1945) AIR 1945 All 146 (V 32)=
ILR (1945) All 162, Charan Das
v. Gur Saran Das Kapur

10

(1929) AIR 1929 Cal 177 (V 16)=
33 Cal WN 418, General Electric
Trading Co. v. Siemens (India)
Ltd.

6

S. Tibriwal and M. P. Chowdhury.
for Petitioner; Miss M. H. Pherwani, for
Respondent.

ORDER:— This is a rule, under Section 115, of the C. P. C. (5 of 1908), obtained by Texmaco, an abbreviation for Textile Machinery Corporation Ltd., calling upon the opposite party Munshaw to show cause why the order dated March 12, 1968, of a learned Subordinate Judge, Alipore, dismissing Texmaco's application for a declaration that Shri Sasank Majumdar has been validly appointed a new arbitrator under Section 9, clause (a), of

the Arbitration Act, 10 of 1940, should not be set aside.

(2) The facts, which have led up to this rule, need not be referred to further than as follows:—

On April 27, 1962, Texmaco, a leading engineering concern, engaged in the manufacture of cotton spinning machinery, appointed Munshaw its Sale Technical Adviser for textile machinery imported into India from Howa Machinery Ltd. of Japan, by virtue of an agreement dated November 10, 1954, or thereabouts, for technical collaboration between Texmaco and "Howa". An appointment as this of Munshaw is evidenced by an agreement of that day (April 27, 1962), the arbitration clause of which bears:

"Any dispute arising at any time between the parties hereto, concerning this agreement, its interpretation or its subject-matter, shall be settled under the rules of the Indian Arbitration Act and the decision of the arbitrators shall be final and binding on both the parties." Disputes did arise. The arbitration clause was invoked. On January 3, 1967, Munshaw appointed Shri J. N. Choudhuri as arbitrator, and Texmaco appointed Solicitor B. P. Khaitan as arbitrator. The two arbitrators appointed Dr. L. M. Singhvi an umpire, and on February 11, 1967, entered upon the reference. On April 25 1967, the learned Subordinate Judge was moved for extending the time within which the award was to be made. And he allowed such extension until January 31 1968. On December 20, 1967, however, Solicitor B. P. Khaitan informed all concerned in writing that he was not willing to act as arbitrator, and wanted his letter to be treated as letter of resignation. On December 28, 1967, Texmaco wrote to Munshaw, informing him that Shri Sasanka Majumdar was the new arbitrator appointed in place of Solicitor B. P. Khaitan, only to bring forth a reply that very day (December 28, 1967) from Munshaw, proposing Shri J. N. Chaudhuri to "be the Sole Arbitrator henceforth", and inviting Texmaco's concurrence thereto. Concurrence did not come. Came instead a reply dated January 3, 1968, telling Munshaw: 'Shri Sasanka Majumdar's appointment as new arbitrator is valid. We are applying to the Court for a declaration to that end'. Two days later, that is, on January 5, 1968, Texmaco did move the Court, by an application under Section 9, clause (a), which, as noticed, the learned Judge dismissed. Hence this rule.

3. As a matter of words, it beats me, as it beats the learned Subordinate Judge, how Section 9, clause (a), of the Arbitration Act can be called in aid here. Taking the arbitration agreement to be valid, as the learned Counsel for

both parties have taken it to be, Texmaco can appoint a new arbitrator, in terms of Section 9, clause (a), only if the following ingredients are present—

1. The agreement itself provides that a reference shall be to two arbitrators.

2. The agreement further provides that, of the two arbitrators, one has to be appointed by each: one by Texmaco and another by Munshaw.

3. One, in fact, has been appointed by each.

4. An arbitrator, so appointed, has refused to act.

5. The agreement expresses no intention that a new arbitrator has not to be appointed.

4. Now, look to the arbitration agreement reproduced above. It does not provide that a reference shall be to two arbitrators. It provides instead that a reference shall be to arbitrators. Necessarily it does not provide either, as indeed it cannot, that, of two arbitrators, one shall be appointed by each party, that is, one by Texmaco and another by Munshaw. So, the first two ingredients tabulated above — and they are basic ingredients upon which depend the remaining three ones — are found conspicuous by their absence in the arbitration agreement on hand. Hence, as a matter of words, Section 9, clause (a), does not fit the facts here, and cannot, therefore, be pressed into service.

5. But, it is said, no matter what the arbitration agreement is, the parties, in fact, have mutually agreed upon two arbitrators, Chaudhuri and Khaitan, one appointing each; Khaitan, one appointed so, has refused to act; and no intention prohibiting the appointment of a new arbitrator is expressed in the agreement. That being so, the contention concludes, the requirement of Section 9, clause (a), is well met. In my judgment, it is not. Because, to hold so will be to read, in the section, words which are not there, such as:

"Where, however, two arbitrators are, in fact, appointed, one by each party, though the agreement does not provide so, the remaining provisions of this section will apply."

It will be legislating, not interpreting the law.

6. Not exactly to the point, but somewhat close to it, is a Bench decision of this Court in General Electric Trading Co. v. Siemens (India) Ltd., (1928) 33 Cal WN 418, where two arbitrators were mutually agreed upon, and, by a written agreement, appointed as such: not one by each party. — facts which, it was held did not come within the language of Section 9 of the old Arbitration Act, 9 of 1899, corresponding to the present

Section 9 of the 1940 Act. Thus, there was infraction of the language of the section in that, by the agreement, two arbitrators were appointed by both the parties, not one by each. Here there is infraction too, because the agreement itself does not provide what it must in terms of Section 9. It provides for a reference to arbitrators. And that is all it does, without saying that a reference shall be to two arbitrators, one to be appointed by each party. So, by its very terms, Section 9 cannot apply.

7. An escape is sought from such a conclusion on the ground that extension of time for the making of the award was prayed for and allowed, with the result that the question of validity of the arbitration agreement is now concluded by the doctrine of res judicata. In support of this proposition, two authorities have been cited. One is Anderson Wright Ltd. v. Moran & Co., AIR 1955 SC 53, where it has been held inter alia that, on an application for stay under Section 34, the Court may, in its discretion, decide an issue (if raised) as to the existence or validity of the arbitration agreement. The other is John Patterson & Co. Ltd. v. Soorajmull Nagarmull, A. F. O. O. No. 190 of 1965 (Cal.), decided by Banerjee and Masud, JJ., on 8-9-1966 where it has been held, after an elaborate analysis of Jawaharlal Burman v. Union of India, AIR 1962 SC 378 that a Court can overrule the defence as to the non-existence of an arbitration agreement, in granting an extension of time under Section 28, and that if the Court does so, it operates as res judicata.

8. The simple answer to such a contention is that in the present proceedings the validity of the arbitration agreement is not in issue. What is at issue is if the agreement comes within Section 9, clause (a). Sure enough, that is not concluded by the rule of res judicata, only because extension of time has been prayed for and allowed. Such extension, indeed, has nothing to do with the facts here fitting Section 9, clause (a), or not.

9. Umpire Singhvi entering on the reference has been objected to, on the ground that no disagreement between the two arbitrators is there, within the meaning of Rule 4 to Schedule 1 to the Arbitration Act. But when Arbitrator Khaitan enters on the reference on February 11, and works on it until December 20, following, when he resigns, it does amount to a disagreement, unless the contrary is shown. The contrary has not been shown.

10. On behalf of the opposite party has been questioned the power of this Court to entertain a matter as this under Section 115 of the Procedure Code. No

doubt, Section 41 of the Arbitration Act is there, prescribing that, subject to the provisions of the Act and of rules made thereunder, the Code shall apply to all proceedings before the Court, and to all appeals under the Act. But in Section 41 the Allahabad High Court saw no ouster of the revisional jurisdiction under Section 115: L. Charan Das v. L. Gur Saran Das Kapur, AIR 1945 All 146. Nor do I, if I may say so, with respect.

11. In the result, the rule fails and do stand discharged with costs. Hearing fee 10 gold mohurs.

BDB/D.V.C.

Rule discharged.

AIR 1969 CALCUTTA 149 (V 56 C 25)

D. BASU, J.

Director General Ordnance Factories Employees' Association, Appellant v. Union of India and Director General Ordnance Factories, Respondent.

Civil Revn. No. 39 (W) of 1965, D-1-2-1968.

(A) Constitution of India, Arts. 226, 309 — Who can file Writ Petition — Civil Service — Central Services (Recognition of Service Association) Rules 1959 — Association gets only status in dealing with Government — It cannot apply under Art. 226, on behalf of its members — When such association can take legal proceedings collectively as such, explained — Exceptions to general rule indicated.

When an association of Government Employees has been recognised by the Government according to the Central Services (Recognition of Service Association) Rules 1959, made in exercise of powers conferred by Article 309 of the Constitution, it gives an employees' association only a status in its relationship and dealings with the employer, i.e., the Government. It has nothing to do with the representation of its members in a litigation before a Court of Law. The question has to be answered on general principles. In cases where the right of a collective body to bring proceedings under Article 226 is challenged, two questions have to be answered:— (a) Is the petitioner a legal entity or otherwise permitted by statute to initiate legal proceedings in its own name? (b) Has it been affected by the impugned order as a collective body? (a) So far as the first question is concerned, it is patent that a legal proceeding may be maintained only by an individual or other body which is recognised as a legal person. In the case of a body incorporated by law, the corporate

body acquires a legal personality of itself and is as such entitled to maintain legal proceedings. But an unincorporated association has no legal personality and it is nothing but an aggregation of its members who can only bring legal proceedings in their individual capacity. Even when all of them are affected by an official act, they can challenge that only if all the members join in the proceedings by name. The association in such a case, cannot maintain an application under Article 226 or other legal proceedings in its own name. Even registration under the Societies Registration Act cannot confer this right.

To the foregoing general rule, certain exceptions have been introduced by the provisions of certain special statutes, e.g., (i) A registered union is made a body corporate by S. 13 of the Trade Unions Act, 1926 and is empowered to sue and be sued in its own name. (ii) Under the Industrial Disputes Act, 1947, an association of workmen has a right to raise industrial disputes and to represent the workmen throughout the proceedings, and can thus move against an award under the Act. (iii) Under Section 47 of the Motor Vehicles Act, even an unincorporated association can make a representation in the matter of grant of a permit and can pursue that right in a proceeding under Article 226.

Even where an association is permitted by law to bring a legal proceeding, it can bring an application under Article 226 only when its rights as a collective body as distinguished from the aggregate rights of its members are affected by the act challenged in the proceedings. AIR 1951 All 1 (FB) & AIR 1962 Cal 45 & AIR 1951 Mys 14 & AIR 1962 Cal 649 & AIR 1951 Cal 255 (SB), Rel. on; AIR 1953 Cal 212, Dist.; AIR 1960 SC 384, Expl. (Paras 7, 8, 9, 10, 15)

(B) Constitution of India, Art. 226 — Writ can be issued only on infringement of legal rights and not administrative practice — Claim based on statements made in Govt. of India Manual and the observations of Pay Commission — Manual has no statutory force and Pay Commission observations have no legal force being matters for administrative authorities — No writ can be issued for any breach of the Manual or Pay Commission observations. (Para 17)

Cases Referred: Chronological Paras

- (1962) AIR 1962 Cal 649 (V 49)=
66 Cal WN 395, W. B. P. W. Union
v. A. U. P. Works Private Ltd. 10
- (1962) AIR 1962 Mys 25 (V 49)=
(1961) 2 Lab LJ 583, Govt. Press
Employees' Assn. v. Govt. of
Mysore

(1962) AIR 1962 Cal 45 (V 49)=
 (1961) 1 Cal LJ 59, General Secy.
 Eastern Zone Insurance Employees
 Assocn. v. Zonal Manager, Eastern
 Zone, Life Insurance Corporation
 (1961) AIR 1961 SC 857 (V 48)=
 (1961) 3 SCR 196, Ram Prasad v.
 Chairman Industrial Tribunal
 Patna
 (1960) AIR 1960 SC 384 (V 47)=
 (1960) 2 SCR 311, All India Station
 Masters' Association v. General
 Manager Central Rly.
 (1957) AIR 1957 Cal 444 (V 44)=
 61 Cal WN 217, Barrackpore Bus
 Syndicate v. Serajuddin
 (1953) AIR 1953 Cal 212 (V 40)=
 56 Cal WN 861, B. C. Das Gupta
 v. Bijoy Ranjan
 (1951) AIR 1951 SC 41 (V 38)=
 1950 SCR 869, Charanjit Lal v.
 Union of India
 (1951) AIR 1951 All 1 (V 38)=
 1950 All LJ 767 (FB), Indian
 Sugar Mills Assocn v. Secy. to
 Govt. U. P. Labour Dept.
 (1951) AIR 1951 Cal 255 (V 38)=
 55 Cal WN 81 (SB), Sabitri Motor
 Service Ltd. v. Asansol Bus
 Assocn. 10, 15
 (1951) AIR 1951 Mys 14 (V 38),
 Bangalore District Hotel Owners'
 Assocn v. District Magistrate
 Bangalore 9

Arun Prokash Chatterjee, for Appellant; Amiya Kumar Mukherjee, Shibal Bose, for Respondent.

ORDER:— This Rule involves a dispute between two sections of the subordinate employees in the office of the Director-General of Ordnance Factories, represented by two Unions.

2. The Petitioner is the Employees' Association which represents employees other than stenographers. The "Stenographers' Association" has been added as Respondent No. 3 at their intervention. Respondent No. 1 is the Union of India and Respondent No. 2 is the Director-General of Ordnance Factories.

3. According to the Petitioner Association, the Stenographers are outside the clerical cadre; that there is no Rule authorising the promotion of Stenographers to the grade of Assistants and that the Stenographers had no higher prospects in their career. Administratively, however, Respondents reserved a post of Assistant-in-Charge to be filled up from the cadre of Stenographers of Grade II and on the protest of the Petitioner, Respondent No. 2 stated that it was only a "non-recurring measure" (Annexure A) which had been adopted "to remove from the minds of the Stenographers the sense of frustration which they were suffering from for not having any scope of advancement".

4. Since 1962, the Respondents have been proposing to combine the two services by making a combined seniority list of Clerks and Stenographers and Petitioner has been making representations against the proposal. On 16-5-64, Respondent No. 1 intimated that the matter was under consideration. In spite of this, the Respondent No. 2, on 22-12-64, appointed 4 Stenographers to the posts of Assistants in the Clerical cadre against existing vacancies in the posts of Superintendents, — to the prejudice of the clerical staff (*vide Annexure F*), and this policy has been repeated by another series of such appointments per order at (Annexure G), dated 31-12-64. The Petitioner points out that the proposal for a merger of the two cadres of Stenographers and Assistants was rejected by the Pay Commission on the ground that the qualifications for and the nature of the work etc., of the two cadres were entirely different. The Petitioner challenges the aforesaid decision of the Respondents to merge the two cadres and the validity of the order of appointment at Annexure F.

5. The Petition is opposed by affidavits on behalf of Respondent 2 as well as the added Respondent No. 3.

6. Before entering into the merits of the Petition, it is necessary to dispose of the preliminary objection taken on behalf of the Respondent 3, namely, that the Petitioner, being an unincorporated association, cannot maintain an application under Article 226 and that the grievance, if any, of its members should be agitated in appropriate proceedings brought by them in their individual capacity.

7. The Petitioner Association is, of course, not an incorporated body but it relies on the fact that it has been 'recognised' by the Government according to the Central Services (Recognition of Service Associations) Rules, 1959, made in exercise of powers conferred by Article 309 of the Constitution. Recognition, however, gives an employees' association only a status in its relationship and dealings with the employer, i.e., the Government. It has nothing to do with the representation of its members in a litigation before a Court of law. The question has, therefore, to be answered on general principles as explained by judicial decisions.

8. In cases where the right of a collective body to bring proceedings under Article 226 is challenged, two questions have to be answered:—

(a) Is the Petitioner a legal entity or otherwise permitted by statute to initiate legal proceedings in its own name?

(b) Has it been affected by the impugned order as a collective body?

(a) So far as the first question is concerned, it is patent that a legal proceeding may be maintained only by an individual or other body which is recognised as a legal person.

9. In the case of a body incorporated by law, the corporate body acquires a legal personality of itself and is as such entitled to maintain legal proceedings. But an unincorporated association has no legal personality and it is nothing but an aggregation of its members who can only bring legal proceedings in their individual capacity. Even when all of them are affected by an official act, they can challenge that only if all the members join in the proceedings by name; the association, in such a case, cannot maintain an application under Article 226 or other legal proceeding, in its own name, as has been established by a number of decisions (Indian Sugar Mills Assn. v. Secy. to Govt. U. P. Labour Dept., AIR 1951 All 1 (FB); General Secy. Eastern Zone Insurance Employees' Assn. v. Zonal Manager, Eastern Zone Life Insurance Corporation, AIR 1962 Cal 45) and even registration under the Societies Registration Act cannot confer this right. (Bangalore District Hotel Owners' Association v. District Magistrate, Bangalore, AIR 1951 Mys 14).

10. To the foregoing general rule, certain exceptions have been introduced by the provisions of certain special statutes, e.g.,—

(i) A registered union is made a body corporate by Section 13 of the Trade Unions Act, 1926, and is empowered to sue and be sued in its own name.

(ii) Under the Industrial Disputes Act, 1947, an association of workmen has a right to raise industrial disputes and to represent the workmen throughout the proceedings (Ramprasad v. Chairman, Industrial Tribunal, Patna, AIR 1961 SC 857) and can thus move against an award under the Act (W. B. P. W. Union v. A. U. P. Works, Private Ltd., AIR 1962 Cal 649).

(iii) Under Section 47 of the Motor Vehicles Act, even an unincorporated association can make a representation in the matter of grant of a permit and can pursue that right in a proceeding under Article 226 (Sabitri Motor Service v. Asansol Bus Assn., AIR 1951 Cal 255 (SB)).

11. Learned Advocate for the Petitioner points out that in B. C. Das Gupta v. Bejoy Ranjan, (1952) 56 Cal WN 861 = (AIR 1953 Cal 212), a petition under Article 226 was allowed to be brought against an unincorporated association, namely, the State Medical Faculty. It is to be noted, however, that that decision solely rested on the interpretation of the word "person" in the expression "issue to

any person" in the text of Article 226 itself; by applying the interpretation of the word 'person' in Section 3 (39) of the General Clauses Act, the Court held that under Article 226, the High Court could issue a writ even against an unincorporated association. The scope of this decision is thus confined to the question of the Respondent in a writ petition and does not answer the question as to who may be a Petitioner as to which there is no express term in Article 226 itself and the general principles have, therefore, to be applied.

12. On behalf of the Petitioners strong reliance has been placed on the fact that the cause title of the Supreme Court decision in All India Station Masters' Association v. General Manager, Central Rly., AIR 1960 SC 384 indicates that the Association was allowed to bring a petition under Article 32 and establishes that an association has got a right under Article 32 or 226 to ventilate the grievances of its members. It is to be noted, however, that the cause title of the cited case adds 'and others' as Petitioners and, in all probability, besides the Association, the Station Masters themselves who were affected were added as Petitioners, as would appear from the opening words of the judgment (p. 385, *ibid.*)—

"The petitioners who describe themselves as Road-side Station Masters challenge."

13. The Court did not say that the Petition had been brought by an association of Station Masters and no question as to the maintainability of the Petition by an association was raised in that case. It does not, accordingly, establish that an unincorporated association can sue in its own name, in the absence of an express statutory provision in this behalf.

14. The instant Rule, therefore, deserves to be discharged on this ground alone.

15. Even where an association is permitted by law to bring a legal proceeding, it can bring an application under Article 226 only when its rights as a collective body as distinguished from the aggregate rights of its members are affected by the act challenged in the proceedings (Chiranjit Lal v. Union of India, AIR 1951 SC 41; Govt. Press Employees' Assn. v. Govt. of Mysore, AIR 1962 Mys 25; Barrackpore Bus Syndicate v. Serajuddin, AIR 1957 Cal 444, e.g., where it is already a party to the impugned order, as in AIR 1951 Cal 255).

16. On this point also, the Petition must fail because if any Stenographer is given a higher post in the Clerical line, it is only a particular Assistant who is thereby deprived of his promotion that will be individually affected and shall be competent to bring a petition under Article 226. The collective existence or inte-

rests of the association as such will not thereby be affected.

17. On the merits also, the Petitioner has little to stand upon excepting certain statements in a Government of India Manual, which has no statutory force. The test in the instant case is not the administrative practice which may be in existence for any length of time but the legal right, if any, of the Clerks to oust the Stenographers from their cadre. The Petitioner has, however, failed to prove the existence of separate cadres for Clerks and Stenographers, in rebuttal of the statement in paragraph 4 of the counter-affidavit that both clerks and stenographers belong to Class III ministerial service. The Pay Commission's observations as to the difference in the nature of their work have no legal force but only matters for consideration of the administrative authorities. The Petitioner may carry on its activities at that level so long as they are not convinced, but this Court cannot interfere under Article 226 unless some legal right is infringed. So long as such legal right is not established there is no question of a violation of Art. 14 or 16 either.

18. The Rule is accordingly discharged, but without any order as to costs.

19. As prayed for by Mr. Chatterjee, let the operation of this order be stayed for a period of four weeks from this date. BDB/D.V.C.

Rule discharged.

AIR 1969 CALCUTTA 152 (V 56 C 26)

A. K. SINHA, J.

Chirajit Pal, Petitioner v. West Bengal Khadi and Village Industries Board and another, Respondents.

C. R. Nos. 1009 (W) of 1964 with 1177 (W) of 1964, D/- 25-6-1968.

(A) West Bengal Khadi and Village Industries Board Act (14 of 1959), S. 33 (2) and (3) — Transfer to a post not created by resolution — Board has neither an inherent power to do so nor can it claim it as incidental to power of appointment.

Provisions of clause (5) of Recruitment Regulations framed under S. 9 of West Bengal Khadi and Village Industries Regulations 1961, show that the orders that are contemplated to be issued by the Secretary or the Executive Officer, as may be, will only mean those orders that will be made by them respectively after the posts are created by the Board by passing the resolution to that effect. Unless such a resolution is passed by the Board, the Secretary or the Executive Officer is not competent to issue the

orders regarding the creation of posts. Where a post is not validly created by the Board by means of resolution it cannot be deemed to have been in existence and consequently an order of transfer to such a post is equally illegal and invalid. Further the Board cannot have any inherent right to transfer the employee in the absence of a contract to contrary. The power of appointment also does not carry with it the power of transfer. AIR 1960 SC 650 & AIR 1930 PC 118, Rel. on. (Paras 5, 6, 7, 9 & 10)

Although an order of transfer is an administrative order and it is not for the Court but for the administration to judge whether the interest of the business demands such transfers nevertheless if it could be shown that no grounds at all existed for the satisfaction of the authorities requiring such transfers, the Court might infer that the authorities did not act honestly or did not apply their mind at all for ordering such transfers, and the order of transfer is liable to be struck down as invalid if it is not made bona fide. AIR 1967 SC 295 & (1963) 1 Lab LJ 282 (SC). Foll. (Para 12)

(B) Civil P. C. (1908), Preamble — Interpretation of statutes — Statute giving power to do certain thing in a certain way — Thing must be done in that way only. AIR 1936 PC 253 (2), Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 295 (V 54)=
1966 Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board 13
(1963) 1963-1 Lab LJ 282 (V 50)=
1963 (6) Fac LR 356 (SC), National Radio Corporation v. Their Workmen 14
(1960) AIR 1960 SC 650 (V 47)=
(1960) 2 SCR 918, Kundan Sugar Mills v. Ziyauddin 10
(1936) AIR 1936 PC 253 (2) (V 23)=
=63 Ind App 372, Nazir Ahmad v. King Emperor 6
(1930) AIR 1930 PC 118 (V 17)=
31 Mad LW 702, Alexandre Bouzourou v. Ottoman Bank 10
Ramendra Nath Banerjee, for Petitioner; Bankim Chandra Dutta, for Respondents.

JUDGMENT:— These two rules are taken up together for hearing as they are issued at the instance of the petitioner against successive orders of his transfer while working under the West Bengal Khadi and Village Industries Board the respondent No. 1 (hereinafter referred to as the Board).

2. The case of the petitioner briefly is that the Board is a body corporate established under Section 3 of the West Bengal Khadi and Village Industries Board Act (West Bengal Act XIV of 1959, hereinafter referred to as the Act)

having its Head-Office at Calcutta and certain Regional Offices at several places including Tamluk in the district of Midnapore and Coochbehar. The petitioner was appointed by an appointment letter dated 25th February, 1961, to the post of 'Marketing Assistant' under the Board on terms and conditions mentioned in the letter and since then continued to serve in that post diligently. This post was created by a resolution of the Board passed at its meeting held on 10/15th October, 1960, as a post attached to the Trading and Publicity Section of the Head-Office at Calcutta. By the same resolution the respondent No. 1 also created several posts in Regional Offices, namely, (I) Circle Inspector, (II) Area Inspector, (III) Clerk typist, (IV) Orderly peons. These resolutions, it is stated, were passed under Section 5 of the West Bengal Khadi and Village Industries Board Regulations, 1961 (hereinafter referred to as the Regulation) by the respondent No. 1 in exercise of the powers conferred by Section 33 of the Act and by virtue of Section 9 of the aforesaid Regulations called "Recruitment Regulations for the Officers and Staff of the West Bengal Khadi and Village Industries Board". The provisions as regards the nature of duties in the post of Marketing Assistant were also laid down which are as follows:

I. To assist the Marketing Surveyor and the Officer-in-charge (Trading) in marketing of Khadi and Village Industries Products.

II. Inspection of Bhandars and Reports.
III. To obtain market quotations.

3. The aforesaid recruitment regulations further laid down that the method of recruitment to the post of Marketing Surveyor a higher post drawing a bigger salary would be by promotion or selection from the post of Marketing Assistant. So the petitioner who held the only post of Marketing Assistant was in the direct line of promotion to the post of Marketing Surveyor.

4. While working in the post of Marketing Assistant the petitioner was transferred by an order dated 3rd September, 1964, signed by its Executive Officer to Tamluk as an 'Assistant to the Circle Inspector, Midnapore East, the respondent No. 2'. In spite of several representations the petitioner was asked to carry on the duties with which he was entrusted. By such transfer, it is stated, the petitioner has been deprived of his house allowance and in fact has been demoted to a lower post and several employees have been promoted to higher posts although they are not entitled to supersede the petitioner. That is how the petitioner felt aggrieved and come up to this Court, and obtained the Rule. After

the issue of the said Rule, the respondent No. 1 again transferred the petitioner to Coochbehar to assist the Circle Inspector in the district and study the position and possibilities of marketing in the area. Against this order, the petitioner again moved this Court in its Writ Jurisdiction and obtained another Rule.

5. Upon these facts, it was contended by Mr. Ramendra Nath Banerjee, learned Advocate for the petitioner that the order of transfer was entirely illegal as the petitioner was transferred to post not created in accordance with clause 5 of Regulation. His argument was that the petitioner was appointed in the post of Marketing Assistant under letter of appointment dated 25th February, 1961, by the Executive Officer of the Board which is a post created by means of a resolution passed under clause 5 of the Regulation. But by the order of transfer (Annexure 'B' to the petition in C. R. 1009 (W) of 1964) to Tamluk he was given the post of an 'Assistant to the Circle Inspector of Midnapore East'. This post, according to him, was not created by the Board by passing resolution as required under clause 5 of the Regulation. Therefore, this post must be deemed to be non est and necessarily the order to transfer to such a post was entirely void. In order to appreciate the correctness of this contention, it is necessary to look into the provisions of clause 5 of the Regulation which provides as follows:

"5. Creation of posts: All posts shall be created by the Board by passing resolutions to that effect. All orders regarding creation of posts of honorary workers shall be issued by the Secretary and of all posts other than those of honorary workers by the Executive Officer."

6. The Board is a statutory body and is empowered to make regulations sanctioned by the State Government not inconsistent with the provision of the Act or with the rules made thereunder for enabling to discharge its function under the Act. Such regulation made under Section 33 (2) of the Act may provide amongst other things, the terms and conditions of appointment and services, salaries and allowances of Officers and servants of the Board other than the Secretary and Executive Officer of the Board. By virtue of this power this regulation was framed by the Board and the above clause lays down the manner and circumstances under which posts may be created by the Board. It appears from the above provision that all posts excepting the posts of Secretary and Executive Officer of the Board as contained in Section 33 (2) of the Act shall be created by the Board by passing resolution to that effect but at the same time it is also provided that all orders regarding creation of posts of honorary workers shall be

issued by the Secretary and all posts other than those of honorary workers by the Executive Officer. Though the latter part in this clause may appear at the first reading to be little bit anomalous, yet on a true and correct interpretation of the provision of the entire clause as a whole, it appears that there is no such anomaly. The orders that are contemplated, to be issued by the Secretary or the Executive Officer as may be will only mean those orders that will be made by them respectively after the posts are created by the Board by passing the resolution to that effect. Unless such a resolution is passed by the Board, the Secretary or the Executive Officer is not competent to issue the orders regarding the creation of posts. In other words these Officers are not empowered to create posts but only to issue orders regarding creation of posts which is to be made by the Board alone by means of resolution only and in no other way. It is well settled that "when a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all." This is the view taken by the Judicial Committee in *Nazir Ahammed v. King Emperor*, 63 Ind App 372=(AIR 1936 PC 253 (2)).

7. Now, that being the correct position in law, it is to be seen as to whether the post of Assistant to the Circle Inspector was ever created in the manner prescribed under Clause 5 of the Regulation by the Board by a resolution. In paragraph 5 of the petition in C. R. 1009 (W) of 1964 it is specifically stated by the petitioner that the post of Marketing Assistant which the petitioner held at all relevant times was created by the respondent No. 1 viz., the Board by passing resolution at its meeting held on 10/15th October, 1960, as a post attached to the trading and publicity section of the respondents' Head-Office at Calcutta. It is also stated that by the same resolution the respondent No. 1 created various posts to be attached to the Regional Office, namely (I) Circle Inspector, (II) Area Inspector, (III) Clerk Typist, (IV) Orderly peon. These statements were not denied in the affidavit-in-opposition on behalf of the respondents Nos. 1 and 2 but the deponent only wanted to refer to the resolution of the Board, a true copy of which was also annexed to the Affidavit. This resolution as annexed does not appear to be a complete resolution but it only relates to agenda No. 3. Nothing is decipherable from this resolution excepting that certain posts created by the Board will be filled up as and when required in proportion to the volume of work. No material was placed before this Court to show that the post of an Assistant to the Circle Inspector of Regional Office was created by

means of resolution of the Board. In fact, Mr. B. C. Dutta, learned Advocate for the respondents, never suggested that such a resolution was there. What was contended by him was that the Assistant to the Circle Inspector either at Midnapore or at Cooch Behar Regional Office was not a separate post at all. His argument was that the petitioner was on transfer merely asked to assist the Circle Inspector in matters of enquiries and investigations into the working of different institutions for his work and also in matters of studying the market at the place which were clarified in the letter of the Executive Officer dated 1st February, 1964, (Annexure 'D' to the petition). I am afraid, I cannot accept the argument. This letter containing the purported order of the Executive Officer is written only in continuation of the previous office order dated 3-1-64 and not in modification or variation of such order. In the affidavit-in-opposition it is stated in para 10 also that the post of an Assistant to the Circle Inspector is not inferior to the post of the Marketing Assistant. Considering all these, it cannot be said that the petitioner who was posted as Marketing Assistant to the Trading Section of the Board's Head-Office was not transferred to a different post viz., the post of an Assistant to the Circle Inspector in the Regional Office at Tamluk or at Cooch Behar by subsequent order. The duties involved in such posts were merely defined in the subsequent order. Since such post as already seen was not validly created by the Board by means of resolution it cannot be deemed to have been in existence and consequently the order of transfer to such post must be held to be equally illegal and invalid. It is sufficient to dispose of the present rule on the view I have taken but even so I shall consider the matter from the other aspects.

8. One is, even assuming, that such post was validly created, whether in absence of any provision in the Act or under its regulations or in absence of any contract express or implied the Board has any inherent power to transfer its employees. Now there is no provision of transfer of employees either in the Act or Regulation, but since there is no provision it may be said that this power of transfer may be a matter of contract either express or implied. From the letter of appointment which is the only document embodying the terms of the contract, it is quite clear, there is no such express contract. Next, in order to ascertain whether there was implied contract, surrounding circumstances, course of dealing or conduct of parties have got to be looked into. From the letter of appointment and the duties involved in the post of Marketing Assistant even ac-

cording to the respondents' own document viz., the draft regulation, it does not appear that this post was not exclusively post for the Head-Office at Calcutta or the duties involved could also be effectively discharged elsewhere. On the other hand from the successive letters given to the petitioner directing his transfer and clarifying the duties to be discharged by him, it becomes significant that the post of Marketing Assistant was exclusively post of Calcutta Head-Office and that is why the petitioner was not transferred as 'Marketing Assistant' but as an 'Assistant to the Circle Inspector' with quite a different type of duties mentioned by the Executive Officer. No materials have been placed before me to show that at the time of appointment the petitioner had the knowledge that the Board had many Regional Offices in Mofussil areas and if necessary he would be required to work there in different capacities or to effectively discharge his duties in the present post. Considering all these it cannot be said that there was implied contract.

9. That being the position, it now remains to be seen whether the Board has any inherent power to transfer its employees. The Board is a statutory body and can only move within the four corners of the statute in the manner and under the circumstances prescribed therein or under rules and regulations not inconsistent with the provisions of the Act for enabling it to discharge its function under the Act. In other words, the powers in furtherance of the objects of the Act or to discharge its function under the Act must be expressly conferred upon the Board under the statute. Even so, there may be cases where such a power may be derived by reasonable implication from the provisions of the particular Act. This implied power is, however, limited to cases where an effective execution of powers of discharge of duty expressly conferred would be rendered ineffective in absence of such implied powers. In the instant case, the only express power given upon the Board relating to terms and conditions of appointments of Officers, servants etc., is the power conferred under Section 33 (2) to be exercised in the manner that may be provided in the Regulations which it may make with previous sanction of the State Government. In this regulation as already noticed earlier there is no express power of the Board for transfer of its Officers and Servants. The question is whether the power of appointment of the Board's Officers and Servants would be ineffective if the power of transfer is not implied. In my view, the power of transfer is neither incidental nor indispensable for the effective execution of the power of appoint-

ment. For it cannot be denied that ordinarily persons appointed in different establishments or institutions are exclusively attached to or meant for the particular office or locality in which they are created or exist. Transfer is not an ordinary incidence of such posts in which they are employed. To put it differently, the power of appointment does not carry with it also the power of transfer. That being so, it cannot be said that there is any inherent or implied power of the Board to transfer the petitioner.

10. Apart from the case of statutory body the Supreme Court while dealing with the question relating to power of transfer of employees has held in *Kundan Sugar Mills v. Ziauddin* reported in AIR 1960 SC 650 that an employer has no inherent right to transfer his employee in absence of contract either express or implied. It is true that in this case the employer wanted to start a business subsequent to the date of employment of the aggrieved employee but nonetheless the principle indicated is the same. For in this case Supreme Court took notice of the decision of the Judicial Committee reported in AIR 1930 PC 118 *Alexandre Bouzourou v. The Ottoman Bank* and several other decisions but they were distinguished on the view that they were limited to their own facts. It is also true that Judicial Committee in its above decision upheld the impugned transfer on the view that employer was carrying on banking business as one unit and the employee was transferred on higher emoluments to one of its branches but this case has no application to the facts of the present case. Firstly because, although the Board is also functioning through its regional offices there is nothing on record to show that for purpose of office administration it is working as one unit; on the other hand separate exclusive posts for the Head-Office and of the Regional Offices have been created and from these posts, nature of duties mentioned therein, it appears that system of working in the Head-Office or Regional Offices is not same. Secondly, the post to which the petitioner was transferred was not higher and this involved also loss of his total emoluments. So on the principles laid down in the above decision of the Supreme Court I am inclined to hold that the Board apart from being a statutory body even as an ordinary employer has no inherent power to pass the impugned orders of transfer.

11. Although I take the above view, I shall consider the instant case from the other aspect which is that in the present case it remained still to be seen whether such a power was exercised bona fide. It is stated in the petition that the impugn-

ed order of transfer was not issued in the interest of the business of the Board but only to enable the respondent to promote another of its employees Nagendra Nath Maity, who was working in an inferior post. This Nagendra Nath Maity according to the petitioner who was holding the post of Technical Assistant under the respondent No. 1 and whose total period of service was less than that of the petitioner was promoted to the post of Bhandar Inspector, a post carrying a higher salary than that of the post of the Marketing Assistant and he was also allotted the duties of the Marketing Assistant, that is the post held by the petitioner. In paragraph 13 of the affidavit-in-opposition in C. R. No. 1009 (W) of 1964 which deals with the statement regarding the promotion of Nagendra Nath Maity it was not denied that he was not promoted. What was stated was that the post of technical Assistant was not inferior to that of the Marketing Assistant and that the petitioner being a temporary employee had no right to claim such promotion nor he was considered for such appointment or promotion. It was also not denied that the post of an 'Assistant to the Circle Inspector' was not a separate post or that by such transfer the petitioner did not remain as Marketing Assistant. On the other hand, it appears from the affidavit of the respondents that this Nagendra Nath Maity was allotted the duties of the Marketing Assistant. So from these facts it may be taken that the Board gave the post of Bhandar Inspector as also of the Marketing Assistant to this Nagendra Nath Maity and transferred the petitioner to another post, namely, the Assistant to the Circle Inspector which according to him is a lower post than the post of the Marketing Assistant. Then again after receiving the order of transfer the petitioner made several representations in writing against the order of transfer setting out his grievances but no reply was given to his earlier representation. It appears that the Executive Officer by his letter dated 21/22nd February, 1964 (marked as Annexure 'J' to the affidavit-in-opposition) merely informed him with reference to his representation dated 10th February, 1964, that the Chairman was pleased to order that he must carry on with his duties with which he had been entrusted. This reply together with other facts as seen above which are not denied by the respondent create a reasonable apprehension that the Authorities in power were inimically disposed towards the petitioner or at any rate were not fairly dealing with him. This apprehension should be more fortified by course of subsequent events that followed resulting in a further order of transfer of the petitioner to Cooch-Behar.

12. The petitioner in obedience to the order went to Midnapore East but from there made representation by way of appeal to the Chairman of the Board but not being satisfied with the reply contained in the above letter of 21/22nd February, 1964, ultimately moved this Court on 21st August, 1964, against his order of transfer to Midnapore East and obtained a Rule. After the issue of the above Rule the respondent No. 1 by another order dated 2nd September, 1964, transferred the petitioner to a far more distant place, viz., Cooch-Behar to assist the Circle Inspector in his day to day work. In addition to his work in studying the position and possibilities of marketing in the area. After this order the petitioner by his letter dated 7th September, 1964 addressed to the Executive Officer of the Board in which he complained amongst other things, that the present transfer order was made with full knowledge of the said Rule issued by this Court for the purpose of making this Rule infructuous. It was also stated that the petitioner's T. A. for transfer from Calcutta to Tamluk and tour allowance in June, 1964 and July, 1964, half average pay for the period of medical leave in April and May, 1964, routine increment due in March, 1964, were not paid to him in spite of repeated requests but in spite of injustice shown to him he was not disagreeable to proceed to Cooch-Behar. It was also pointed out that a poorly paid employee could not move from Headquarters meeting all expenses and obligations if his T. A., part of salary and increment etc., remained unpaid for a considerable period. He showed his readiness to proceed to Cooch-Behar also on receipt of the said T. A., half average pay, routine increment etc., and requested the Board to issue necessary instructions for payment of these dues (this letter in C. R. 1177 (W) is marked as Annexure 'G'). But to this no reply was given. The petitioner was thus again compelled to move this Court and obtained a Rule. The receipt of this letter has also not been denied. It is merely stated in the affidavit-in-opposition that the previous rule was not served till 3rd December, 1964, but nevertheless the petitioner long before the alleged service brought it to the notice of the Board that such a rule was issued. Even thereafter, the attitude adopted by the Board only reveals its mala fide intention. The Board did not pay the arrears nor made any arrangements to enable the petitioner to proceed to Cooch-Behar. I cannot imagine a case where an employee can be directed to move from office to office or in distant places in such a quick succession of time and that too at his own costs when he was certainly not taken as a touring employee. Even the touring employees must

be given their travelling allowances before they may be asked to discharge their duties effectively. No materials have been placed before this Court to show that such was not the case or that such transfer or successive transfers within the course of one month were necessary in the interest of the business. It is true that an order of transfer is an administrative order and it is not for the Court but for the administration to judge whether the interest of the business demands such transfers but nevertheless if it could be shown that no grounds at all existed for the satisfaction of the authorities requiring such transfers, the Court might infer that the authorities did not act honestly or did not apply their mind at all for ordering such transfers.

13. This view finds support in one of the latest decisions of the Supreme Court reported in AIR 1967 SC 295, Barium Chemicals Ltd. v. Company Law Board. While dealing with the question as to whether an administrative order would be justiciable or not, Shelat, J., observed at page 323 of the report on reviewing a long line of cases as follows:

"Though an order passed in exercise of power under a statute cannot be challenged on the ground of propriety or sufficiency, it is liable to be quashed on the ground of mala fides, dishonesty or corrupt purpose. Even if it is passed in good faith and with the best of intention to further the purpose of the legislation which confers the powers, since the Authority has to act in accordance with and within the limits of that legislation, its order can also be challenged if it is beyond those limits or is passed on grounds extraneous to the legislation or if there are no grounds at all for passing it or if the grounds are such that no one can reasonably arrive at the opinion or satisfaction requisite under the legislation. In any one of these situations it can well be said that the authority did not honestly form its opinion or that in forming it, it did not apply its mind to the relevant facts."

14. Apart from the above principles, in a decision reported in (1963) 1 Lab LJ 282 (SC), National Radio Corporation v. Their Workmen, the Supreme Court has held that the order of transfer is liable to be struck down as invalid if it is not made bona fide. I respectfully follow the said decision.

15. For the reasons given, I have no doubt that the impugned orders of transfer are also not bona fide and consequently must be struck down as invalid.

16. The result is, the petitions succeeded. The impugned orders of transfers are quashed. The rules are made absolute but there will be no order as to costs.

17. Let a writ in the nature of mandamus issue accordingly in each of the two cases.

GGM/D.V.C.

Rule made absolute.

AIR 1969 CALCUTTA 157 (V 56 C 27)

R. N. DUTT AND S. K.

CHAKRAVARTI, JJ.

Mohd. Pearoo, Petitioner v. The State and others, Opposite Parties.

Criminal Misc. Case No. 179 of 1968.
D/- 30-5-1968.

(A) Preventive Detention Act (1950).
S. 3 (2) — Detenu set free under orders of Court not on considerations of merits but on technical defect — Subsequent order of detention on same grounds is competent.

(B) Preventive Detention Act (1950).
S. 3 — Commissioner of Police, Calcutta has jurisdiction to make detention order in respect of suburban areas also.

(Para 6)

Shiblal Bose, for Petitioner; Debaprasad Chowdhury, for Opposite Party.

R. N. DUTT, J.:— This is an application under Section 491 of the Code of Criminal Procedure for a Writ in the nature of habeas corpus against the detention of Mohd. Idris under sub-section (2) of Section 3 of the Preventive Detention Act, 1950.

2. It appears that the detenu, Mohd. Idris is being detained on the basis of an order of detention made by the Commissioner of Police, Calcutta, on February 5, 1968 under Section 3 (2) of the Preventive Detention Act, 1950.

The detention order reads as follows:
"Whereas I am satisfied with respect to the person known as Mohd. Idris, son of Mohd. Israel of 19 Watunge Street (Austin Berry Gali) Calcutta, that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order it is necessary so to do, I therefore in exercise of the powers conferred by Section 3 (2) of the Preventive Detention Act, 1950 make this order directing that the said Mohd. Idris be detained."

3. Mr. Bose first submits that the detenu was taken into custody under Section 3 (2) of the Preventive Detention Act on August 15, 1967. But this Court set aside the order of detention and the detenu was released from prison on February 5, 1968. The detenu was again detained under the Preventive Detention Act on the same date. He argues that such detention is bad in law. He contends that since the previous detention

order was set aside the District Magistrate was not competent to again detain the detenu under the Preventive Detention Act on the self-same grounds. It is not denied that the detenu has again been detained on the self-same grounds. But here it is not a question of revocation of the order of detention by the State Government. Here under the orders of the Court the detenu was set free not on considerations of merits but on a technical defect and so the detaining authority is competent to again detain the detenu on the same grounds. There is no bar in law to this. This objection therefore fails.

4. Mr. Bose then submits that ground No. (1) recites an incident which is said to have taken place on August 31, 1966 and he argues that this has no proximate connection with the order of detention which was made on February 5, 1968. It is true that the detention order was made about one and a half years after the alleged date of ground No. (1). But when we take into consideration the other grounds it appears that the detenu was said to have been indulging in similar activities till 1967 and that gives ground No. (1) proximate connection with the detention order or, in other words, with the purpose for which the detenu is being detained, namely, maintenance of public order.

5. Mr. Bose then submits that the other grounds have no connection with the maintenance of public order. Ground (1) speaks of a riot clearly involving public order. The other grounds no doubt recite individual assaults but such assaults are said to have taken place on public streets and ground No. (3) states that peace of the locality was disturbed. The allegation in these grounds is that the detenu used violence in public places and in view of ground No. (1), when the grounds are considered together we are not prepared to say that the grounds have no connection with the maintenance of public order.

6. Mr. Bose finally argues that the Commissioner of Police had no jurisdiction to make the instant detention order as the detenu is said to have been indulging in these activities beyond the Presidency town of Calcutta. We find that the detenu is said to have indulged in these activities within the jurisdiction of Watbung Police Station. This is a suburban area and by a notification under Section 1 of the Suburban Police Act this area has been brought under the Commissioner of Police, Calcutta. Section 3 of the Preventive Detention Act empowers the Commissioner of Police, Calcutta, to make the detention order. It does not specifically say "in the Presidency town of Calcutta". Obviously, the

Commissioner of Police has jurisdiction to make the detention orders under the Preventive Detention Act in respect of the suburban areas also, and in that view of the matter we do not think that the order of detention is bad in law.

7. No other point is taken. In the result the Rule is discharged.

8. S. K. CHAKRAVARTI, J.:— I agree.

JHS/D.V.C.

Rule discharged

AIR 1969 CALCUTTA 158 (V 56 C 28)

P. N. MOOKERJEE AND

T. P. MUKHERJI, JJ.

Kartic Chandra Pal and another, Petitioners v. Noakhali Union Bank Ltd., (In Liquidation), Opposite Party.

Civil Revn. Case No. 2639 of 1962, D-28-5-1968.

Banking Companies Act (1949), S. 45B — Score — Bank in liquidation — Decree in favour of bank transferred by High Court to another Court for execution — Claim under O. 21, R. 58, Civil P. C. made to executing Court — Notwithstanding S. 45B, executing Court has jurisdiction to decide it — Leave under S. 171, Companies Act (1913) not necessary to prefer such claim. AIR 1962 Cal 86, Overruled — (Civil P. C. (1908), O. 21, R. 58 and S. 47) — (Companies Act (1913), S. 171).

Where a decree in favour of a bank in liquidation is transferred by the High Court to another Court for execution, the executing Court has jurisdiction to decide a claim under O. 21, R. 58, Civil P. C. made to it, notwithstanding S. 45B of the Banking Companies Act. No leave under S. 171, Companies Act is necessary to prefer such a claim. (Paras 13 & 14)

Though S. 45B, gives exclusive jurisdiction to the High Court to deal with claims by or against banks in liquidation, it also permits execution of decrees by other Courts transferred to them by the High Court. The transfer order covers the whole execution process and the executing Court, unless the transfer order is recalled or modified, will have full and same powers as the High Court to complete the execution. It will necessarily then have to consider all claims whether under S. 47, Civil P. C. or under O. 21, R. 58, Civil P. C. Such claims are really incidental to the main execution and there is no difference between claims under S. 47, Civil P. C. and those under O. 21, R. 58, Civil P. C. AIR 1962 Cal 86, Overruled. (1950) 54 Cal WN 975 & AIR 1951 Mad 348 & (1962) 1 Mad LJ 251, Foll. (Paras 10 and 13)

The transfer order carries with it also the necessary leave under S. 171 of the Companies Act to proceed with the execution including consideration of claims and objections thereto and no leave or fresh leave under this section is therefore necessary for preferring such a claim. (Para 14)

Cases Referred: Chronological Paras

(1965) Unreported decision, D/- 3-2-1965 (Cal), Durgadas Kundu v. Central Calcutta Bank Ltd.	12
(1962) AIR 1962 Cal 86 (V 49)=66 Cal WN 761, Comrade Bank Ltd. v. Jyoti Bala Dassi	8, 11
(1962) 1962-1 Mad LJ 251=74 Mad LW 698, Malli Selva Iyer v. Madurai Mercantile Bank Ltd.	11
(1951) AIR 1951 Mad 348 (V 38)=1950-2 Mad LJ 450, Palghat Wariar Bank Ltd. v. Padmanabhan	11
(1950) 54 Cal WN 975, Bharat Central Bank Ltd. v. Rathindra Nath Sen	10

Sukumar Sen, for Petitioners; Santi Prosad Banerjee, for Opposite Party No. 1.

P. N. MOOKERJEE, J.:— This Rule raises an important question.

2. The point, which requires consideration in this case, is whether the executing court, before whom execution is pending, it having been transferred to that court by this Court, exercising Company jurisdiction, would have jurisdiction to entertain and decide a claim in relation to the said execution under O. 21 R. 58 of the Code of Civil Procedure, in a case, where a banking company in liquidation is involved.

3. The relevant facts lie within a short compass and are as follows:

4. Opposite Party No. 1, Noakhali Union Bank Ltd., went into liquidation sometime in the year 1949 and winding up proceedings are still pending in this Court. In the meantime, it obtained a decree on May 13, 1953, in Suit No. 2650A/3 of 1950 from this Court on its original side for Rs. 4,100/- with costs against Opposite Party No. 2, Tulsi Charan Paul. This decree was, eventually, transferred for execution to Alipore. In course of this execution, which commenced in January 1956, certain immovable properties, alleged to belong to the judgment-debtor, were attached at the instance of the decree-holder Bank on April 16, 1959.

5. Thereupon, the present petitioners preferred a claim under Order 21, R. 58 of the Code of Civil Procedure before the Alipore Court, which was executing the above decree, as aforesaid, and prayed for removal of the attachment on the ground that the said properties were not

liable to be attached in the above execution inasmuch as the same belonged to the petitioners in their own right. Upon this, Misc. Judicial Case No. 2 of 1961 was started and the decree-holder Bank in liquidation objected to the entertainment of the above claim by the Alipore Court on several grounds, of which only two are relevant for our present purpose.

6. The first is that the Bank having been directed to be wound up under the provisions of the Banking Companies Act, for which proceedings were still pending before this Court, the claim could be investigated only by this Court and not by any other Court, having regard to the terms of Section 45B of the Banking Companies Act, which, according to the decree-holder Bank, confers exclusive jurisdiction on this Court in the matter.

7. Secondly, the decree-holder Bank also contended that the claim case could not be maintained before the Alipore Court without fresh leave from this Court under Section 171 of the Indian Companies Act.

8. The learned Subordinate Judge has accepted the above objections and given effect to the same, primarily the one under Section 45B of the Banking Companies Act, upon the view that, having regard to the terms of the said section, even though the execution may be pending before the Alipore Court and may be validly pending there, claim cases, arising out of the same, must be filed and dealt with by this Court, which would have exclusive jurisdiction to deal with the same under the said section, thus debarring other Courts from entertaining or dealing with such cases. He has also, in support of his view, referred to an unreported judgment of Debabrata Mookerjee, J., in C. R. No. 1859 of 1960, D/- 10-7-1961, the said judgment having since been reported in Comrade Bank Ltd. (In Liquidation) v. Jyoti Bala Dassi, 66 Cal WN 761=(AIR 1962 Cal 86). He has, accordingly, given effect to the decree-holder's above objection and held that he had no jurisdiction to entertain the petitioners' claim case or to deal with the same and he has directed return of the petitioners' application under Order 21, Rule 58, of the Code of Civil Procedure to the filing lawyer for presentation to proper Court with a further direction that the execution case be stayed till a particular date, within which date the claimants must bring a stay order from this Court.

9. Against this order, the present Rule was obtained by the petitioners and it was contended on their behalf that the Alipore Court, being in seisin of the execution case validly under the law, had jurisdiction to entertain and deal with

the petitioners' claim case notwithstanding Section 45B of the Banking Companies Act. It is this question which, primarily, requires consideration in this Rule, although there is also a subsidiary question, namely, whether leave should have been taken by the petitioners under Section 171 of the Indian Companies Act for presenting their claim petition to the Alipore Court.

10. In our view, this Rule should succeed and both the above points should be answered in favour of the petitioners. On the main question, namely, that under Section 45B of the Banking Companies Act, it is clear that, although Section 45B, apparently, gives exclusive jurisdiction to this Court to deal with claims by or against banking companies in liquidation, contemplated under the said section, it also permits execution of such decrees by other Courts on appropriate transfer of the same by this Court to the said Courts. This, in effect, was the decision of this Court in Bharat Central Bank Ltd. (In Liquidation) v. Rathindra Nath Sen, (1950) 54 Cal WN 975. Indeed, this Court on the present occasion, too, actually transferred the decree in question for execution to the Alipore Court, presumably on the view taken in the above decision. If there is a valid transfer of the decree for execution to the Alipore Court, it must be taken that the order of transfer embraces the whole process of execution, or, in other words, the transferee Court, unless the order of transfer is recalled or modified by the transferor Court, will have full powers in the matter of the execution in question, and, indeed, the same powers as the transferor or the original Court to proceed with and complete the entire process of execution. That would, necessarily, involve consideration by it of all objections to the said process, namely, whether under Section 47 of the Code or under Order 21, Rule 58. Indeed, these claims are really incidental to the main execution and are as much integral parts of the same as objections under Section 47, the only difference between the two sets of proceedings being that, while, in one case, claim or objection is made by a third party, who, again, under the terms of Order 21 Rule 58 itself, would be deemed to be a party to the execution proceeding, in cases of objections under Section 47, they are put forward by the judgment-debtors. In substance, there is no difference between the two. Both are for the purpose of resisting the execution of the decree in the manner, desired by the decree-holder. There can be no question that objections under Section 47 of the Code to execution proceedings would have to be dealt with by the executing Court, even if it is the transferee Court, and the trans-

feree Court will have full jurisdiction to deal with the same. There can be no adequate or valid reason for making a distinction or difference in the case of claims under Order 21, Rule 58 of the Code.

11. It is true that the decision in 66 Cal WN 761=(AIR 1962 Cal 86) has taken a contrary view, but, with all respect to the learned Judge, Debabrata Mookerjee J., we are unable to agree with his view. We feel that the correct approach was made in cases like the present by the Madras High Court, where two Division Benches expressed the same view, as we have expressed above, in the cases of Palghat Warilar Bank Ltd. v. Padmanabhan, (1950) 2 Mad LJ 450=(AIR 1951 Mad 348), and Malli Selva Iyer v. Madurai Mercantile Bank Ltd. (In Liquidation), (1962) 1 Mad LJ 261.

12. In this Court, too, a Division Bench has since taken the same view in the unreported decision of this Court in the case of Durgadas Kundu v. Central Calcutta Bank Ltd. (In Liquidation), decided on 3-2-1965 (Cal).

13. We would, accordingly, hold that notwithstanding Section 45B of the Banking Companies Act, the Alipore Court would have jurisdiction in the instant case to entertain the petitioner's claim and to proceed with the Misc. Case, started upon the same.

14. We are also of the view that the order of this Court, transferring the decree for execution to the Alipore Court, carried with it the necessary leave under Section 171 of the Indian Companies Act to proceed with the whole gamut of execution there, or, in other words, to proceed with all stages in the process of execution, including claims and objections thereto in the Alipore Court. No leave or fresh leave under the said section was, therefore, necessary to be obtained by the petitioners for preferring their claim before the Alipore Court.

15. In the above view, we would make this Rule absolute, set aside the order of the learned Subordinate Judge and direct him to proceed with the petitioners' Misc. case in accordance with law in the light of the observations made in this judgment.

16. There will be no order for costs in this Rule.

17. T. P. MUKHERJI, J.:— I agree.
JRM/D.V.C. Petition allowed.

Constitution of India does not precisely define the boundary of Indian territory. Constitutional amendment would be necessary only if any alteration in Art. 1 is involved. If there is a dispute as to what in fact the territory of India is and that dispute is settled on the basis that certain territory never belonged to India it does not entail any cession of Indian territory requiring a constitutional amendment. There is a distinction between cession of territory and the settlement of a dispute as to where in fact the boundary between India and Pakistan lies. If the matter falls in the latter category, no constitutional amendment would be necessary for the purpose of handing over such territory. When such territory never belonged to India, there is no question of cession of Indian territory, thereby involving any alteration in Art. 1. Neither can it be said that the Government of India is disclaiming its territory, when the initial agreement, referring the dispute to the Tribunal, clearly shows that the two Governments agreed to get the boundary determined.

AIR 1960 SC 845, Dist.

(Paras 14, 15, 16, 21)

(C) Constitution of India, Art. 1 (3)
(c) — Acquisition of territory — Mere possession is not sufficient when Govt. is uncertain about its title to such territory.

If India be in possession of a particular territory because it claims sovereignty over it but is all the time cognizant of the uncertainty of the position and existence of a bona fide dispute about where the territory lies, it cannot be termed as acquisition within the meaning of Article 1. Acquisition implies absorption into the territories of the Union of India and mere possession without certainty as to legitimate title over such territory cannot be treated as acquisition. AIR 1960 SC 845, Rel. on.

(Para 15)

(D) Constitution of India, Arts. 253, 19 (d) and (e), Schedule VII, List 1, Entry 14 — Scope of Art. 253 — Treaty made by Indian Government with Pakistan to abide by decision of Tribunal respecting boundary dispute — Implementation of award by Executive is valid — Legislation not necessary.

Where the implementation of a treaty merely involves the ascertainment of the disputed boundaries with a foreign State, no legislation is necessary and the Executive can give effect to the treaty without enacting any law for that purpose under Art. 253.

(Para 20)

Making of a treaty is an attribute of sovereignty and, therefore, any country could enter into a treaty. Treaty making and implementation of treaties is a subject which falls under Entry 14 of List I of the Seventh Schedule. If the

matter had been left at that, the Parliament would have, without the aid of Art. 253, been competent to enact laws for the implementation of treaties etc. under the said entry 14. Art. 253 was enacted to avoid difficulty which the Union Parliament would have felt in enacting different types of laws for the implementation of obligations under treaties etc. with respect to the subjects assigned exclusively to the States. Article 253 is directed towards giving power to the Union Parliament to invade the State List to the extent it may be necessary for the purpose of implementing the treaty obligations of India in respect of subjects assigned exclusively to the State. In India treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in Municipal Courts unless backed by legislation. Nevertheless implementation of every treaty does not require legislative aid. Legislation is necessary only if a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making State and its subjects have to be made enforceable in municipal Courts, or which involves raising or expending of money or conferring new powers on the Government recognizable by the municipal Courts. Settlement of dispute as to boundary raises no such obligation requiring implementation in Municipal Courts. AIR 1960 SC 845, Ref.

(Paras 19, 20)

Fundamental rights guaranteed under Art. 19 (d) and (e) are also not affected by implementing the treaty without legislative aid, for if any part did not in fact belong to India there would be no such right with respect to that part. AIR 1937 PC 82, Ref.

(Para 21)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 845 (V 47) =

1960-3 SCR 250, Reference by the President of India under Art. 143 (1) 14, 16, 19

(1937) AIR 1937 PC 82 (V 24) = 1937 AC 326, Attorney General for Canada v. Attorney General for Ontario 17, 19

(1932) 1932 AC 14 = 101 LJ KB 105, Civilian War Claimants Association Ltd. v. The King 19

(1905) 1905-2 KB 391 = 74 LJKB 753, West Rand Central Gold Mining Co. Ltd. v. The King 19

(1892) 1892 AC 491 = 61 LJ PC 92, Walker v. Baird 19

Petitioner in person, C. K. Daphtry, Attorney General of India (on 25-4-68), N. A. Palkhiwala, Senior Advocate with B. Sen, Senior Advocate and Prakash Narain, for Respondent.

S. K. KAPUR, J.: This judgment will dispose of Civil Writ Petitions Nos. 294

of 1968, 330 of 1968 and 343 of 1968. The principal attack in these writ petitions is against the implementation of the Award dated 19th February, 1968, of the Indo-Pakistan Western Boundary Case Tribunal constituted pursuant to the agreement dated 30th June, 1965, between the Government of India and the Government of Pakistan. The award will, for brevity, be hereafter referred to as the "Kutch Award."

2. The dispute between the two Governments was regarding the Gujarat-West Pakistan border and by agreement dated 30th June, 1965, the two Governments agreed inter alia that—

(1) Ministers of the two Governments will meet in order to agree on the determination of the border in the light of their respective claims and the arrangements for its demarcation;

(2) in the event of no agreement between the Ministers of the two Governments on the determination of the border being reached within two months of the cease-fire, (1-7-65), the two Governments shall, as contemplated in the joint Communiqué of October 24, 1959, have recourse to the Tribunal (to be constituted in the manner provided in (3) hereafter) for determination of the border in the light of the respective claims of the parties and the evidence produced before it and the decision of the Tribunal shall be final and binding on both the parties;

(3) the Tribunal shall be constituted consisting of three persons, none of whom would be a national of either India or Pakistan. One member shall be nominated by each Government and the third member, who will be the Chairman, shall be jointly selected by the two Governments. In the event of the two Governments failing to agree on the selection of the Chairman within three months of the cease-fire, they shall request the Secretary-General of the United Nations to nominate the Chairman;

(4) the decision of the Tribunal shall be binding on both the Governments, and shall not be questioned on any ground whatsoever. Both Governments shall implement the findings of the Tribunal in full as quickly as possible and shall refer to the Tribunal for decision any difficulties which may arise between them in the implementation of these findings. For that purpose the Tribunal shall remain in being until its findings have been implemented in full.

3. The Award was published on or about February 19, 1968 and the alignment of the boundary as in the majority opinion was declared as the boundary determined by the Tribunal.

4. The petitioners' case is that the alignment of the boundary by the Tribunal has resulted in awarding parts of the

territory of India to Pakistan and such territory cannot be handed over to Pakistan by mere executive action. According to the petitioners there is a cession of territory belonging to India and consequently the Kutch Award cannot be implemented without an amendment of the Constitution as provided by Article 368 and, in the alternative, even if there be no cession of territory belonging to India requiring a constitutional amendment as aforesaid, the Kutch Award can be implemented only by legislation under Article 253 of the Constitution. According to the respondents, on the other hand, neither any constitutional amendment nor any law is necessary, there being no cession of territory but only settlement of a dispute between the two countries as to where in fact the boundary is. It is further contended that entering into an agreement for settlement of such a dispute is an attribute of sovereignty and, therefore, the Award can be implemented without any law.

5. After we had issued rule in Civil Writ No. 294 of 1968, Civil Writ Petitions Nos. 330 and 343 of 1968 were filed and we issued rules in those petitions as well. On 23rd April, 1968, Mr. Parkash Narain accepted notice on behalf of the respondents in the two later writ petitions and the learned counsel for the petitioners stated that the only point they wished to urge in support of the petitions was that having regard inter alia to the terms of the Kutch Award a law was necessary before transferring any territory. Upon this statement by the learned counsel for the petitioners, Mr. Parkash Narain stated that no separate returns would be necessary in these two writ petitions. In view of this all the three writ petitions were heard together.

6. Shri Shiv Kumar Sharma, petitioner in Civil Writ Petition No. 294 of 1968, appearing in person, relied on certain maps to show that the border between the erstwhile Province of Sind and the then independent State of Kutch was well defined and, therefore, any transfer of territory in pursuance of the Kutch Award amounted to cession of Indian territory as envisaged in Article 1 (3) of the Constitution and consequently such territories could not be altered without amending Article 1 of the Constitution. He further contended, relying on paragraph 6 of the counter-affidavit, wherein it is stated:

"It is denied that a very important part of territory or any territory of India is being given to Pakistan and that too 'for fear of war'. A mistaken claim to territory which was in the adverse possession of India does not have the effect of converting such territory into terri-

tory of India and demarcation of the real boundary does not amount to cession of territory."

That even if any territory was, as admitted by the respondents in their counter-affidavit, "in the adverse possession of India" it was a territory acquired by India within the meaning of Article 1 (3) (c) and, therefore, parting with such territory also amounted to cession of territory. He also referred us to page 153 of the Award, and particularly the following paragraph—

"In my opinion it would be inequitable to recognise these inlets as foreign territory. It would be conducive to friction and conflict. The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such. The points where the boundary will thus cut off the two inlets are these:

At the western inlet, the boundary will leave the boundary symbols indicated on Indian Map B-34 at the point marked thereon as '26', more precisely where the cart track is indicated as departing from the edge of the Rann in a southeasterly direction. This point is indicated as Point 'L' on map C. On the other side of the inlet, the point will be that where the camel track is indicated on Indian Map B-34 to reach the edge of the Rann; that point is indicated as Point 'M' on Map C. Between Points 'L' and 'M', the boundary shall be a straight line.

The boundary will cross the eastern inlet at its narrowest point in a straight line between Points 'N' and 'O' marked on Map C."

and contended that in the context foreign territory meant foreign to Pakistan and that the Tribunal had, on the basis of equity and in the interest of amity, peace and stability between the two countries, decided to award the inlets, which in fact belonged to India, to Pakistan and, therefore, the implementation of the Kutch Award must necessarily involve cession of Indian territory. Mr. Bobde, learned counsel for the petitioner in Writ Petition No. 343 of 1968, and Mr. Lekhi, learned counsel for the petitioner in Civil Writ Petition No. 330 of 1968, also adopted the same line of reasoning as Shri Shiv Kumar Sharma, the petitioner in person, with respect to effect of the finding at page 153 of the Kutch Award. Mr. Bobde, however, further contended that:

(1) the Kutch Award could not be implemented without constitutional amendment, or, in any case, a law made under Article 253, even if India was wrongly in possession of any part of the

territory now awarded in favour of Pakistan;

(2) as decided by the Tribunal itself the scope of reference to the Tribunal was to decide what actual boundary between India and Pakistan was and not what it should be. In spite of the limited scope of the reference and the finding of the Tribunal, the Tribunal went on to decide on grounds of equity and in the interest of peace and harmony between the two countries as to what the boundary should be and this involved cession of territory belonging to India, or at least claimed by India as belonging to it;

(3) India was exercising administrative control over the territories allocated to Pakistan and had all along been claiming the same as belonging to India and India could not now be allowed, for the sake of sustaining the validity of the Award, to disclaim those territories and say that those never belonged to India;

(4) in view of the actual possession of the territory with India the subjects of the Republic of India had a constitutional right under Article 19 to travel within that territory and cession thereof necessarily affected the rights of the subjects of the country necessitating law for the implementation of the Award;

(5) wherever a Treaty requires either alteration of laws or confers benefits on Indian subjects or affects their rights, in any manner, the implementation can be effected only by law and not by executive fiat. Since Indian laws were applicable to the territory transferred to Pakistan by the Kutch Award cession thereof to Pakistan must necessarily involve cutting down the amplitude of laws insofar as they applied to that territory.

Mr. Bobde, in fact, went to the extent of saying that whenever a territory is in possession of a country rightly or wrongly the transfer thereof amounts to cession and that would be more so in case of India in view of the fact that under Article 1 (3) of the Constitution territory acquired by India forms as much a part of Indian territory as any other territory mentioned in sub-clauses (a) and (b) of clause (3) of Article 1 of the Constitution. He further suggested that since he was unable to visualise any treaty which did not either involve alteration of laws or confer benefits on the subjects or take away their rights, it was impossible to say that any treaty could be implemented without the sanction by Parliament. According to him, Article 253 of the Constitution was directed to that end; and

(6) even if it be held that the petitioners had failed to prove that the territories transferred belonged to India

and there was no cogent evidence on which a decision could be based, the questions should be referred to the Union Government as to whether or not any of the territories allocated to Pakistan was in possession of India or belonged to India or was claimed by India as belonging to her.

7. With regard to this contention I may straightway point out that on the view I have taken of the nature of the dispute and the amplitude of executive powers as to the making and implementation of treaties, it is unnecessary to refer the questions to the Government as suggested.

8. Mr. P. N. Lekhi, learned counsel in Civil Writ No. 330 of 1968, contended that—

(1) in 1935 the territorial limits of the Province of Sind were properly defined and, therefore, Pakistan could not claim any area beyond such defined boundaries;

(2) the inlets around Nagar Parkar peninsulae are Indian territories and, therefore, the implementation of the Kutch Award entails cession of territory belonging to India;

(3) in spite of the unauthorised statement made by the representative of India in favour of Pakistan before the Tribunal Chhad Bet and Dhara Banni continued to remain Indian territories;

(4) the area of Kanjarkot allocated to Pakistan under the Kutch Award is Indian territory;

(5) the Rann of Kutch is geographically a well defined feature and the entire Rann was a part of the territory of the erstwhile State of Kutch;

(6) Pakistan was estopped by conduct of the British Government to claim any area in excess of the area comprising the Province of Sind as on 15th August, 1947; and

(7) the erstwhile State of Kutch exercised jurisdiction over the entire area given by the Tribunal to Pakistan.

9. Mr. Palkhiwala, the learned counsel for the respondents, did not dispute that the meaning attributed to the words "foreign territory" in the Award by the petitioners was correct. Mr. Palkhiwala referred us to various passages in the Kutch Award and contended that there was no defined boundary between the erstwhile State of Kutch and the Province of Sind and the whole dispute referred to the Tribunal was the determination and demarcation of the boundary. He did not suggest that the findings of the Tribunal were binding on the Courts in India in deciding the issue, namely, whether any territory of India had been ceded, but referred to them only as indicative of the position, name-

ly, that the boundary between Kutch State and Sind was undefined; that India was laying claim to the entire territory shown as belonging to India in the Map A filed before the Tribunal; that Pakistan was claiming a part of the area held to belong to India; and that there was genuine bona fide dispute as to the real boundary between the two countries and it is that dispute which was referred to the Tribunal for decision. Mr. Palkhiwala placed the following points before us for consideration:

(1) the question before the Tribunal was as to where the boundary lay between India and Pakistan in 1947;

(2) it was a pure question of fact which has been determined by a duly appointed international Tribunal and accepted and confirmed by the Government of India;

(3) the Tribunal found that there was no well-defined boundary between Sind and Kutch;

(4) there was no satisfactory evidence, according to the Tribunal, that the territories awarded to Pakistan were comprised in, or administered by, Kutch State at any material time;

(5) Sind was found by the Tribunal to have exercised jurisdiction and authority over the area awarded to Pakistan;

(6) the Tribunal's Award rested purely on appreciation of evidence and conflicting testimony; and

(7) as regards the two inlets and the jagged boundary the Tribunal supported its decision on the additional ground that it was conducive to harmony and international peace that those areas should be held to belong to Pakistan and that conclusion was arrived at because there was no cogent evidence contrary to the decision on these points.

10. It is unnecessary to refer to the Award in detail but I would just refer to certain passages which lend cogency to the arguments of Mr. Palkhiwala that the real dispute between India and Pakistan was about determination of the undetermined boundary between the two countries. Before I do that, it is pertinent to point out that both the countries agreed before the Tribunal that the relevant date for ascertaining the boundary of Sind was 18th July, 1947, the date of passing of Indian Independence Act and the learned counsel for the parties did not contest that that would be the appropriate date. It is also worthy of note that India had contended before the Tribunal that its function was to ascertain where the boundary has been and not to ascertain where the boundary ought to be. The Tribunal, it appears from the Award, rendered its decision on that basis, namely, that if

"a particular line is the boundary then there is no question of any equity

being applied in order to vary it from where, as a matter of fact, it has been found to be. There is no question of any legal doctrine being applied, it is a question of fact, pure and simple. Principles of equity can at most be invoked in assessing evidence."

11. I now proceed to refer to some of the passages in the Award. Mr. Palkhiwala referred us to the following pages of the Award in support of his arguments:

- Contention No. 1 Pages 2, 3, 15, 108 and 152.
- Contention No. 2 Page 17.
- Contention No. 3 Pages 8, 117 to 119, 123 to 126, 129, 134 to 145.
- Contention No. 4 Pages 141 and 142.
- Contention No. 5 Pages 140, 142, 143, 144, 151 and 152.
- Contention No. 6 Pages 10, 107, 108, 149 and 152.
- Contention No. 7 Pages 17, 147 and 153.

At page 141 the Tribunal observed—

"In summary, on the evidence on record it may be taken as positively established that, in this century, prior to Independence, outside Dhara Banni and Chhad Bet (which will be treated presently), the police and criminal jurisdiction of Sind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokot and Biar Bet. There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind Courts encompassed areas west of the eastern loop, or east of Chhad Bet. Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory (leaving aside Dhara Banni and Chhad Bet.)

The instances cited in Chapter IX, Sections 12,05 and 13 do not materially assist in clarifying where the limits of police and criminal jurisdiction of India and Pakistan lay at each relevant time after Independence."

12. Regarding Dhara Banni and Chhad Bet the Tribunal observed:

"With reference to Dhara Banni and Chhad Bet, I deem it established that, for well over one hundred years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind. It is not suggested that the grazing as such was subject to British taxation. Such limited evidence as there is on record seems, however, to justify the assumption that the task of maintaining law and order was discharged by the Sind authorities; it is not even suggested that the authorities of Kutch at any time viewed such a task as form-

ing part of their duties. The Kutch Tajvijdar of Chhad Bet stated in a revealing letter of 26th March 1940 that 'it is seen that the people of foreign territory have assumed a form of Administration on this Bet and have for a long time established their foothold' (see Chapter IX, Section 15.10.3). Whatever other Government functions were required with respect to these outlying grazing grounds, on which herds of cattle were from time to time shepherded, were apparently undertaken by Sind. Thus, the births, deaths and epidemics occurring there were recorded by the taluka office in Diplo. It is not shown that Kutch, at any time, established a thana on Chhad Bet.

The collection by Kutch of grazing fees must be viewed as an exercise of Government functions in the period before 1945, despite the fact that the actual presence of Kutch police is not proved and that the tax collectors do not appear to have been themselves invested with general police authority; their jurisdiction was strictly fiscal. It is established that these measures were instituted in 1926 and were discontinued about two years later, were reassumed for a brief period of time in 1942, were seemingly discontinued connection with the extradition case, and were thereafter again instituted in a different form under the lease executed in the summer of 1945. At no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fall far short of the expenditure incurred in the collection. More significantly, during each of the three phases, the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned. The first phase resulted in the order of the Collector, acting on the authority of the commissioner in Sind, that payment of fees should be refused. The second phase led to the indictment and demand for extradition of Kutch officials for having arrested Sind villagers who contended that the territory was British; then also the Khavda Thanedar noted that British authorities 'impressed upon the minds of the people of the villages.... that the limits of Chhad Bet do not belong to this sacred State....'(Pak Doc B 145/Ind). During the third phase, lastly, the lessee — who worked under a Kutch contractual indemnity clause protecting him against criminal indictment encountered the opposition of a party furnished with British Government weapons and accompanied by Sind police. The third phase began shortly before Independence. Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise of jurisdiction. By con-

trast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who used the grazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory. (Pages 144 and 145 of the Award)."

"Many passages of this nature which were published both on the Kutch and the British side characteristically referred to 'the Rann' without specifying what this term meant. It is by no means obvious that 'the Rann' necessarily included the Bets situated therein, for much of the evidence on record which relates to the nineteenth century establishes that a distinction was made in practice between rights to the Bets and rights in and to the Rann proper, and it is not a foregone conclusion to assume that an area like Dhara Banni - Chhad Bet, either subjectively or objectively, can at the time of each statement have been deemed to constitute a Bet in the Rann. Furthermore, it appears quite possible that upon enquiry, that area as well as the jutting triangle and other marginal areas would have been recognised and treated as forming an extension of the mainland of Sind, and as not being encompassed by the expression 'the Rann' used in the publication in question. Any uncertainty in this respect ought properly to be resolved in favour of Pakistan. The reason therefore is that the claim made by Kutch must, because of the form in which it was made, and because it was unsupported by other action, be interpreted restrictively, to the disadvantage of the claiming party and the statements issued by the British authorities must be understood in like fashion and cannot in the circumstances be extensively interpreted. (page 147 of the Award)."

"Some of the maps which do depict a conterminous boundary as aforesaid are inconsistent in so far as they show minor portions of the boundary variously. It is known that these variations were made by the Survey of India without consulting or obtaining sanction from the authorities solely competent to decide political matters. (page 149 of the Award)."

"As stated earlier, the activities undertaken by Kutch in these areas cannot be characterised as continuous and effective exercise of jurisdiction. By contrast, the presence of Sind and Dhara Banni and Chhad Bet partakes of characteristics which, having regard to the topography of the territory and the desolate charac-

ter of the adjacent inhabited region, come as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who openly used the grazing grounds for over one hundred years and the Sind authorities must have acted on the basis that Dhara Banni and Chhad Bet were Sind territory."

Against the background of other evidence produced by Pakistan, decisive importance must be given to the Sind activities displayed in the sector of Rahim Ki Bazar and in Dhara Banni and Chhad Bet. (page 151 of the Award)."

"Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India. These sectors comprise about ninety per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim Ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appears as an extension of the main land of Sind."

These findings concern the true extent of sovereignty on the eve of Independence. I do not find that the evidence presented by the parties in relation to the post-independence period is of such a character as to have changed the position existing on the eve of Independence (page 152 of the Award)."

13. It is needless to burden this judgment with further quotations from the Award though we were taken through practically the whole of it because as will appear from what I am going to say hereafter that the nature and scope of the enquiry before us is confined within certain limits. To me the perusal of the Kutch Award shows beyond doubt that there was considerable evidence supporting both the countries and it was on the appraisal of that evidence that the Tribunal determined where the boundary lay. The passage at page 153 of the Award, which has already been quoted, must be read in the context and, to my mind, it appears to have been based up-

on a finding of fact that the territories referred to therein belonged to Pakistan.

14. Mr. Bobde referred us to S. 2 of the Indian Independence Act, 1947, and said that according to sub-section (2) of S. 2 read with sub-sec. (1) thereof all territories which at the date of the passing of the Act were included in the Province of Sind alone belonged to Pakistan and consequently what was not included in Sind was not a part of Pakistan. He also drew our attention to item 8 in the First Schedule to the Constitution as originally enacted wherein Kutch was shown as a Part 'C' State. Be that as it may, the fact remains that neither the statutes nor the Constitution defined the boundary precisely. The learned counsel for the petitioners laid considerable emphasis on paragraph 6 of the counter-affidavit, about which I have already made a mention, filed by the respondents in Civil Writ No. 294 of 1968, and said that the respondents had therein admitted that a part of territory now awarded to Pakistan was in adverse possession of India which inter alia showed that India exercised administrative control and jurisdiction over that area. Apart from the fact that this paragraph has to be read in the light of paragraph 2 of the petition, which it seeks to answer, it clearly appears that the paragraph, when read as a whole and in the light of other paragraphs in the counter-affidavit, means nothing more than this that both the countries were laying claim to certain parts of the territory in dispute and even if some territory now awarded to Pakistan was in possession of India in assertion of their claim but with full consciousness of the dispute and uncertain factual position that would not make it Indian Territory and settlement of such dispute could not be termed as cession of territory in fact belonging to India requiring any amendment in the Constitution or the passing of a law.

Let me now address myself of the question posed on behalf of the petitioners that a part of territory belonging to India has in fact been given to Pakistan. It is an impossible task to be undertaken by this Court in the exercise of writ jurisdiction to go into the mass of evidence placed by both the countries before the Tribunal and come to a conclusion in favour of the petitioners particularly because the dispute is with a foreign country which cannot be before us. Once it is held that there was a bona fide dispute between the two Governments as to where in fact the boundary lay, writ jurisdiction cannot be invoked for a decision on conflicting evidence that, as a matter of fact, certain territories awarded to Pakistan were a part of Indian territory. That is more so

because on the perusal of the Award, which incorporates the evidence considered by the Tribunal, we are satisfied that there was evidence in support of the claims of both the countries.

The material placed before the Tribunal further shows that there is no such conclusive evidence justifying a decision in favour of the existence of a conterminous boundary finally settled between the two countries. As a matter of fact, Mr. Bobde made it very clear that he did not want to invite a decision on appraisal of the conflicting evidence as to what areas belonged to India or to Pakistan. He said that for the purposes of his argument it was sufficient to show that India claimed the territories now awarded to Pakistan as her territories and therefore necessarily exercised administrative control and jurisdiction therein and that even otherwise no treaty could be implemented without a law made in exercise of power under Article 253 of the Constitution. From the Kutch Award it does clearly appear that India was laying claim to certain areas now awarded to Pakistan and that is further supported by the Map marked 'A' filed before the Tribunal.

That, however, does not carry Mr. Bobde or Mr. Lekhi any further. The Constitution does not precisely define the boundary of Indian territory. Constitutional amendment would be necessary only if any alteration in Article 1 is involved. If there is a dispute as to what in fact the territory of India is and that dispute is settled on the basis that certain territory never belonged to India it does not, in my opinion, entail any cession of Indian territory requiring a constitutional amendment. In answering this question one has to bear in mind the distinction between cession of territory and the settlement of a dispute as to where in fact the boundary between India and Pakistan lies. If the matter falls in the latter category, no constitutional amendment would be necessary. The learned counsel then contended that the territories of India would include the territories acquired by India and consequently the territories in possession of India must be treated as territories acquired within the meaning of Article 1(3) (c) of the Constitution. Their Lordships of the Supreme Court explained the scope of Article 1(3) (c) in the case which came before them upon a Reference by the President of India under Article 143 of the Constitution reported in AIR 1960 SC 845 and their Lordships observed:

"Then, as regards the argument that the inclusion of the power to acquire must necessarily exclude the power to cede or alienate, there are two obvious answers. Article 1(3)(c) does not confer power or

authority on India to acquire territories as Mr. Chatterjee assumes. There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favour of a foreign State. What Article 1 (3) (c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It may be that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territories which, the date of the Constitution, continued to be under the dominion of foreign State; but that is not the whole scope of Article 1 (3) (c). It refers broadly to all foreign territories which may be acquired by India and provides that as soon as they are acquired they would form part of the territory of India. Thus, on a true construction of Article 1 (3) (c) it is erroneous to assume that it confers specific powers to acquire foreign territories."

15. If India be in possession of a particular territory because it claims sovereignty over it but is all the time cognizant of the uncertainty of the position and existence of a bona fide dispute about where the territory lies, it cannot be termed as acquisition within the meaning of Article 1. Acquisition implies absorption into the territories of the Union of India and mere possession in the circumstances mentioned hereinbefore cannot be treated as acquisition. What has to be seen is whether any territory belonging to India has been ceded thereby bringing about any change in Article 1. In the light of the above discussion I hold that there is no cession of any territory belonging to India. In my opinion, therefore, no constitutional amendment is called for, for the implementation of the Kutch Award.

16. Mr. Bobde and Mr. Lekhi then contended that having claimed this territory as belonging to India, the respondents cannot be permitted to claim the same. The answer, to my mind, is simple. All that the respondents say is that there was no well defined and demarcated boundary between the two countries and by a Treaty the said dispute has been settled. There is, in the circumstances, no disclaimer as suggested by Mr. Bobde. It is not a disclaimer in Court to support the action of India or the Kutch Award but even the agreement dated 30th June, 1965 shows that the two Governments agreed to get the boundary determined. That apart on the perusal of the materials placed before us, including the Kutch Award, I am satisfied that there was a

bona fide dispute between the two countries as to the boundary. Mr. Bobde strongly relied on the Berubari case reported in AIR 1960 SC 845. That has no application to the present case. In that case their Lordships of the Supreme Court interpreted the agreement to mean that it involved cession of territory belonging to India. That is not the case here.

17. This then takes me to the other argument of the learned counsel for the petitioners that a treaty can be implemented only by legislation. Mr. Bobde referred us to Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 328 : (AIR 1937 PC 82), in support of this proposition. In that case, three laws made by the Parliament of Canada, namely, the Weekly Rest in Industrial Undertakings Act, 1935; the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, which gave effect to draft conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, were held ultra vires of the Parliament of Canada on the ground that the legislation related to matters assigned exclusively to the Legislatures of the Provinces. It was observed—

"Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes."

18. Now that I am on this decision, I may also point out, as that will have a bearing on the other argument based on Article 253 of the Constitution, that there was in the British North America Act section 132 providing that the Parliament of Canada shall have "all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire,

towards foreign countries, arising under treaties between the Empire and such foreign countries". It was in exercise of the power under section 132 that the impugned laws were enacted by the Parliament of Canada and were held by the Privy Council to be ultra vires of the Parliament of Canada. The ratio of the decision is that the obligations, which were sought to be given effect to, were not obligations incurred by Canada as part of the British Empire but by virtue of her status as an international person and, therefore, section 132 did not apply. Section 132 having been treated as out of the way, the validity of the legislation was tested in the light of Ss. 91 and 92 of the said Act and it was held that the legislation came within the classes of subjects, by section 92, assigned to the Legislatures of the Provinces and was, therefore, ultra vires of the Dominion Parliament.

19. Mr. Bobde and Mr. Lekhi did not dispute that making of a treaty was an attribute of sovereignty and, therefore, any country could enter into a treaty but they contended that the implementation thereof belonged to the Legislature and, therefore, the Executive could not give effect to the treaty unless supported by law. They said that Article 253 was enacted for that purpose and that is why the Article is confined only to implementing of any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body, and does not touch upon the making of the treaties. This question was left open by their Lordships of the Supreme Court in AIR 1960 S. C. 845. In my opinion, the scope of Article 253 is different. It starts with a non obstante clause, namely, notwithstanding anything in the foregoing provisions of this Chapter. The Chapter deals with the distribution of legislative powers. Treaty making and implementation of treaties is a subject which falls under entry 14 of List I of the Seventh Schedule. If the matter had been left at that, the Parliament would have, without the aid of Article 253, been competent to enact laws for implementation of treaties etc. under the said entry 14. The Constitution-makers must have felt the difficulty in the way of the Union Parliament in enacting different types of laws for the implementation of obligations under treaties etc. with respect to the subjects assigned exclusively to the State. To give one example, if the implementation of a treaty involved legislation or change in a law in force in a State falling exclusively within the State list, it could have been suggested that though that law was being altered with a view to implementing a treaty yet the State

Legislature alone could do that, exactly as it happened in (1937) A. C. 326 : (AIR 1937 PC 82).

This Article is, therefore, directed towards giving power to the Union Parliament to invade the State List to the extent it may be necessary for the purpose of implementing the treaty obligations of India. In short, the Article has been enacted to cope with a situation similar to one which arose in (1937) A. C. 326 : (AIR 1937 PC 82). In my opinion, implementation of every treaty does not require legislative aid. In the case Attorney-General for Canada 1937 AC 326 : (AIR 1937 PC 82), the Privy Council held that the performance of obligations under the treaty, if they entailed alteration of the existing domestic law, required legislative sanction. Mr. Palkhiwala suggested that this statement of law was exhaustive on the subject and in no other case was legislation necessary for implementation of treaties. Mr. Bobde, however, relied on Civilian War Claimants Association, Limited v. The King, (1932) AC 14; Walker v. Baird, (1892) A. C. 491; and West Rand Central Gold Mining Co. Ltd. v. The King, (1905) 2 K. B. 391, to show that the Privy Council decision in (1937) A. C. 326 : (AIR 1937 PC 82), was not exhaustive of the position and legislation was required even where the fulfilment of obligations under a treaty affected the right of or conferred benefits on the subjects of the concerned country or necessitated alteration in domestic laws. In Halsbury's Laws of England, Third Edition, Volume 7, page 287, paragraph 607 the position is stated thus:

"Treaties concluded by the Crown are in general binding upon the subject without express parliamentary sanction but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases."

In foot-note (1) it is said—

"In England there is no codified list of subjects upon which the Crown has power to bind the subject by treaty without parliamentary sanction; but where any reasonable doubt arises, it is usual either to obtain statutory authority beforehand, or to stipulate in the treaty that the consent of the legislature shall be obtained (2 Anson's Law and Custom of the Constitution (4th Edn.), Pt. II, p. 137). Now that treaties regularly require ratification to become binding, the authority of Parliament need only be obtained for ratification. Thus for example, the treaties of peace made in 1947 with Italy and certain other countries had to be ratified before they came into force. Since they affected the private rights of British subjects, the

Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and Finland) Act, 1947 (10 & 11 Geo. 6 C. 23), was passed, which gave the Crown power to make such appointments, establish such offices, make such Orders in Council, and do such things as appeared to it to be necessary for carrying out the treaties, and for giving effect to any of their provisions (*ibid.*, S. 1 (1)). Orders in Council could provide for the imposition, by summary process or otherwise, of penalties in respect of breaches of its provisions (*ibid.*, s. 1 (2)). They had to be laid before Parliament, and might be annulled by the Crown in Council upon an address from either House (*ibid.*, s. 1(3)). Expenses incurred in carrying out the treaty were to be defrayed out of moneys provided by Parliament (*ibid.*, s. 1 (7)). Thus the Crown obtained powers of subordinate legislation enabling it to carry the treaties into effect. The Japanese Treaty of Peace Act, 1951 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 6), is in almost the same terms."

Again, in Constitutional Law by Wade and Phillips, Fourth Edition, page 201, it is said—

"The question — when do British treaties involve legislation? — may be answered by the following summary:

(1) Treaties which, for their execution and application in the United Kingdom, require some addition to, or alteration of, the existing law. Thus a treaty which purported to confer immunity upon privately owned foreign merchant ships may deprive a British subject of his remedy and so constitute an alteration of his legal rights which can only be made enforceable by statute. The King will not be advised to ratify such treaties unless and until such legislation has been passed, or Parliament has given the necessary assurance that it will be passed. A treaty imposing upon the United Kingdom a liability to pay money, either directly or contingently, usually falls within this category, because, as a rule, money cannot be raised or expended without legislation.

(2) Treaties requiring for their application in the United Kingdom that new powers which it does not already possess shall be given to the Crown. Extradition treaties are in this category. Without statutory authority arrest by the Crown of a person accused of the commission of a crime in a foreign State with a view to his surrender can be challenged successfully by writ of habeas corpus.

(3) It is the practice and probably by now may be regarded as a binding constitutional convention, that treaties involving the cession of territory require the approval of Parliament given by a statute."

20. The position, to my mind, appears to be this that if a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making State and its subjects have to be made enforceable in municipal Courts, or which involves raising or expending of money or conferring new powers on the Government recognizable by the municipal Courts, a legislation will be necessary. Of course, if it involves cession of territory then so far as India is concerned constitutional amendment may also be necessary. It is not possible to prepare an exhaustive list as to which treaties can be implemented by legislation and I will not attempt to do so. There may be other treaties where implementation by law is necessary and therefore the Privy Council decision cannot be treated as an exhaustive statement of law on the subject. To my mind, one thing is however clear that where the implementation of a treaty merely involves the ascertainment of the disputed boundaries with a foreign State, no legislation would be necessary. Legislation in the instances mentioned heretofore is necessary because in India treaties do not have the force of law and consequently obligations arising therefrom will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary raises no such obligation requiring implementation in Municipal Courts. Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of a treaty, settling a dispute like the present, has to be handed over to another country. In that case legislation may be necessary.

21. On behalf of the petitioners it was contended that under Article 19 every citizen of the country has the right to reside and settle in any part of the territory of India and move freely within the territory of India and if before this Treaty, Indian subject had the right to settle or move freely within the territory in occupation of India, the rights of the subjects will certainly be affected if that part is given over to Pakistan. That argument suffers from a fallacy. The right under Article 19 extends only within the territory of India and, therefore, if any part did not in fact belong to India there would be no such right with respect to that part.

22. As to the other contentions by Mr. Lekhi, I have already indicated that it is not possible in these proceedings to decide the controversial question of fact as to which part belonged to which country and on the perusal of the aforesaid agreement dated 30th June 1965, and the material referred to in the Kutch Award

my conclusion is that there was a bona fide dispute and none of the countries was actually sure where the boundary lay.

23. Mr. Lekhi then contended that the term "boundary" is itself a well-recognized term in international law and the various maps of the Province of Sind drawn during the British rule should be taken as conclusive. He said that, for instance, the boundaries of none of the States on the border of Pakistan are expressly defined in the Constitution and tomorrow any Government may say that a particular part does not belong to India and thereby cede territory without even a reference to the Legislature. My answer to that is that no Government is expected to function in that manner and, therefore, such a situation could not have been visualised or taken note of by the Constitution makers. The boundaries of One's country are more sacred to every subject than anything else. Those who head the various departments of Government sit under oath to uphold the integrity, honour and prestige of the country. There are checks and counter checks provided under our system of laws and that system permits on occasions the legislature to be pitted against the executive, the State against the Union, interest against interests and the courts against illegal, mala fide or arbitrary act by any other branch of Government. Such balances always provide sufficient safeguards. There is nothing in this case which shows lack of integrity on the part of the Government to its oath.

24. In the result, therefore, the petitions fail and are dismissed with no order as to costs.

25. ANDLEY, J.: I agree.

BNP/D.V.C. Petitions dismissed.

AIR 1969 DELHI 75 (V 56 C 14)
M. M. ISMAIL, J.

R. S. Shri Ram Pershad and others, Plaintiffs, Appellants v. Smt. Chhano Devi Wd/o Ram Sarup and others, Defendants, Respondents.

Second Appeal No. 7-D of 1958, D-5-9-1967, from decree of Addl. Dist. J., Delhi D/- 12-10-1957.

(A) **Trusts Act (1882), Ss. 48, 19—Public Trust — Suit by trustee against co-trustee for rendition of accounts — Maintainability.**

A suit by a trustee against his co-trustees for rendition of accounts is maintainable. If the right of a trustee to be made aware of the state of the accounts relating to the trust is to be an effective

right, the said trustee must have the right to call upon the other trustee who is in-charge of the income and expenditure to render an account of the same: AIR 1922 Mad 17 (FB) and AIR 1940 Cal 376 Rel. on. (Para 6)

(B) **Trusts Act (1882), S. 48 — Public Trust — In trust-deed author of trust naming one of trustees to be in day-to-day charge of income and expenditure of trust property — Provision does not in any way affect joint responsibility of trustees in respect of management and administration of trust.** (Para 7)

(C) **Civil P. C. (1908), S. 92 — Scope — Suit for rendition of accounts by co-trustees against trustee who was in day-to-day charge of trust-properties — Suit does not come within scope of S. 92: AIR 1952 Trav Co 323, Disting.** (Para 8)

(D) **Trusts Act (1882), S. 19 — Public Trust — Suit for rendition of accounts against trustee — Suit does not abate with death of trustee — Liability of legal representatives with regard to mode of accounting.**

A suit for rendition of accounts filed against a trustee cannot be said to abate with the death of the trustee but such suit can be continued against the legal representatives with the change in the obligation necessarily caused by the death of the trustee: AIR 1967 SC 1124 and AIR 1948 Cal 19 and AIR 1951 Cal 182, AIR 1953 Cal 244 and AIR 1941 All 187 and AIR 1945 Bom 21 and AIR 1950 EP 250, Rel. on. (Para 11)

The obligation of the legal representatives will be to produce before the Court whatever books and papers and vouchers left behind by the deceased and it is thereafter the duty of the plaintiff to establish what amount was really due from the estate of the deceased trustee. In other words, the burden is on the plaintiff to establish that monies were due by the deceased to the trust and once he succeeds in establishing that, then the estate of the deceased in the hands of the legal representatives will be liable to the extent of the amount so established. (Para 11)

(E) **Trusts Act (1882), Ss. 19, 48, 44 — Public Trust — Suit for rendition of accounts by co-trustees against legal representatives of managing trustee — Books of accounts maintained by managing trustee in possession of plaintiff-co-trustees — Evidence revealing that account-books were prepared by managing trustee from his personal account-books and supporting vouchers had been retained by him — Held, simply because account-books were in custody of plaintiffs it could not be said that suit for accounts could not be proceeded against legal representatives of managing trustee.** (Para 13)

(F) Trusts Act (1882), Ss. 19, 48, 44, 46 — Public Trust — Suit by co-trustee against legal representatives of deceased managing-trustee for rendition of accounts—Co-trustee shown to have resigned his post earlier — Since for period during which co-trustee was trustee, he had right to call upon deceased managing-trustee and after him his legal representatives to render accounts of trust property and since notwithstanding his resignation co-trustee had not ceased to be trustee, suit by him held maintainable : AIR 1963 SC 309 Rel. on.

(Para 15)

(G) Trusts Act (1882), Ss. 19, 44, 48—Public Trust—Suit by co-trustee against legal representatives of deceased managing-trustee for rendition of accounts — Held, since liability of legal representatives was not onerous and was lighter than their predecessor there was no justification for restricting period of accounting : AIR 1955 Andhra 18, Expl. Halsbury's Laws of England, 3rd Edn. P. 385, Rel. to. (Para 16)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1124 (V 54)—

(1967) 1 SCR 93, Girijanandini Devi v. Bijendra Narain

51

(1963) AIR 1963 SC 309 (V 50) —

15

(1963) 3 SCR 623, Abdul Kayum v. Mulla Alibhai

15

(1955) AIR 1955 Andhra 18 (V 42) — 1954-2 Mad LJ (Andhr) 177, Gutha Hariharabrahman v. D. Janikiramaiah

16

(1953) AIR 1953 Cal 244 (V 40) — Panmal Lodha v. Omraomal Lodha

10

(1952) AIR 1952 Trav Co. 323 (V 39) — ILR (1951) Trav Co 543, Mathevan Pillai v. Muthia Pillai

8

(1951) AIR 1951 Cal 182 (V 38), Profulla Kumar v. Firoza Sundari Dassi

10

(1950) AIR 1950 EP 250 (V 37) — 1950-52 Pun LR 182, Daulat Ram v. Balak Ram

10

(1948) AIR 1948 Cal 19 (V 35) — 83 Cal LJ 1, Brij Kishore Singh v. Sm. Nazuk Bai

10, 11

(1945) AIR 1945 Bom 21 (V 32) — 46 Bom LR 649, Purshottam Vasudeo v. Ramkrishna Govind

10

(1941) AIR 1941 All 187 (V 28) — ILR (1941) All 642, Ghulam Rashid v. Muhammad Abdul Rab

10

(1940) AIR 1940 Cal 376 (V 27) — 44 Cal WN 327, Indu Bhusan Sen v. Kiron Chandra Sen

6

(1922) AIR 1922 Mad 17 (V 9) — ILR 45 Mad 113 (FB). Appanna

11

Poricha v. Narasinga Poricha

6, 11

S. L. Sethi with Vijay Kishan, for Appellants; Bhagwat Dayal, (for Nos. 3 & 4); R. L. Tandon, (for No. 1); N. D. Bali, (for No. 4) and Smt. Shyamala Pappu, (for No. 5), for Respondents.

JUDGMENT: One Shri Bholumal executed a will dated 4-7-1916. In that will, inter alia, he provided for spending a sum of rupees thirty-two thousand and interest thereon in the construction of a Dharamashala. Subsequent to the said will, the said Bholumal himself completed the construction of the Dharmashala. Therefore, by a subsequent will dated 15-7-1921, he revoked his earlier will and provided for the management of the Dharmashala among other things. He appointed Ram Parshad, the first plaintiff in the suit and Ram Sarup, the deceased first defendant in the suit, which has given rise to the present Second Appeal, and two others as executors and managers for the purpose of carrying out the directions contained in the will and for managing the Dharmashala. The will stated that after the death of the testator the said managers should manage the Dharmashala in every way and carry out repairs. The will further provided that Ram Sarup, one of the managers, would be authorised to realise the rents of the shops pertaining to Dharmashala and maintain the accounts of income and expenditure himself. One other clause in the will that has to be noticed is that which provided that in future whatever amount was to be spent in respect of the Dharmashala, the same shall be spent by Ram Sarup in consultation with the other 'receivers'. It appears that the testator, namely, the founder of the Trust died in 1921 itself.

2. On 31-10-1951, the plaintiffs filed suit No. 495 of 1951 on the file of the Commercial Sub-Judge, 1st Class, Delhi, against Ram Sarup for

"preliminary decree for rendition of accounts in favour of the plaintiff against the defendant directing him to render accounts of the income of the trust property since Sambhat 1976 and a final decree for such amount as may be found due from the defendant to the trust on rendition of accounts.

Sambhat 1976 corresponds to 1919 A.D."

3. During the pendency of the suit and as a matter of fact immediately after the service of the summons on Ram Sarup and before he could file the written statement, Ram Sarup died on 25-2-1952. On an application dated 5-3-1952 filed by the plaintiffs, the respondents 1-6 herein were brought on record as legal representatives of the deceased Ram Sarup. Out of these respondents, respondent No. 1 is the widow of Ram Sarup and respondents 2-6 are the children of Ram Sarup and of whom respondents 3-6 were minors at that time. Two separate written statements were filed in the suit, one by the widow of Ram Sarup and the other on behalf of the minor defendants. On the basis of

the pleadings, the following issues were framed for trial:

1) Did Bhulumal create a public trust under his will dated 15-7-1921? What are its terms and scope?

2) Was Ram Sarup, deceased, one of the Trustees? Was he charged with the maintenance of the trust account? Did he maintain accounts and was accountable to other trustees?

3) Were the plaintiffs constituted trustees along with Ram Sarup, deceased, in accordance with the terms of the trust by the founder or subsequently by the other trustees?

4) Is the suit maintainable against the present defendants now impleaded as legal representatives of Ram Sarup, deceased, who died during the pendency of the suit?

5) Is the suit within limitation?

By a judgment and decree dated 4-1-1955 the Commercial Sub-Judge, 1st Class, Delhi, found all the issues except issue No. 5 in favour of the plaintiffs, but dismissed the suit on account of his finding on issue No. 5. His finding on issue No. 5 was that the obligation to account was personal to the trustee and came to end on his death, and consequently, the suit could not be proceeded against the legal representatives of the deceased trustee. He was further of the opinion that if it was desired to proceed against the legal representatives, then the suit must be for a specific sum. The appeal preferred by the plaintiffs was dismissed by an Additional District Judge, Delhi, on 12-10-1957. On the point on which the trial Court dismissed the suit, the Appellate Court came to a different conclusion and stated that the suit could have been proceeded against the legal representatives. But for two other reasons, the Appellate Court dismissed the suit.

The first reason was that the account books of the Trust were handed over by the deceased Ram Sarup to the Auditor and the Auditor Secretary of the Trust, who was no other than the third plaintiff in the suit. Consequently, all the accounts of the Trust properties were fully known to the plaintiffs and they could not be allowed to file a suit for rendition of accounts when they could certainly, after calculation, file a suit for the amount which was actually due to them particularly when the legal representatives were after all only under an obligation to hand over the books of the deceased father to the persons asking for the accounts. The second reason given by the Lower Appellate Court was that the first plaintiff had contended that he and the deceased Ram Sarup had co-opted plaintiffs Nos. 2 and 3 as trustees and in the view of the lower Ap-

pellate Court, it was not possible to say definitely if Ram Sarup had ever concurred in the appointment of plaintiffs Nos. 2 and 3 as trustees. Further pending the appeal admittedly the first plaintiff had resigned his trusteeship. Consequently, there was nobody to whom the respondents herein could be called upon to render accounts.

4. The plaintiffs herein, thereafter, preferred the present Second Appeal to the High Court of Punjab, Circuit Bench at Delhi. The appeal was disposed of by R. S. Narula, J. by an order dated 30-3-1966. However, by an order dated 26-5-1966, the learned Judge set aside his order dated 30-3-1966 on the ground that the appeal was disposed of without proper service of notice on some of the respondents. It is how the present Appeal has come up before me. This time, all the minor defendants had attained majority and all of them are represented before me by counsel.

5. Elaborate arguments were advanced before me by counsel on both the sides and the points that arise for determination are:

1) Whether a trustee can maintain a suit for rendition of accounts against a co-trustee?

2) Whether the first defendant Ram Sarup was under an obligation to render accounts to his co-trustees in view of the powers conferred on him under the Trust-deed?

3) Whether the suit filed by the plaintiffs was not really a suit coming within the scope of section 92, Civil Procedure Code, and consequently, was not maintainable for non-compliance with the provisions of that Section?

4) Whether the suit for rendition of accounts could be proceeded against the legal representatives?

5) Whether the suit for rendition of accounts was not maintainable for the reason that the plaintiffs had in their possession the books of accounts maintained by the deceased Ram Sarup?

6) Whether the suit was maintainable, and any decree could be passed, against the respondents in view of the finding of the Lower Appellate Court that plaintiffs Nos. 2 and 3 were not proved to have been appointed as trustees and the first plaintiff had resigned his trusteeship?

6. A number of authorities were cited by counsel on both the sides with regard to these points and I deal with them seriatim. With reference to the first point, I am of the view that a suit by a trustee against his co-trustees for rendition of accounts is maintainable. The trial Court in its judgment dealt with this point and referred to the authorities which held that such a suit

was maintainable. The contention of Shri S. L. Sethi, the learned counsel for the appellant, was that all the trustees as a body are in-charge of the management of the Trust, and consequently, each trustee is entitled to know the position of the accounts relating to the income and expenditure of the Trust properties and if any one of the trustees is in charge of such income and expenditure, the other trustees are entitled to call upon him to render an account. On the other hand, Shri Bhagwat Dayal, appearing for respondents Nos. 3 and 4 contended that the only right of the co-trustees is to be made aware of the state of the accounts and not to call upon the other trustee to render an account. I am of the opinion that if the right of a trustee to be made aware of the state of the accounts relating to the trust is to be an effective right, the said trustee must have the right to call upon the other trustee who is in charge of the income and expenditure to render an account of the same. As pointed by Kumar-swami Sastri, J. in Appanna Poricha v. Narasinga Poricha, AIR 1922 Mad 17 (FB).

"Co-trustees are co-owners of trust properties and are in law entitled to be in joint possession of all trust properties, whether it be in the form of immoveables, moveables or cash. It would ordinarily render a trustee personally liable, if he allowed the cash or moveables, to be in the exclusive possession and management of a co-trustee and there was misappropriation."

Therefore, in my opinion, Ram Sarup was liable to render an account of his management of the trust properties to his co-trustees. This conclusion is really supported by a decision of the Full Bench of the Madras High Court in AIR 1922 Mad 17 and a decision of the Calcutta High Court in Indu Bhusan Sen v. Kiron Chandra Sen, AIR 1940 Cal 376. Those two decisions concerned themselves with the scope of Section 92, Civil Procedure Code. Still, they dealt with the question of a suit by a trustee against co-trustees for rendition of accounts and held that such suit was maintainable.

7. With regard to the second point, I am of the opinion that there is nothing in the trust-deed which prevented deceased Ram Sarup being liable to render accounts to the other trustees. Shri Bhagwat Dayal laid emphasis on the provision of the trust-deed that Ram Sarup, one of the managers, will be authorised to realise the rents of the shops pertaining to Dharmashala and maintain the accounts of income and expenditure himself. I am of the view that this clause in the trust-deed does not support the contention of the learned counsel. Having named four persons as trustees of the

trust, the author of the trust named one of them to be in day-to-day charge of the income and expenditure from the shops in question. That does not in any way affect the joint responsibility of all the four trustees in respect of the management and administration of the trust. As a matter of fact, the clause in the trust-deed providing that the managers will manage the Dharmashala in every way and carry out the repairs and Ram Sarup will incur the future expenditure in consultation with the other "receivers" (obviously, there is no other receiver contemplated and, therefore, the expression "receivers" used in the trust-deed must refer only to the other trustees described as managers and all the counsel appearing for the parties agreed on this), will emphasize the joint responsibility of all the trustees and negative any independent status for Ram Sarup, which will be destructive of such joint responsibility.

8. With regard to the third point whether the suit by the plaintiff has to fail for failure to comply with the provisions of Section 92, Civil Procedure Code, it was urged by the learned counsel for the appellants that Section 92 governs only suits for vindication of the rights of the public in public charitable trusts, that is, it governs only representative suits and has no application to suits for the vindication of any private right of any individual including a co-trustee. In other words, the suit contemplated by Section 92, Civil Procedure Code, is a suit instituted on behalf of the public by the Advocate-General or two members of the public with the consent of the Advocate-General for vindication of the rights of the public in relation to a public trust against the entire body of the trustees of such trust. On the other hand, the contention of the learned counsel for the respondents was that in this particular case, the appellants had no individual right as trustees, and consequently, when they filed the suit for rendition of accounts against Ram Sarup, they were really seeking to vindicate the right of the trust as such or the right of the public in the trust, and therefore, the suit fell within the scope of S. 92, Civil Procedure Code. This argument is really the same as the argument that was advanced in relation to the contention that Ram Sarup had no obligation to render accounts to his co-trustees in view of the express powers conferred on him by the trust-deed itself.

I have already held that the co-trustees had a right to call upon Ram Sarup to render an account of the trust properties which he was in day-to-day charge of. It is this right which the co-trustees had, they were seeking to vindicate when they filed the present suit for rendition of accounts against Ram Sarup. Shri

Bhagwat Dayal, appearing for respondents Nos. 3 and 4, relied upon a decision of the High Court of Travancore-Cochin in Mathevan Pillai v. Muthia Pillai AIR 1952 Trav Co 323. In that case, a Bench of the Travancore-Cochin High Court held that the suit in that case came within the scope of section 92, Civil Procedure Code. There, three plaintiffs claiming to be joint owners and trustees of a trust known as Gurupooja Dharmam instituted the suit for the removal of the first defendant from the trusteeship and for a settlement of the accounts for the period during which he was in charge of the affairs of the trust.

The allegation in the plaint was that by a resolution passed at a meeting of the representatives of the founders of the trust, the plaintiffs were appointed as trustees and were authorised to institute the suit against the defendant for getting the necessary reliefs. The claim of the plaintiffs was that the trust in question was really a private trust. It is on these facts, the High Court held that the suit was within the scope of section 72 of the Travancore-Cochin Civil Procedure Code corresponding to S. 92, Civil Procedure Code of India. The learned Judges pointed out that the plaintiffs filed their suit on the strength of the authorisation granted by the representatives of the founders of the trust and in that situation, it could not be said that the suit was for vindication of the personal or individual rights of the plaintiffs and on the other hand, the facts clearly showed that the plaintiffs had brought the suit in a representative capacity and for the advancement of the interest of the trust in question and the fact that the plaintiffs claimed to be trustees entitled to be in the management of the affairs of the trust did not alter the situation and did not take the suit outside the scope of section 92, Civil Procedure Code. In my opinion, this decision has no application to the facts in the case before me and does not support the case of the respondents. Therefore, I hold that the suit instituted by the appellants did not come within the scope of section 92, Civil Procedure Code.

9. The question that was very strenuously and strongly argued before me related to the fourth point whether the suit for rendition of accounts originally filed against the deceased first defendant could be proceeded against the legal representatives. The contention of the counsel appearing on behalf of the respondents was that a suit for recovery of a specific sum of money from the estate of the deceased first defendant can be proceeded against the respondents on the basis that the first defendant misappropriated the trust money and the said

misappropriated amount formed part of the estate of the deceased in the hands of the legal representatives; but a suit for rendition of accounts simpliciter cannot be continued against the legal representatives of the deceased first defendant; the reason for this is that the obligation to render accounts is personal to the deceased first defendant and after his death that obligation came to an end and the legal representatives cannot be called upon to render accounts.

On the other hand the learned counsel for the appellants submitted that a right to obtain rendition of accounts against the agent or a trustee or a guardian does not come to an end with the death of the said agent, trustee or guardian but can be enforced against the legal representatives. It may be that the method of accounting will differ because the legal representatives may not have personal knowledge of the affairs, and consequently, may not be called upon to vouch and explain every one of the items in the accounts as the original obligee was under an obligation; but that does not mean that the estate of the deceased can escape liability when the said estate has benefited from the failure of the obligee to render accounts; a suit for rendition of accounts under such circumstances is really a suit for recovery of specific sum of money after taking accounts by the Court in the presence of the legal representatives of the deceased and the present suit filed by the plaintiffs really falls within this category.

10. I may point out here that the objection to the continuance of a suit for accounts against the legal representatives of a deceased agent, trustee, or guardian is based upon the contention that the obligation to render an account is personal to the person concerned and does not survive his death and upon a confusion between the obligation to render an account and the method of accounting as such. Decisions of the Calcutta High Court in Brikishore Singh v. Sm. Nazuk Bai, AIR 1948 Cal 19, in Profulla Kumar v. Sm. Firoza Sudari Dassi, AIR 1951 Cal 182 and in Panmal Lodha v. Omrao-mal Lodha, AIR 1953 Cal 244 and the decision of the Allahabad High Court in Ghulam Rashid v. Muhammad Abdul Rab, AIR 1941 All 187 and the decision of the Bombay High Court in Purshottam Vasudeo v. Ramkrishna Govind, AIR 1945 Bom 21 and a decision of the Punjab High Court in Daulat Ram v. Balak Ram 1950-52 Pun LR 182 : (AIR 1950 EP 250), really support the contention that such a suit can be continued against the legal representatives. These decisions emphasize that the liability to account should not be confused with the method of accounting; just as the liability dif-

fers, the method of accounting also differs; there cannot be any uniform rule in all cases upon such point as to what books of accounts should be kept, when they should be adjusted and what vouchers should be kept and so forth; the obligation to render account involves duties

- a) to keep accounts,
- b) to keep them ready and deliver them,
- c) to vouch after delivery to the obligee,
- d) to explain them if explanation is needed or called for;

and that the legal representatives of an agent or other person holding a fiduciary character cannot be directed by the Court to explain the accounts kept by the agent or other person but there is no inherent impossibility in the performance of other acts by the legal representatives, viz., to deliver the account papers and support them by vouchers left behind by the deceased person; though the legal representatives cannot be called upon to render an account in the technical forensic sense in which the agent himself would be liable in ordinary suit for rendition of accounts, when the suit is continued against the legal representatives, it is really, for the Court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiffs from the deceased agent or the other person in the fiduciary position.

11. The decisions have laid down that principle that the legal representatives may not be aware and may be totally ignorant of what the deceased did with reference to the trust properties and therefore, the legal representatives cannot be called upon to perform the impossible. At the same time, to the extent to which the estate of the deceased is in the hands of the legal representatives, such estate should not be allowed to escape the liability if the said estate has been enriched by any misappropriation committed by the deceased in respect of the trust properties. With the result, a suit for rendition of accounts filed against a trustee cannot be said to abate with the death of the trustee but such suit can be continued against the legal representatives with the change in the obligation necessarily caused by the death of the trustee. The obligation of the legal representatives will be to produce before the Court whatever books and papers and vouchers left behind by the deceased and it is thereafter the duty of the plaintiff to establish what amount was really due from the estate of the deceased trustee. In other words, the burden is on the plaintiff to establish that monies were due by the dece-

ased to the trust and once he succeeds in establishing that, then the estate of the deceased in the hands of the legal representatives will be liable to the extent of the amount so established.

Under these circumstances, I am unable to accept the contention of the learned counsel for the respondents that the suit for rendition of accounts filed by the appellants cannot be proceeded against the legal representatives either on the ground that the obligation to render accounts came to an end with the death of the first defendant or on the ground that it will be impossible for the legal representatives to render accounts. As I pointed out already, the liability of the legal representatives with regard to the mode of accounting will not be the same as that of the original trustee and they cannot be called upon to account in the same sense and in the same manner in which their predecessor could be called upon to account but that does not put an end to the liability to pay any amount that may be found due to the trust on taking accounts by the Court in presence of the plaintiffs as well as the legal representatives of the deceased trustee.

As a matter of fact, the decision of the Supreme Court in *Girijanandini Devi v. Bijendra Narain*, AIR 1967 SC 1124, clearly negatives the contention that the obligation to render an account comes to an end with the death of the trustee. In that judgment, the Supreme Court observed as follows:

"But a claim for rendition of account is not a personal claim. It is not extinguished because the party who claims an account or the party who is called upon to account dies. The Maxim, "actio personalis moritur cum persona" a personal action dies with the person, has a limited application. It operates in a limited class of actions ex delicto such as actions for damages for defamation, assault or other personal injuries not causing the death of the party, and in other actions where after the death of the party the relief granted could not be enjoyed or granting it would be nugatory. An action for account is not an action for damages ex delicto, and does not fall within the enumerated classes. Nor is it such that the relief claimed being personal could not be enjoyed after death, or granting it would be nugatory. Death of the person liable to render an account for property received by him does not therefore affect the liability of his estate."

Shri Bhagwat Dayal, learned counsel for respondents Nos. 3 and 4 sought to distinguish the above decision on the ground that it was a suit between the co-owners and a preliminary decree for accounts was passed before the death of the de-

fendant. I have already referred to the observation of Kumaraswami Sastri, J. in Appanna Poricha's case, AIR 1922 Mad 17 that the co-trustees are in the position of co-owners and consequently, this point of distinction sought to be made out by Shri Bhagwat Dayal fails. The decisions already referred to by me clearly negative any distinction being made between a suit in which a preliminary decree has been passed before the death of the original accounting party and a suit in which no such decree was passed. Two other circumstances may also support the conclusion that such a suit can be continued against the legal representatives.

Section 10 of the Limitation Act expressly contemplates a suit against the legal representatives of the trustee in respect of an express trust, for the purpose of following the trust property or the proceeds thereof, or for an account of such property or proceeds. Section 306 of the Indian Succession Act, 1925, after having provided that all demands and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators expressly except causes of action for defamation, assault, as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. It is pertinent to point out that the suit for accounts is not one that has been excepted by this Section.

As a matter of fact, a Bench of the Calcutta High Court in the decision already referred to by me, viz., AIR 1948 Cal 19, relied upon this circumstance as a ground for holding that a suit for accounts can be continued against the legal representatives. Therefore, I hold that the suit in the present case can be proceeded against the present respondents before me.

12. In this connection, two further points were made on behalf of the respondents. The first point was that in this suit the plaintiffs had prayed for recovery of a sum of money in their favour and the plaintiffs and the first defendant being co-trustees, all of them were entitled to the custody of the money as the property of the trust, and therefore, the plaintiffs could not ask for a decree for payment of money to them alone. There are two answers to this point. The first is that the plaintiffs did not ask for payment of money to them. They filed the suit as trustees of the trust in question and all that they wanted was that the money belonging to the trust

but in the hands of the first defendant without being accounted for as the money of the trust, should be brought into the account of the trust. In other words, the money should be paid to the trust. The second answer is that this contention will not be open to the respondents after the death of the first defendant. As against the respondents, the plaintiffs will be the trustees and will be entitled to the possession of the money, since the respondents do not claim to be the trustees of Dharmashala in question. Therefore, I do not see any substance in this point.

The second point is that the suit as framed was not for recovery of money but was simply for rendition of accounts, and therefore, cannot be proceeded against the respondents. I have already extracted the prayer contained in the plaint and that prayer included a decree for the money due from the first defendant to the trust on rendition of accounts. Further, in paragraph 11 of the plaint, it was alleged that without accounts being rendered, it was not possible for the plaintiffs to estimate the exact amount due to the trust from the defendant but a rough estimate of the said amount due from the defendant to the trust was about Rs. 32,000/- Thus, the plaint contained a specific averment that money was due from the defendant to the trust and sought a decree for payment of that money. Consequently, I am unable to accept the contention of the learned counsel that the suit as framed could not be proceeded against the respondents.

13. The fifth of the points I had already enumerated relates to the contention that the suit for rendition of accounts was not maintainable since the plaintiffs had in their possession books of accounts maintained by the deceased first defendant. This contention was based upon the evidence of the first plaintiff and the Auditor as PWs 1 and 2 and the report of the Auditor marked 'Ex. P 16.' The case was that the deceased Ram Sarup had handed over the Bahi Khata maintained by him in relation to the trust to the Auditor who in turn had handed it over to the Secretary of the Trust. The evidence of PW 1, viz., the first plaintiff, in this behalf is as follows:

"Mr. Saxena was appointed an Auditor for taking accounts from Ram Sarup. Ram Sarup gave the account books to him but he did not explain the accounts or produce any vouchers to support them.

xx xx xx

The Bahi Khata given by Ram Sarup must be with the Auditor. I have not seen it. I do not know what accounts it contained because I have not seen them. Nor can I say in whose hand it is."

Shri Saxena mentioned herein refers to Shri H. C. Srivastava, the Auditor who had given evidence as PW 2. The relevant evidence of Shri Srivastava as PW 2 is as follows:

"Bholu Mal Dharmashala Trust appointed me auditor to check their accounts. Those accounts were maintained by Ram Sarup. Long after my appointment Ram Sarup brought me a bahi. He did not produce any supporting vouchers nor did he show me his own account books from which he stated that the bahi produced before me had been prepared. I put in my report Ex. P 16, the forwarding letter is Ex. P 15. I forwarded these along with the bahi to the Trust Secretary Mr. Premjas Rai.

xx xx xx
He brought the bahi himself with one attendant. I did not record his statement. I have no documentary evidence to show that the bahi was produced by him. That bahi was for 31 years."

In Ex. P16, which was the report of the Auditor, the same position was reiterated in addition to pointing out a number of defects with regard to the accounts said to have been produced by the deceased Ram Sarup. It is on the basis of this evidence, the respondents contended that the books of accounts having been produced by the deceased Ram Sarup himself and they being in the possession of the plaintiffs themselves, if at all the plaintiffs wanted to proceed against the respondents, the suit must be only for the recovery of a specific sum of money arrived at after going through the said accounts and not for the rendering of accounts as such. It is not disputed before me that the bahi is in the custody of the plaintiffs. On 10-1-1955, an application was filed by the plaintiffs before the Commercial Sub-Judge, Delhi, for the return of the said bahi and the learned Sub-Judge on 11-1-1955 ordered the return of the same on the plaintiffs furnishing an undertaking to produce the same as and when required. However, the evidence pointed out above makes it clear that the deceased Ram Sarup told the Auditor that he prepared the bahi from his own account-books and the deceased Ram Sarup did not produce any supporting vouchers before the Auditor. Consequently, for the purpose of taking accounts correctly, it may be necessary to examine the said personal accounts of Ram Sarup and the vouchers. If the said vouchers and the personal accounts are available, it will be the duty of the respondents to produce them before the Court. Consequently, simply on the ground that the bahi is in the custody of the plaintiffs themselves, it cannot be said that the suit for accounts as filed by the plaintiffs cannot be proceeded against the respondents. Further, the suit

is for recovery of any money that may be found due by the first defendant to the trust on taking accounts and that money can come only out of the estate of the deceased first defendant in the hands of the respondents and hence the suit has necessarily to be proceeded against the respondents.

14. Coming to the sixth point, I may mention that this point is based upon a finding of the first Appellate Court, which is as follows:

"My attention was also invited by the counsel for the respondents that the plaintiffs 2 and 3 had never been appointed as trustees of the property and could not file the suit or prosecute the appeal. Regarding third plaintiff Ram Parshad, it was stated that he had ceased to be a trustee during the trial of this appeal and had no interest left in demanding the accounts. I have heard the learned counsel on this point and in my opinion it is very difficult to rebut this argument. According to Ram Parshad, he and Ram Sarup deceased had co-opted the other two trustees who were plaintiffs in the case as laid down in the will of Bholuram. However, there was very little proof if Ram Sarup had subscribed to these appointments. The resolutions Exts. P2 and P3 are merely sought to be proved by the bare statement of Ram Prashad whereas in rebuttal we have the statements of couple of witnesses and the handwriting expert to show that the signatures on these resolutions were not that of Ram Sarup. I am afraid it is not possible to say definitely if Ram Sarup had ever concurred in the appointment of Rameshwar Sarup and Premjas Rai. The third trustee had gone out of the picture voluntarily and there was therefore, no question of taking any accounts of the trust property said to have been entrusted to Ram Sarup some more than 30 years ago."

Three factors emerge from the paragraph quoted above. One is the finding of the lower Appellate Court that the plaintiffs 2 and 3 were not validly appointed as trustees of the Dharmashala in question. The second is that the first plaintiff had resigned his trusteeship. The third is that in view of the fact that none of the three plaintiffs is trustee at this moment, there is no liability on the part of the respondents to render any account to anybody. The finding that the plaintiffs 2 and 3 were not validly appointed as trustees was not challenged before me. On the other hand, that was accepted by the first plaintiff since it was represented to me by Shri Sethi, appearing for all the three appellants-plaintiffs that subsequent to the decision of the lower Appellate Court, the first plaintiff purporting to exercise his powers as

the sole surviving trustee, had appointed plaintiffs Nos. 2 and 3 as trustees of the Dharmashala. Consequently, plaintiffs Nos. 2 and 3 could not have any cause of action against the first defendant and cannot have any cause of action against the respondents, because, if at all they can be said to be the trustees, they became trustees only by virtue of their appointment as trustees by the first plaintiff after the decision of the lower Appellate Court in this case, and therefore, the respondents are not under any obligation to render any accounts to the said two plaintiffs, with the result the appeal preferred by them must be dismissed.

15. With reference to the resignation of the first plaintiff as a trustee of the Dharmashala, it is contended by Shri Sethi, the learned counsel, that his resignation will not deprive him of his right to ask for accounts from the first defendant and after his death from the respondents herein. The basis of his contention is two-fold. Firstly, even if he had ceased to be a trustee, for the period during which he was a trustee, as a co-trustee along with the first defendant, he had a right to call upon the first defendant and after his death, the respondents herein, to render accounts to him since his liability to the beneficiaries jointly with the first defendant remained intact. The second aspect was that even though the first defendant resigned his trusteeship, in law there is no effective and valid resignation, and consequently, the first plaintiff continued to be the trustee. He invited my attention to the principles contained in Section 46 of the Indian Trusts Act, which is as follows:

"46. Trustee cannot renounce after acceptance:

A trustee who has accepted the trust cannot afterwards renounce it except (a) with the permission of a principal Civil Court of original jurisdiction, or (b) if the beneficiary is competent to contract, with his consent, or (c) by virtue of a special power in the instrument of trust."

The argument of the learned counsel was that even though this Section in terms does not apply to the public charitable trusts, still the principles contained in that Section will be applicable to the case of the public charitable trusts. For this purpose, the learned counsel placed strong reliance on the following passage occurring in the judgment of the Supreme Court in Abdul Kayum v. Mulla Alibhai AIR 1963 SC 309:

"It is true that Section 1 of the Indian Trusts Act makes provisions of the Act inapplicable to public or private religious or charitable endowments; and so,

these sections may not in terms apply to the trust now in question. These sections however embody nothing more or less than the principles which have been applied to all trusts in all countries. The principle of the rule against delegation with which we are concerned in the present case, is clear: a fiduciary relationship having been created, it is against the interests of society in general that such relationship should be allowed to be terminated unilaterally. That is why the law does not permit delegation by a trustee of his functions, except in cases of necessity or with the consent of the beneficiary or the authority of the trust deed itself, apart from delegation 'in the regular course of business,' that is, all such functions which a prudent man of business would ordinarily delegate in connection with his own affairs."

It is pertinent to point out that their Lordships of the Supreme Court, made the above observation, after quoting Sections 46 and 47 of the Indian Trusts Act. It is with reference to this, Shri Sethi argued that the mere submission of resignation by the first plaintiff did not amount to his ceasing to be a trustee of the trust in question and as matter of fact, in view of the finding of the lower Appellate Court that plaintiffs Nos. 2 and 3 were not validly appointed as trustees, there would be nobody to accept the resignation of the first plaintiff and there would be none to act on behalf of the trust. Shri Sethi further submitted that notwithstanding the resignation, the first plaintiff continued to act as a trustee even till this day and by virtue of his powers as the sole surviving trustee, he appointed plaintiffs Nos. 2 and 3 as trustees after the decision of the lower Appellate Court. However technical the arguments of Shri Sethi be, I am of the opinion that this suit cannot be dismissed simply on the ground that the first plaintiff had submitted his resignation. Both on the ground that for the period he was the trustee he had a right to call upon the first defendant and after his death the respondents to render accounts of the trust property and on the ground that notwithstanding his resignation, the first plaintiff had not ceased to be a trustee, I hold that the suit was not liable to be dismissed and it can be proceeded against the respondents herein.

16. Lastly, it was urged by Shri Bhagwat Dayal that the decree for accounts is only a discretionary relief and consequently the Court in the exercise of its discretion should refuse to grant accounting for such a long period and restrict it for a reasonable period. In support of this submission of his, the learned coun-

sel relied upon the following passage occurring at page 385, Volume IV of Halsbury's Laws of England, 3rd Edition:

"The general rule is that, in the absence of special circumstances, accounts are to be taken against the trustees from the date at which the misapplication commenced. Each case is, however decided on its merits at the discretion of the Court, and therefore, the dates to which accounts against charity trustees are carried back differ widely. The Court may decline to direct an account where the litigation would be expensive and the benefit to the charity problematical or trifling."

The learned counsel also relied upon a decision of the Andhra Pradesh High Court in *Gutha Hariharabrahman v. Doddapaneni Janikiramaiah*, AIR 1955 Andhra 18, where the account was asked for a period of 37 years and the Court in exercise of its discretion directed the accounts to be taken for a period of six years from 1938. In this case, as I pointed out already, the plaintiffs had asked for accounts from 1919 onwards. On the very face of it, the plaintiffs cannot ask for accounts from 1919 onwards since the author of the trust died only in 1921 and the first defendant could be said to have taken charge as a trustee under the trust-deed only in 1921 and he was liable to render accounts only from the date he took charge and not earlier. Apart from this, in this case, I do not consider that there is any justification for restricting the period of accounting. After all, the liability of the respondents as legal representatives of the deceased first defendant is not going to be an onerous one in this behalf and their liability is much lighter than the liability of their predecessor, viz., deceased Ram Sarup.

17. Under these circumstances, I allow the present Second Appeal as far as the first appellant is concerned and dismiss the appeal of the appellants 2 and 3 against the respondents. I set aside the judgments and decrees of the Courts below and direct that a preliminary decree for rendition of accounts be passed under Order 20 Rule 16 of the Civil Procedure Code against the estate of the deceased Ram Sarup in the hands of his legal representatives, the respondents in this appeal, for the purpose of ascertaining the amount of money due to or from the deceased to the trust in question. The following directions are given under Order 20 Rule 17 of the Code:

(i) The trial Court shall appoint a Commissioner for taking accounts, fix his remuneration and give him necessary directions in this behalf not inconsistent with the directions herein given.

(ii) The defendants-respondents will be called upon to produce all accounts, papers and vouchers relating to the trust, maintained and left behind by the deceased Ram Sarup as may be available with the defendants-respondents with reference to the period commencing from the date when the deceased Ram Sarup took charge as trustee under the trust-deed and ending with the date of his death. But no adverse inference can be drawn against them for non-production unless it is proved that they are available and the defendants-respondents are deliberately withholding any of them.

(iii) If the defendants-respondents do not produce the books of accounts, vouchers or documents relating to the trust or produce only a part, the Court will be at liberty to investigate and find out whether they or any one of them are or is withholding the same and in the event of a finding to that effect, draw such inferences as it thinks proper.

(iv) The defendants-respondents will not be under an obligation to explain any entry in the accounts and vouch for any part of the account but if they or any of them, are or is able to so explain or vouch for, they or he may do so.

(v) If books, documents, papers and vouchers are produced, the first plaintiff-appellant will be at liberty to prove that they are, not proper books, documents, papers and vouchers or that the contents thereof are not correct or that the items are not true. The onus in this behalf will be on the first plaintiff-appellant. If the first plaintiff-appellant does so, the defendants-respondents can answer the challenge if they so desire.

(vi) If the first plaintiff-appellant claims any particular amount with reference to the accounts from the estate of the deceased Ram Sarup, the burden of proving that any such amount was due to the trust by the deceased Ram Sarup will be on the first plaintiff-appellant and the legal representatives will have the right to adduce evidence and answer.

(vii) It would be open to any of the parties to move the trial Court for such other direction to the Commissioner under Order 20 Rule 17 of the Civil Procedure Code as may become necessary, during the course of the proceedings before the Commissioner, in the circumstances of the case.

There will be no order as to costs in this Second Appeal.

18. Before parting with this case, I must make one observation with regard to the conduct of the first appellant-plaintiff. He was one of the trustees appointed under the trust-deed itself. From 1921 till towards the end of 1951, he did

not care to take any proceedings for obtaining accounts from the first defendant and practically just before the death of the first defendant, he filed the present suit against the first defendant. Subsequently, he resigned his trusteeship and notwithstanding the resignation, is continuing to act as a trustee. I consider that such a conduct on the part of the first appellant-plaintiff makes him unfit to be a trustee of a public charitable trust. Further, it is admitted by his counsel that he continues to act as a trustee and has appointed plaintiffs Nos. 2 and 3 as co-trustees along with him. Such a situation in which the first appellant-plaintiff and his two nominees are in sole charge of the trust will not be in the interests of the trust and in my view, this is a fit case in which a scheme for proper administration of the trust should be framed under Section 92, Civil Procedure Code. I am making this observation in the interests of the trust which is a public charitable trust and in the light of the facts that emerged in this appeal.

AGJ/D.V.C.

Appeal of first appellant allowed, Appeal of second and third appellant dismissed.

AIR 1969 DELHI 85 (V 56 C 15)
FULL BENCH

I. D. DUA, C. J., S. K. KAPUR
AND S. N. ANDLEY, JJ.

Begum Aftab Zamani, Petitioners v.
Shri Lal Chand Khanna, Respondents.

R. F. A. (O. S.) No. 10 of 1968, D/-
31-5-1968, from order of Hardayal Hardy
J., D/- 30-10-1967.

(A) **Delhi High Court Act (1966), S. 10** — Civil P. C. (1908), S. 2 (9) — Judgment — Meaning of 'judgment' in Civil P. C. not helpful in ascertaining meaning of 'judgment' in S. 10. (Para 2)

(B) **Letters Patent (Lahore), Cl. 10** — 'Judgment', meaning of explained—Delhi High Court Act (1966), S. 10—Words and Phrases — Judgment — Letters Patent (Bom., Cal and Mad.), Cl. 15 — Civil P. C. (1908), Ss. 2 (2) and 2 (9).

The Letters Patent, when providing for appeals from judgments contemplate judgments which have both the effect of a decree as defined in the Civil Procedure Code and of such order as may affect the merits of a controversy between the parties by determining some disputed right or liability. A judgment may thus be either final or preliminary or interlocutory. In order to decide whether an adjudication should be treated

as "judgment" within the meaning of Clause 10 of the Letters Patent (Lahore) regard should be had not to the form of the adjudication but to its effect upon the suit or the civil proceeding in which it is made. If its effect, whatever its form and whatever the nature of the proceeding in which it is made, is to put an end to the suit or proceeding, or if its effect, if not complied with, is to put an end to the suit or proceeding, the adjudication is indisputably a "judgment" within the meaning of this clause. Other decisions or determinations adjudicating upon a disputed controversy on the merits in a suit or proceeding may also appropriately fall within the contemplation of the word "judgment". Each case would thus depend on its own peculiar facts and circumstances. (Para 4)

(C) **Delhi High Court Act (1966), S. 10—Court-fees Act (1870), Sch. I, Art. 1, Sch. II, Art. 11** — Judgment of Single Bench is appealable under S. 10 — Determination of Court-fee on appeal — "Judgment," meaning of explained.

Section 10 of the Delhi High Court Act in the background of the statutory scheme could neither have been intended to restrict the right of appeal only to final judgments disposing of the entire suit, nor could have been intended to extend to all orders made during the course of trial, however ministerial or procedural in their nature or ineffectual on the rights of the parties. The Delhi High Court Act does not define either "judgment" or "decree". It merely makes the judgment appealable under S. 10. To be appealable the judgment, broadly stated, must be more than a mere statement given by the Judge of the grounds of a decree or order; in other words, it must contain or embody a decision on a dispute affecting the merits as well. Where the judgment conclusively determines rights of the parties with regard to the matters in controversy in the suit and embodies in itself the formal expression of the adjudication merely because as the result of the adjudication, it purports also to grant a decree, would not deprive the judgment of the characteristics of a decree for the purpose of the Court-fees Act. For the purpose of court-fee therefore, the Court will have to consider in each case whether the judgment falls within the contemplation of Article 11, Schedule II of the Court-fees Act, because of its not amounting to a decree in the sense of finally disposing of a suit or an order having the force of a decree or whether it is a judgment which, without so amounting, otherwise materially affects the rights of the parties so as to give rise to a right of appeal under section 10 of the Delhi High Court Act. If the judgment does not fall under Art. 11 of Sch. II the appeal

would be governed by Art. 1 of Sch. I. Where the judgment, besides embodying a decision on a dispute affecting the merits, also contains all the criteria of a decree, the case quite clearly falls within the purview of Article 1, Schedule I of the Court-fees Act and is subject to payment of ad valorem court-fee. Case Law Reviewed. (Paras 5, 6, 7)

Cases Referred: Chronological Paras

- (1968) AIR 1968 Mad 1 (V 55) = ILR (1967) 3 Mad 227 (FB).
 Palaniappa v. M. R. Krishnamurthy 8
 (1966) AIR 1966 Mys 150 (V 53) = (1965) 1 Mys LJ 557, Dundappa v. S. G. Motor Transport Co. (P) Ltd.
 (1966) AIR 1966 Punj 185 (V 53) = ILR (1966) 2 Punj 38 (FB).
 Rajinder Parshad v. Punjab State
 (1965) AIR 1965 SC 507 (V 52) = (1964) 1 SCR 717, Shankarlal v. Shankarlal Poddar
 (1964) AIR 1964 Raj 202 (V 51) = ILR (1964) 14 Raj 354, Vastulal Pareek v. Pareek Commercial Bank Ltd.
 (1963) AIR 1963 SC 946 (V 50) = (1963) 1 SCR 1, State of U. P. v. Dr. Vijai Anand
 (1960) AIR 1960 Cal 190 (V 47), Union of India v. Khetra Mohan
 (1960) AIR 1960 Cal 582 (V 47) = 64 Cal WN 861, Mohd. Felumeah v. S. Mondal
 (1957) AIR 1957 Punj 32 (V 44) = ILR (1957) Punj 142, Kanwar Jagat Bahadur Singh v. Punjab State
 (1956) AIR 1956 Bom 563 (V 43) = ILR (1956) Bom 211, Taxing Officer v. Jamnadas Dharamdas
 (1956) AIR 1956 Pat 325 (V 43) = ILR 35 Pat 499 (FB), Kanak Sunder Bibi v. Ram Lakan Pandey
 (1955) AIR 1955 Pat 56 (V 42) = ILR 33 Pat 974, Gobind Lal v. Administrator-General of Bihar
 (1953) AIR 1953 SC 198 (V 40) = 1953 SCR 1159, Asramati Deb v. Rupendra Deb
 (1947) AIR 1947 Nag 159 (V 34) = ILR (1947) Nag 51, Bhawara v. Mt. Renuka
 (1946) AIR 1946 Oudh 254 (V 33) = ILR 21 Luck 444, Irshad Husain v. Bakhsish Husain
 (1945) AIR 1945 Lah 146 (V 32) = 221 Ind Cas 114 (FB), Official Liquidator v. M. U. Qureshi
 (1938) AIR 1938 All 50 (V 25) = ILR 1938 All 181, Ram Prasad v. Triloki Nath
 (1935) AIR 1935 Rang 267 (V 22) = 156 Ind Cas 318, Dayabhai Jiwan-dass v. Murugappa Chettiar
 (1933) AIR 1933 Pat 139 (V 20) = ILR 12 Pat 202, Banwari Lal v. Shukrullah
- (1928) AIR 1928 Lah 904 (V 15) = ILR 10 Lah 132, Shibba Mal v. Rup Narain 3
 (1925) AIR 1925 PC 155 (V 12) = 23 All LJ 555, Sevak Jeranchod Bhogilal v. Dakore Temple Committee 3
 (1922) AIR 1922 Lah 185 (V 9) = 77 Ind Cas 327, Firm Badri Das Jankidas v. Mathamal 3
 (1920) AIR 1920 Lah 326 (V 7) = ILR 1 Lah 348, Gokal Chand v. Sanwal Das 8
 (1915) AIR 1915 PC 116 (V 2) = ILR 42 Cal 914, Ahmed Musaji Saleji v. Hasham Ibrahim Saleji 8
 Avadh Behari, for Petitioners; F. C. Bedi with S. P. Aggarwal, Parkash Narain with A. B. Shahrya, for Collector, for Respondents. 8
- INDER DEV DUA, C. J.:** The question which this Full Bench is called upon to decide relates to the amount of court-fee payable on appeal presented by an aggrieved party under section 10 of the Delhi High Court Act (hereafter called the Act) against the judgment of a learned Single Judge of this High Court given in the exercise of ordinary original civil jurisdiction conferred by the Act, to a Division Court thereof. Section 10 may now be read:
- "10. Powers of Judge:—(1) Where a Single Judge of the High Court of Delhi exercises ordinary Original civil jurisdiction conferred by sub-section (2) of section 5 on that Court, an appeal shall lie from the judgment of the single Judge to a Division Court of that High Court. (2) Subject to the provisions of sub-section (1) the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and Division Courts of the High Court of Punjab and with respect to all matters ancillary to the exercise of those powers shall, with the necessary modifications, apply in relation to the High Court of Delhi."
- The distinctive features of this provision are that it provides for an appeal from a judgment and not from a decree and the appeal lies from the judgment of a Single Judge to a Division Court of the same High Court. It is worth noting that the judgment of a Single Judge, as also that of the Division Court on appeal, acting within their respective jurisdictions, are both considered to be judgments of the High Court. The controversy, we may point out, centres round a very narrow point. It is agreed, and is common case of the parties, that if court-fee is not payable in accordance with Article 11, Schedule II of the Court Fees Act, then it would indisputably fall within the purview of Article 1 of Schedule I, which provides for payment of

ad valorem court-fee computed on the amount or value of the subject matter in dispute on appeal. We are therefore, only confined to the scope and effect of these two Articles. These articles, so far as relevant, may now be read:

COURT-FEES ACT, SCHEDULE I.

Ad valorem fees.

Number	Proper Fee
1. Plaintiff written statement pleading a set off or counter-claim or memorandum of appeal (not otherwise provided for in the Act or of cross-objection presented to any civil or Revenue Court except those mentioned in column 3.)	When the amount or value of the subject-matter in dispute does not exceed * * *
It is not necessary to reproduce the remaining contents of columns 2 and 3 because it is only the contents of column 1 which require construction.	* * *

11. Memorandum of appeal when the appeal is not from a decree or an order having the force of a decree, and is presented—

It is not necessary to reproduce the remaining contents of columns 2 and 3 because it is only the contents of column 1 which require construction.

SCHEDULE II

- (a) to any civil Court other than a High Court, or to any Revenue Court or Executive Officer other than the High Court or Chief Controlling Revenue or Executive Authority;
- (b) To a High Court or Chief Commissioner, or other Chief Controlling Executive or Revenue Authority."

In this case also, it is not necessary to reproduce the contents of column 3. Suffice it to say that the court-fee is a fixed amount. The short argument on behalf of the appellant is that the present appeal is not from a decree or from an order having the force of a decree and, therefore, it falls within Article 11 of Schedule II and not within Article 1, Schedule I, which, for our purpose, is a residuary Article. It is added that reading these two Articles together it must follow that Article 1, Schedule I, so far as appeals are concerned, is confined only to appeals from decrees and orders having the force of decrees. The cogency of this argument depends on the meaning of the word "judgment" used in section 10 of the Act. No decision directly covering the construction of this section has been brought to our notice, but by way of analogy, reference has been made to the decisions construing the meaning of the word 'Judgment' occurring in clause 10 of the Letters Patent of the High Court of Judicature at Lahore and in clause 15 of the Letters Patent constituting the High Courts of Judicature at Calcutta and Bombay. Reference has also been made to the definitions of the words "judgment" and "decree" contained in section 2 (9) and (2) respectively of the Civil P. C. We shall have to see, among other things,

as to how far these definitions are helpful in construing the word "judgment" as used in section 10 of the Act.

2. Turning first to the definitions as contained in the Code, it may be pointed out that those definitions, as the opening part of section 2 suggests, are confined to the Code itself and are in addition subject to repugnancy. Now, according to the scheme of the Code, as is discernible from Part VII, it is only decrees and certain orders which are made appealable and the word "judgment", as defined in section 2 (9), merely means the statement given by the Judge of the grounds of a decree or order. The scheme of section 10 of the Act is clearly different and quite obviously, the definitions of the Code cannot have any direct bearing on the problem we are required to solve.

3. Let us now turn our attention to clause 10 of the Letters Patent of the Lahore High Court. It reads as under:

"10. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Lahore from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or

order passed or made in exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made on or after the first day of February, one thousand nine hundred and twenty-nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us, Our Heirs or Successors in Our or Their Privy Council, as hereinafter provided." Clause 15 of the Calcutta, Bombay and Madras High Courts is identical, and being substantially to the same effect, need not be reproduced. The word "judgment" in this clause has been construed somewhat liberally and it is not synonymous with a decree, final or preliminary, in a suit.

Shri Parkash Narain, the learned counsel for the Union of India, has however, drawn our attention to a decision of the Privy Council in *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*, AIR 1925 P. C. 155, in which the term "judgment" in the Letters Patent has been construed to mean, in civil cases, a decree and not a judgment in the ordinary sense. The language used in the decision of the Privy Council is somewhat general, though the Judicial Committee was apparently concerned only with clause 39 of the Letters Patent of the Bombay High Court. Following this decision, a Division Bench of the Patna High Court in *Gobind Lal v. Administrator-General of Bihar*, AIR 1955 Pat 56, observed that if one of the parties comes and asks the Judge of the High Court to recall his earlier order under his power of review or under his inherent power, and the Judge merely refuses to take any steps in the matter, then such an order is not a judgment within the meaning of clause 10 of the Letters' Patent.

An earlier Bench decision of the same High Court also seems to have taken a similar view in *Banwari Lal v. Shukrullah*, AIR 1933 Pat 139. The Privy Council decision seems also to have been

followed by the Rangoon High Court in *Dayabhai Jiwandass v. Murugappa Chettyar*, AIR 1935 Rang 267, and by the Nagpur High Court in *Bhiwara v. Mt. Renuka*, AIR 1947 Nag 159. As noticed earlier, the Privy Council was concerned with clause 39 and not clause 15 of the Bombay High Court. The phraseology of clause 39, it is not disputed, is materially different from clause 15, and indeed this distinction has been noticed by a Bench of the Lahore High Court in *Shibba Mal v. Rup Narain*, AIR 1928 Lah 904, where it is observed as under:—

"Now, the learned Counsel on both sides are unable to explain why their Lordships of the Privy Council, after holding that no appeal was competent, not only heard the appeal but accepted it. Mr. Kishan Dayal placed his reliance upon the solitary sentence in the judgment of the Privy Council, which says that the term 'judgment' in the Letters Patent of the High Court means in Civil cases 'a decree and not a judgment in the ordinary sense,' and urges that no appeal lies under Cl. 10 from an adjudication unless it amounts to a 'decree' as defined by section 2, Civil P. C. This contention runs counter to the view of all the High Courts in India, which have never placed such a narrow construction upon the term 'judgment'..

It must be remembered that their Lordships of the Privy Council were dealing with Cl. 39, Letters Patent of the Bombay High Court, which provides for an appeal to the Privy Council from a 'final judgment, decree or order', and that the clause which gives the right of appeal from a single Judge to a Division Bench makes no mention of the word "final." The Privy Council apparently intended to point out that the word "judgment" as used in Cl. 39 is not to be taken in the sense in which that expression is used in the Civil Procedure Code; where a distinction is drawn between a judgment and a decree.

The observations relied upon by Mr. Kishan Dayal may not, be free from ambiguity; but there can be no doubt that the expression 'judgment' as used in Cl. 10, Letters Patent cannot be held to be synonymous with the word 'decree' and that there is no warrant for curtailing the scope of that clause in the manner suggested by him. Indeed, it has been expressly decided by a Division Bench of this Court in the Firm Badri Das Janki Das v. Mathanmal, AIR 1922 Lah 185 that an order rejecting an application for staying further proceedings in pursuance of a preliminary decree amounts to a 'judgment'. In view of this authority, which is admitted to be on all fours with the present case, the preliminary objection must be overruled." The Lahore High Court was of course

concerned with clause 10 of its own Letters Patent which is similar to clause 15 of the Letters Patent of the Bombay High Court.

4. Without dealing at length with some other decisions which have distinguished the Privy Council decision, we feel that we have to construe the word "judgment" in section 10 of the Act in its own context and in the background of its own statutory scheme and that the ratio of the Privy Council decision merely goes to suggest that the word "judgment" as used in the Letters Patent may not be restricted to the literal definition of the expression "judgment" as contained in the Civil P. C. The Letters Patent, when providing for appeals from judgments, in our view, contemplate judgments which have both the effect of a decree as defined in the Code and of such order as may affect the merits of a controversy between the parties by determining some disputed right or liability. A judgment may thus be either final or preliminary or interlocutory. In order to decide whether an adjudication should be treated as a "judgment" within the meaning of clause 10 of the Letters Patent, we feel that regard should be had not to the form of the adjudication but to its effect upon the suit or the civil proceeding in which it is made. If its effect, whatever its form and whatever the nature of the proceeding in which it is made, is to put an end to the suit or proceeding, or if its effect, if not complied with, is to put an end to the suit or proceeding, the adjudication is indisputably a "judgment" within the meaning of this clause. Other decisions or determinations adjudicating upon a disputed controversy on the merits in a suit or proceeding may also appropriately fall within the contemplation of the word "judgment". It is not possible to lay down any definite rule which would meet the requirements of all cases and all that we may say is that in determining whether an order or decision constitutes a "judgment" or not, the Court has to take into consideration the nature of the order and its effect upon the suit or the civil proceeding in which it is made. Each case would thus depend on its own peculiar facts and circumstances.

5. We have arrived at this conclusion on the plain reading of section 10 of the Act in the background of the statutory scheme. In our view, the draftsman could neither have intended to restrict the right of appeal only to final judgments disposing of the entire suit, nor could he have intended it to extend to all orders made during the course of trial, however ministerial or procedural in their nature or ineffectual on the rights of the parties.

6. For the purpose of court-fee also therefore, the Court will have to consider in each case whether the judgment falls within the contemplation of Article 11, Schedule II, because of its not amounting to a decree in the sense of finally disposing of a suit or an order having the force of a decree or whether it is a judgment which, without so amounting, otherwise materially affects the rights of the parties so as to give rise to a right of appeal under Section 10 of the Act. It may be observed that in the case in hand, the competency of the appeal is not in question, and indeed it is common ground that the judgment is appealable. The only question which arises for our consideration is whether the present is an appeal from a decree or from an order having the force of a decree or whether it is an appeal from a judgment which is neither a decree nor an order having the force of a decree. It is also contended at the bar that the Court-fees Act, being a fiscal statute, unless it clearly falls within Article 1, Schedule I, which provides for ad valorem court-fee, this Court must give benefit of doubt to the citizen and hold that a fixed court-fee is payable in this case under Article 11, Schedule II. This argument seems to us to be somewhat misconceived. If the judgment does not fall within the plain meaning of Article 11, Schedule II, then appeal, which is admittedly competent, would be governed by Article 1, Schedule I.

7. In the present case, the judgment has indisputably disposed of the suit finally, with the result that nothing more remains to be done in the trial of the suit. Whether a decree is also to be framed in agreement with the judgment under the Civil P. C. is, in our opinion, immaterial because the Act does not take notice of decrees and in terms it provides for appeals only from judgments. The judgment under appeal, however, conclusively determines the rights of the parties with regard to the matters in controversy in the suit and it embodies in itself the formal expression of the adjudication. Merely because as a result of the adjudication, it purports also to grant a decree, would not deprive the judgment of the characteristics of a decree for the purposes of Court Fees Act. This judgment must, therefore, be held to amount to a decree and, therefore, excluded from the operation of Article 11, Schedule II. The Act, it may be remembered, does not define either "judgment" or "decree". It merely makes the judgment appealable under Section 10. To be appealable, as hereinbefore discussed, the judgment, broadly stated, must be more than a mere statement given by the Judge of the grounds of a decree or order; in other words, it must contain or embody a decision on a dispute affecting the merits as

well. In the case before us, the judgment also contains all the criteria of a decree and this indeed is not contested. We are, therefore inclined to hold that this case quite clearly falls within the purview of Article 1, Schedule I and is subject to payment of ad valorem court-fee.

8. The learned Counsel for the parties have cited a number of decisions with the object of showing that the judgment can neither amount to a decree nor to an order having the force of a decree and that, therefore, the present case must necessarily fall within Art. 11, Sch. II. We do not consider it necessary to refer in details to all the cases cited because none of them deals with the Act. The decisions dealing with cl. 10 of the Letters Patent of the Lahore High Court and clause 15 of the Letters Patent of the Calcutta and Bombay High Courts, do seem to be of some assistance, but few of them deal with the question of court-fee, with the result that the ratio decidendi of most of these cases does not throw much helpful light on the problem which we are called upon to solve. Without elaborately commenting on them, we may merely notice them in passing. In Palaniappa v. M. R. Krishnamurthy, AIR 1968 Mad 1 (FB), an order granting leave to sue in forma pauperis was held to be a judgment and, therefore, appealable. In Rajinder Parshad v. Punjab State, AIR 1966 Punj 185 (FB), an order dismissing a writ petition on the ground of delay was held to be a judgment subject to appeal under clause 10 of the Letters Patent. In Mohd. Felumeah v. S. Mondal, AIR 1960 Cal 582, it was observed that a judgment within the meaning of clause 15 of the Letters Patent (Calcutta) could not be construed as a decree under the Civil P. C. and an ad interim injunction during the pendency of writ proceedings was held to amount to a "judgment". In Union of India v. Khetra Mohan, AIR 1960 Cal 190, there is an exhaustive discussion on the test as to what is a final and what is an interlocutory judgment. In that case, a suit was brought by the plaintiff on the original side of the Calcutta High Court against the Union of India for a sum of money. The trial Judge, after recording his decision on several issues, directed a reference for the ascertainment of the amount due and payable by the defendant to the plaintiff. The referee was directed (i) to take accounts on the footing of certain measurements for ascertainment of the amount due to the plaintiff; (ii) to determine the market rate for items of work done by the plaintiff and (iii) to ascertain whether there had been an increase in the rate of labour charges in respect of certain excess quantity of work done. In an appeal

preferred by the defendant, an objection was taken by the plaintiff that the decision of the trial Judge was not a judgment. It was held that so far as direction (i) was concerned, it should be held to be a 'judgment' within clause 15 of the Letters Patent and the order should be considered as a whole and it amounted to a preliminary decree and thus a 'judgment' within the meaning of clause 15 of the Letters Patent. On this reasoning, it was held appealable on the basis of a decision of the Privy Council in Ahmed Musaji Saleji v. Hasham Ebrahim Saleji, ILR 42 Cal 914 : (AIR 1915 PC 116). In Sultan Singh v. Jai Chand, 1966 Delhi LT 62, a learned Single Judge of the Punjab High Court sitting on Circuit in Delhi, laid down that an order of the Rent Controller or the Rent Control Tribunal under the Delhi Rent Act, 1958 does not become an order having the force of a decree merely because it is executable as a decree. The order, therefore, was held not to fall within Article 7, Schedule I, Court Fees Act. We do not consider it necessary or proper to express any opinion on the correctness or otherwise of this view. Suffice it to say that this decision does not throw much light on the question before us. According to the Supreme Court in Asrumati Debi v. Rupendra Deb, 1953 SCR 1159 : (AIR 1953 SC 198), an order for transfer of a suit under clause 13 of the Letters Patent of the Calcutta High Court is not a "judgment" within the meaning of clause 15 and no appeal lies therefrom because it neither affects the merits of the controversy between the parties in the suit itself, nor terminates or disposes of the suit on any ground. In this judgment, there is illuminating discussion as to the meaning of the word "judgment". In State of U. P. v. Dr. Vijay Anand, AIR 1963 SC 946, the order of a Division Bench dismissing an application for review of an order under Article 226 of the Constitution was held to be a "judgment" within the meaning of clause 10 of the Letters Patent of the Allahabad High Court. In the body of the judgment, the Court declined to reconcile the decisions of the Madras High Court on the one hand and those of Calcutta and Nagpur High Courts on the other on the interpretation of the word "judgment." It was, however, noticed that there was a cleavage of opinion of the scope of the expression "judgment." In Shankarlal v. Shankarlal Poddar, AIR 1965 SC 507, it was observed that orders passed by the District Court or by a Single Judge of the Calcutta High Court in the matter of winding up petitions are appealable under section 202 of the Companies Act independently of the provisions of sections 96 and 104 of the Code or of clause 15 of the Letters Patent and

it would be sufficient if the order is judicial as distinguished from administrative or ministerial order. The Court left open the question of the scope of the expression "judgment" in the Letters Patent. In *Taxing Officer v. Jamnadas Dharamdas*, AIR 1956 Bom 563, a decree passed by the Tribunal under the Displaced Persons (Debts Adjustment) Act, 1951 made appealable under section 40 of that Act was held not to amount to a decree within the meaning of the Court Fees Act. In any event, the award made by the Tribunal under that Act was not regarded as a decree within the meaning of Schedule II, Article 11, Court Fees Act, with the result that the memorandum of appeal filed under section 40 of that Act was held to fall for payment of court-fee, under Schedule II, Art. 11. In *Irshad Husain v. Bakshish Husain*, AIR 1946 Oudh 254, an order for quashing the proceedings under section 20, U. P. Encumbered Estates Act, was held not to amount to an order having the force of a decree and was, therefore, governed by Schedule II, Article 11, Court Fees Act. In *Kanwar Jagat Bahadur Singh v. Punjab State*, AIR 1957 Punj 32, an award of compensation made by an arbitrator acting under the Punjab Requisitioning and Acquisition of Immovable Property Act was held neither to amount to a decree nor an order having the force of a decree, with the result that an appeal against such an award was held to fall under Article 11, Schedule II, Court Fees Act. In *Official Liquidator v. M. U. Qureshi*, AIR 1945 Lah 146 (FB) an executable order made under the Companies Act of 1913, which is enforceable under section 199 thereof in the same manner as a decree, was held to fall for the purposes of court-fee under Article 11, Schedule II, Court Fees Act. According to *Gokal Chand v. Sanwal Das*, AIR 1920 Lah 326, the term 'judgment' in clause 10 of the Letters Patent (Lahore) includes any interlocutory judgment which decides, so far as the Court pronouncing the judgment is concerned, whether finally or temporarily, any question materially in issue between the parties and directly affecting the subject matter of the suit. In the reported case, an order on an application to stay execution pending appeal was held to be a judgment and, therefore, appealable. In *Vastul Pareek v. Pareek Commercial Bank Ltd.*, AIR 1964 Raj 202, an appeal against an order passed on a claim made by a Bank under section 45-B of the Banking Companies Act, after the commencement of its winding up proceedings, was held to fall, for purposes of court-fee, under Schedule II, Article 11, Court-fees Act. In *Dundappa v. S. G. Motor Transport Co., (P) Ltd.*, AIR 1966 Mys 150, an appeal against an order

refusing to wind up a company was held to be liable to court-fee under Article 11, Schedule II, Court Fees Act. In *Kanak Sunder Bibi v. Ram Lakhman Pandey*, AIR 1956 Pat 325 (FB), the word "decision" in Article 133 (1) of the Constitution was held equivalent to the word "decree". In *Ram Prasad v. Tirloki Nath*, AIR 1938 All 50, an order under section 5 (1), U. P. Agriculturists' Relief Act of 1934 was held not to have the force of a decree and on appeal from such an order, Court-fee was payable under Article 11, Schedule II, Court Fees Act.

9. As a result of the foregoing discussion, we hold that in the present case the memorandum of appeal is liable to payment of ad valorem court-fee under Article 1, Schedule I of the Court Fees Act.

10. S. K. KAPUR, J.: I agree.

11. S. N. ANDLEY, J.: I agree.

EDB/D.V.C. Order accordingly.

AIR 1969 DELHI 91 (V 56 C 16)

S. K. KAPUR

AND S. N. ANDLEY, JJ.

Balwant Singh and others, Petitioners v. R. D. Shah, Director of Inspection, Income-tax, Respondents.

Civil Writ No. 750-D/66, D/- 22-3-1968.

(A) Income-tax Act (1961), S. 132 (1) (as amended by Act 1 of 1965) — Penal Code (1860), S. 26 — Expression "reason to believe" — Meaning attributed to said expression under Penal Code cannot be applied to that expression under S. 132 (1) of Income-tax Act. (Para 7)

(B) Constitution of India, Art. 226 — Nature of writ jurisdiction — Court cannot act as court of appeal. (Para 8)

(C) Income-tax Act (1961), S. 132 (1) (as amended by Act 1 of 1965) — Expression "reason to believe" — It is in a sense both subjective and objective but area of objectivity is limited.

The existence of "reason to believe" in section 132 is subject only to limited scrutiny and the Courts cannot substitute their own opinion for that of the Director of Inspection. Of course, the Director of Inspection must not lightly or arbitrarily invade the privacy of a subject. Before he acts, he must be reasonably satisfied that it is necessary to do so but the decision must still remain his and not that of the Courts. If the grounds on which reason to believe is founded are non-existent or are irrelevant or are such on which no reasonable person can come to that belief, the exercise of power would be bad, but short of that, the Courts cannot inter-

fere with the reason to believe bona fide arrived at by the Director of Inspection. It is also open to the Courts to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief. In that sense the expression "reason to believe" is both subjective and objective but the area of objectivity is limited.

(Para 8)

(D) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Scheme of the section.

The scheme of the section shows that mind has to be applied by two officers at two different stages :— (1) by the Director of Inspection or the Commissioner when authorising an officer to search. Such application of mind extends to two matters — (a) that the person concerned will not produce the books of account; and (b) he will not produce the books which will be useful or relevant to any proceedings and (2) by the authorised officer that the books searched or seized will be useful or relevant to any proceedings. That follows from the use of the words "such books of account" etc. in clauses (i) and (iii) of sub-section (1) of section 132.

(Para 12)

(E) Income-tax Act (1961), S. 132 (1) (as amended by Act 1 of 1965) — Fact of authorisation issued in statutory form in accordance with requirements of R. 112 (14) — It does not necessarily lead to conclusion that Director of Inspection had applied his mind to question of necessity of search and seizure, as mandate of that rule extends to no more than reciting only applicable provisions in the Form.

(Para 14)

(F) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Seizure of documents — Usefulness and relevancy of documents — Test.

If the conclusion is that a reasonable man acting bona fide could believe that the documents were useful or relevant, it will not be open to the Courts to substitute their own opinion or sit in appeal over the judgment of the authorised officer. Of course, if the Courts come to the conclusion that the documents have no connection with any proceedings the seizure would be bad. Similarly, if the seizure is held to be not bona fide it will be struck down.

In any case, where, by and large, all the documents seized appear to be such as could lead a reasonable man to believe that they were useful and relevant the search and seizure itself cannot be struck down on the ground of absence of application of mind.

(Para 20)

(G) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Search and seizure of documents—Two alternatives,

viz., to seize books or place marks of identification and leave documents with persons concerned, available — Seizure cannot be resorted to — (Constitution of India Art. 19).

The only legal means that can be applied to search a person's abode is a search warrant and in the absence thereof neither any private person nor any officer can invade the privacy of a home and subject its occupants to indignity. It is, therefore, imperative that seizure should not be allowed to exceed the limits of absolute necessity and the overzealousness of the searching officers is not permitted to cross the permissible limits. Such provisions must, therefore, be necessarily construed in the light of this background and when two alternatives, namely, to seize the books or place marks of identification and leave them with the persons concerned are available, the seizure will be struck down on the ground that it is arbitrary and not in the public interest. It is so because every provision of the Act has to be construed in the light of Article 19 of the Constitution.

But whether or not seizure is the only alternative depends on the facts and circumstances of each case.

(Para 21)

(H) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Seizure of irrelevant documents — Validity.

In searching or seizing the documents authorities may err slightly here or there and seize documents which may on closer scrutiny ultimately turn out to be irrelevant but that cannot vitiate the search.

(Para 21)

(I) Income-tax Act (1961), S. 132, 2nd Explanation (as amended by Act 1 of 1965) — Scope — Proceedings need not be pending.

To say that though the proceedings might be commenced after the date of the search those proceedings must be in a pending case would be cutting down the scope of the Second Explanation. From the Explanation it is obvious that the proceedings may not be pending. In terms the Explanation expands the meaning of the word "proceeding" and extends the power to issue search warrants where proceedings "have been completed". The words "have been completed" obviously show that there may be no proceeding pending when the search warrant is issued.

(Para 22)

(J) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Search and seizure — Exercise of power — Proceedings need not be imminent.

Section 132 does not require that the proceedings should be imminent. All that is necessary is that the Director of Inspection or the Commissioner must, in consequence of the information, have

reason to believe that the notices or summonses as mentioned in clause (a) of sub-section (1) of section 132 might have to be issued. If there is only remote possibility of such summonses or notices being issued the section would not be satisfied not because there are no proceedings imminent but because a reasonable person could not have, in those circumstances, reason to believe that the person concerned will not produce the documents if summonses or notices are issued to him. In that sense it may be said that search warrants cannot be issued merely with a view to making a roving or fishing enquiry, but can be issued only when there exists a good ground for believing that further proceedings may have to be taken.

(Para 22)

(K) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Search and seizure of documents — Precise specification of documents in authorisation order is not necessary — All that authority issuing authorisation must believe is that there are useful and relevant documents available in premises to be searched. AIR 1966 SC 1209 & AIR 1967 SC 1298 Rel. on.

(Para 23)

(L) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Criminal P. C. (1898), S. 165 (1) — Search and seizure of documents — Authorised officer is not required to record any reasons — Section and rule 112 require only authorising officer to give reasons.

Under section 132 the search warrants can be issued upon reason to believe by the Director of Inspection or the Commissioner. The section does not require the Director or the Commissioner to record reasons though he may have to do so because if the action is challenged in court the authorising officer will have to justify his action within the limited area of objectivity. Rule 112, however, provides this safeguard in terms and requires the Director of Inspection or the Commissioner to record reasons for authorising the search or seizure.

Section 165 of the Criminal Procedure Code applies only "so far as may be" and at the most it can be said that the effect of section 165 (1) is that the person issuing the authorization must record reasons. The said section 165 cannot be held to require the authorised officer to record reasons. Under the said section the police officer concerned may either make the search or cause it to be made. Even then the officer, who is authorised to make the search by the police officer concerned, need not record reasons.

(Para 25)

(M) Income-tax Act (1961), S. 132 (as amended by Act 1 of 1965) — Scope — Investigation under, not being in the

nature of investigation into any offence, S. 165 (5) of Criminal P. C. cannot in terms apply. (Para 25)

(N) Constitution of India, Arts. 14, 19 — Income-tax Act (1961), Ss. 131 and 132 (as amended by Act 1 of 1965) — Constitutional validity of S. 132 — It is not violative of Art. 14 or 19 — AIR 1964 Assam 1 (FB), Dissent. from.

Section 131 is a general power given to the Income-tax Officer etc. for enforcing the attendance of persons, for issuing commissions or compelling the production of accounts or other documents. Section 132, on the other hand, is directed to compel compliance with notices already issued or which may be issued. Section 131, therefore, gives power to compel production of persons and books while section 132 is intended to give power to search or seize documents which the persons concerned are likely to withhold. There is, therefore, a valid classification and a distinction based on the reason to believe by senior officials, which reason is to a certain extent subject to judicial scrutiny, that the books will not be produced, cannot be struck down as discriminatory particularly when sufficient safeguards have been provided. The object of the Legislature in enacting section 132 is both to avoid tax evasion and facilitate enquiry in proceedings. Search warrants may be issued against an assessee who has filed a return or has failed to file a return and the apprehension is that he will destroy the books so that the proper income-tax is not assessed against him. It can also be issued to witnesses who are possessed of books and documents which may help the assessee in arriving at a correct assessment but it is apprehended that 'inter alia' out of vindictiveness or ill-will or even indifference towards the assessee such person, if summoned as a witness, will not produce the documents or may destroy the same. There is, therefore, a valid classification of persons against whom proceedings under Section 132 may be taken. AIR 1964 Assam 1 (FB), Dissent, from.

(Para 20)

The Director of Inspection and the Commissioner are very senior officials. They must have reason to believe that relevant or useful books or documents will not be produced. The existence of reason to believe is, to a certain extent, justiciable. The search and seizure is confined to relevant or useful books of account. The provisions of the Criminal Procedure Code have been made applicable and by virtue thereof and of Rule 112 the search has to be conducted in the presence of witnesses and the Director of Inspection or the Commissioner has to record reasons. No official below the rank of Income-tax Officer can be authorised to search or seize and that also

only the useful and relevant books. Under sub-section (8) of Section 132 the books of account or other documents cannot be retained by the authorised officer for a period exceeding 180 days except after recording reasons in writing and taking the approval of the Commissioner, and the Commissioner cannot authorise the retention for a period exceeding 30 days from the completion of the relevant proceedings. The persons concerned are entitled to object to the order of the Commissioner by an application to the Board of Direct Taxes. They are also entitled to make copies or take extracts from the books or documents seized. Search of a premises by itself no doubt offends the right of a subject to hold property guaranteed under Article 19 but searches necessitated for avoiding tax evasion or facilitating the making of assessment cannot but be termed as reasonable restrictions on the rights of the subjects. Similarly, seizure of documents for a limited period for the purposes of assessment would also constitute reasonable restriction. It follows that the Section is not hit either by Article 14 or by Article 19 of the Constitution. (1967) 66 ITR 212 (Mys) and AIR 1967 SC 1298 and AIR 1961 Cal 578 (SB) and AIR 1968 SC 59, Ref. (Para 29)

can undoubtedly be used. If, on the other hand, he withholds it, it cannot be said that Article 19 will exclude such evidence because he has no fundamental right to withhold the records and information. The conclusion, therefore, is that information gathered as a result of illegal search and seizure can be used subject to the value to be attached to it or its admissibility in accordance with the law relating to evidence. (Para 31)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 59 (V 55)= (1968) 1 SCR 148, Board of Revenue,

Madras v. R. S. Jhaveri 25

(1967) AIR 1967 SC 295 (V 54)=

(1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board

(1967) AIR 1967 SC 523 (V 54)=

(1967) 63 ITR 219, S. Narayananappa v. Commr. of I. T.

(1967) AIR 1967 SC 1298 (V 54)=

1967 Cri LJ 1194, R. S. Seth Gopikisan Agarwal v. R. N. Sen, Asstt. Collector of Customs and Central Excise Raipur 23, 26

(1967) 1967-66 ITR 212 = 9 Law Rep.

262 (Mys), C. Venkata Reddy v. L. T. Officer (Central) I Bangalore

(1968) AIR 1966 SC 1209 (V 53)=

(1966) 2 SCR 991, Durga Prasad v. Supdt. (Prev.) Central Excise, Nagpur

(1966) 1966-62 ITR 58 (Punj), N. K. Textile Mills v. Commr. of I. T. New Delhi

(1964) AIR 1964 Assam 1 (V 51)=

(1964) 52 ITR 637 (FB), S. Doon-garmal Agency v. K. E. Johnson

(1964) 12 L. Ed 2nd 246=377 U. S. 201, Winston Massiah v. United States

(1961) AIR 1961 Cal 578 (V 48) (SB), Surajmul Nagarmull v. Commr. of I. T.

(1961) 6 L Ed 2nd 1081=367 U. S. 643, Dollree Mapp, etc. v. Ohio

(1955) 1955 AC 197= (1955) 2 WLR 30, Kuruma v. Queen

(1954) AIR 1954 SC 179 (V 41)=1954 SCR 410; 1954 Cri LJ 456, Shibban Lal Saksema v. State of U. P.

(1940) AIR 1940 Cal 97 (V 27)=41 Cri LJ 329, K. Hoshide v. Emperor

(1928) 277 U. S. 438=72 L Ed 944, Olmstead v. United States

(1921) 256 U. S. 465=65 L Ed 1048, Burdean v. Mc. Dowell

(1914) 232 U. S. 383=58 L Ed 652, Weeks v. United States

(1882) 21 Ch D. 642 = 51 LJ Ch 940, In re, Guards Hill & C. Company, Ex parte Young

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Veda Vyasa, Senior Advocate with Sadhu Singh, D. S. Daug and P. C. Khanna, for Petitioners; S. T. Desai,

Senior Advocate with A. N. Kirpal, Dalip K. Kapur and B. N. Kirpal, for Respondents.

S. K. KAPUR, J.: It will not be an unfaithful summary of the history to say that for ages searches and seizure of documents and objects alleged to be incriminating have been responsible for many a battle at the bar. The safeguards of liberty of the subjects in this behalf have been forged out of conflicts between overzealous prosecutors on the one hand and not very nice people on the other. In preserving this liberty of the subjects the Courts always bear in mind that under our Constitution the concept of liberty is wider and the prisoner's dream of freedom from custody alone is not liberty. The present writ petition is directed against searches conducted on 10th August, 1966 at the residence of the petitioners at 35 Rajpur Road, Delhi, and other places occupied by the petitioners in connection with their business by a group of officers headed by Shri Rajendra Mohan, Income-tax Officer, respondent No. 2. The search was held in pursuance of the various authorizations issued by the Director of Inspection (Investigation) under Section 132 of the Income-tax Act, 1961, and Rule 112 (1) of the Income-tax Rules, 1962. It is sufficient to reproduce one of the authorisation forms signed by the Director of Inspection (Investigation) as all other forms are exactly in the same language:

"(See Rule 112)

Warrant of Authorisation under Section 132 of the Income-tax Act, 1961 and Rule 112 (1) of the Income-tax Rules, 1962.

The Income-tax Officers, S/Shri R. P. Gautam, P. K. Sharan, Rajendra Mohan, Govind Ram, S. N. Tandon, P. L. Madan, P. Ranganathan, R. R. Gupta, Miss S Ghosh and Miss M. Sehgal, I. T. Os. Delhi.

Whereas information has been laid before me and on the consideration thereof, I have reason to believe that:

If a summons under sub-section (1) of Section 37 of the Indian Income-tax Act, 1922 or under sub-section (1) of S. 131 of the Income-tax Act, 1961 or a notice under sub-section (4) of Section 22 of the Indian Income-tax Act, 1922 or under sub-section (1) of Section 142 of the Income-tax Act, 1961, is issued to S. Balwant Singh to produce, or cause to be produced, books of account or other documents which will be useful for, or relevant to proceedings, under the Indian Income-tax Act, 1922 or under the Income-tax Act, 1961, he would not produce, or cause to be produced such books of account or other documents as required by such summons or notice;

S. Balwant Singh is in possession of any money, bullion, jewellery or other valua-

ble article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purposes of the Indian Income-tax Act, 1922 or the Income-tax Act, 1961:

And whereas I have reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing have been kept and are to be found at the premises of S. Balwant Singh at Bawa House, 35, Rajpur Road, Delhi including outhouses, garages and other appurtenances thereto;

This is to authorise and require you as overleaf (name of the Inspecting Assistant Commissioner of Income-tax or the Income-tax Officer),

a. to enter and search the said premises;

b. to place identification marks on such books of account and documents as may be found in the course of the search and as you may consider relevant to or useful for the proceedings aforesaid and to make a list thereof together with particulars of the identification marks;

c. to examine such books of account and documents and make or cause to be made, copies or extracts from such books of account and documents;

d. to seize any such books of account, documents, money, bullion, jewellery or other valuable article or thing found as a result of such search and take possession thereof;

e. to make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing;

f. to convey such books of account, documents, money, bullion, jewellery or other valuable article or thing to the office of the Inspecting Assistant Commissioner of Income-tax or any other authority not below the rank of the Income-tax Officer employed in the execution of the Income-tax Act, 1961; and

g. to exercise all other powers and perform all other functions under S. 132 of the Income-tax Act, 1961 and the rules relating thereto.

You may requisition the services of any Police Officer or any Officer of the Central Government, or of both, to assist you for all or any of the purposes specified in sub-section (1) of section 132 of the Income-tax Act, 1961.

Sd/- R. D. Shah
22-7-66.

Seal Director of Inspection (Investigation).

2. In pursuance of the said authorisation a number of Income-tax Officers went to the various premises set out in the authorisation forms, searched the said premises and seized a large number

of documents. There has been some controversy at the bar as to how many people were comprised in the raiding party and that controversy will be dealt with later. There has, however, been no dispute about the documents seized.

3. Petitioners 1 to 5 are brothers and petitioner No. 6 is their mother. All the petitioners live at 35-Rajpur Road, Delhi. Petitioners 1 to 5 have another brother who is not a petitioner. It is alleged that petitioners 1 to 4 and 6 carry on business while the fifth petitioner is engaged in cultivating land. There was no authorisation for search and seizure of any documents belonging to the fifth petitioner. It is also not in dispute that assessments of the petitioners were completed in some cases up to the assessment year 1962-63 and in some cases up to the assessment year 1963-64. The assessments were completed at Calcutta as the petitioners gave Calcutta address to the Revenue and the respondents assert that it was a 'ghost address' as in fact the petitioners neither resided nor had any office in Calcutta and that was done to facilitate the petitioners escaping assessment or detection of various activities not disclosed to the Revenue. The respondents have to their affidavit dated 24th October, 1966, sworn by Shri R. D. Shah, Director of Inspection (Investigation), annexed various charts showing inter alia as to which assets and income had been disclosed and which concealed. It has also been asserted by the respondents that the petitioners all along maintained that they had no banking account while, according to the information received by the respondents, the petitioners had a large number of accounts with banks. The petitioners have by their writ petition raised several points challenging the search and seizure and even the constitutionality of section 132 of the Income-tax Act. They have also challenged the right of the respondents to retain the books and documents illegally seized or to use any information derived therefrom. I will deal with the various points raised one by one.

4. Mr. Veda Vyasa, the learned counsel for the petitioners, first contended that the search and seizure was bad in law as the condition precedent to the applicability of Section 132, namely, the existence of "reason to believe" in the mind of the Director of Inspection was missing. Since admittedly section 132, as amended by Act 1 of 1965, applies to this case, I propose to confine myself to that section except to the extent it may be necessary to refer to the legislative history in aid of its interpretation. The said section reads—

"(1) Where the Director of Inspection or the Commissioner, in consequence of

information in his possession, has reason to believe that—

(a) any person to whom a summons under sub-section (1) of section 137 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of S. 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922 (11 of 1922) or under sub-section (1) of S. 142 of this Act was issued to produce or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account, or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed for the purpose of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property), he may authorise any Deputy Director of Inspection, Inspecting Assistant Commissioner, Assistant Director of Inspection or Income-tax Officer (hereinafter referred to as the authorised officer) to—

(i) enter and search any building or place where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies thereof;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing.

(2) The authorised officer may requisition the services of any police officer or of any officer of the Central Government, or of both, to assist him for all or any of the purposes specified in sub-section (1) and it shall be the duty of every

for the time being in force and the provision of that Code and such laws shall apply to such Chief Magistrate and Magistrate as they apply to the Chief Presidency Magistrate and a Presidency Magistrate and shall be construed accordingly. It is, therefore, evident that a City Magistrate can exercise all the powers that could be exercised by a Presidency Magistrate under the provisions of this Code in a Presidency town of Bombay. It is, therefore, evident that a City Magistrate was competent to try this case summarily in respect of these offences and he has tried it summarily. There is nothing to indicate that this case was tried regularly and not summarily. Sub-sec. (2) of S. 262 of the Criminal Procedure Code, 1898, clearly lays down that no sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this chapter. It is, therefore, evident that the order of sentence passed by the learned City Magistrate, sentencing the appellant to a sentence of rigorous imprisonment for a period of four months in respect of the offence, punishable under Section 279, is beyond his powers. He could not have awarded sentence of imprisonment in excess of three months. Another illegality committed by him is that he has awarded three months' rigorous imprisonment in case, there is a default in payment of fine of Rs. 500. The maximum sentence awarded for the offence under section 279 of the Indian Penal Code, is 6 months. Section 65 of the Indian Penal Code runs as under:

"The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine."

In the instant case, the offence was punishable with imprisonment as well as fine. It is, therefore, evident that he could not have awarded a sentence of more than $1\frac{1}{4}$ months, in case, there was a default in payment of fine. That illegality is also committed by him.

11. The learned Advocate, Mr. Abhichandani has also invited my attention to the case of *Poka v. Emperor*, (1909) 9 Cri LJ 23 (LB), which supports his contention that if the case was tried summarily, sentence awarded for the term of 6 months of imprisonment, was illegal. It has been observed in that decision that no sentence exceeding three months may be passed at a summary trial under section 262 of the Criminal Procedure Code. A perusal of the language of Section also leaves no doubt about that position of law.

12. The only question that remains for consideration is whether separate sen-

ces can be awarded for the offences under Sections 279 and 337 of the Indian Penal Code, if they are committed in the course of same transaction. It was contended by the learned Advocate, Mr. Abhichandani that no such separate sentences can be awarded. In support of his argument, he had relied upon the observations made by the Madhya Bharat High Court in the case of AIR 1956 Madh Bha 141, referred to by me in the earlier part of the judgment. After referring to two relevant Sections 279 and 337 of the Indian Penal Code, at page 144, para 15, a Full Bench of the Madhya Bharat High Court has made the following observations, which can be referred to, with advantage at this stage:—

"It will be seen that there are some rash and negligent acts which without anything more, are themselves offences. It is the rash or negligent manner of driving or riding that constitutes an offence under Section 279; it must be so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person.

But for an offence under Section 337, rash or negligent driving or riding is not at all necessary. Any act which if done so rashly or negligently as to endanger human life or the personal safety of others, will make the doer of the act punishable under section 337, Indian Penal Code if by that act any hurt is caused to some person. The rider or driver may be guilty of an offence under Section 279 from the very start of his journey, the hurt may be caused to some person after half an hour or after he had gone a distance of two to five miles.

In such a case, an offence under Section 279 would be complete much before the time when actual hurt is caused to somebody. Therefore, in my opinion, the two offences are quite distinct from one another and cannot be held to be related as genus and specie. I am, therefore, of opinion that a person can be convicted of an offence under Section 279 as well as of an offence under section 337 of the Indian Penal Code at the same time."

It is thus evident that the Full Bench of Madhya Bharat High Court has also found that these two offences are quite distinct offences and objects in framing those two sections are quite distinct. It has been observed thereafter as under:—

"Of course, if the two offences are committed in the same transaction, the assessment of punishment will be governed by the provisions embodied in Section 71 of the Indian Penal Code."

It also, therefore, lays down that if these two offences are committed in the same transaction, Section 71 of the Indian Penal Code will govern the assessment of punishment. Section 71 of the Indian Penal Code runs as under:—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

In the instant case, therefore, the punishment awarded, taking into consideration the punishment that be awarded for both the offences, should not exceed the maximum punishment that be awardable for any one of these two offences. While that assessment has got to be made, if both these offences are committed in the course of same transaction, but it does not indicate that no separate punishment can be awarded for both these offences, and if it is awarded, it is illegal.

13. * * * * *
CWM/D.V.C. Appeal partly allowed.

AIR 1969 GUJARAT 66 (V 56 C 13)*

N. G. SHELAT, J.

State of Gujarat, Appellant v. Batukbhai Hargovind Vora and others, Respondents.

Criminal Appeal No. 548 of 1965, D/24-1-1967, against judgment of Judicial Magistrate, First Class, Palitana in Cri. Case No. 1171 of 1964.

Bombay Police Act (22 of 1951), S. 37 (1)(b) — Expression "corrosive substance" is not equivalent to inflammable or combustible substance" and the Section does not authorise the prohibition of carrying of torches. (Paras 9, 12)

Cases Referred: Chronological Paras (1954) AIR 1954 SC 496 (V 41) — 1954 Cri LJ 1333, Tolaram Relu mal v. State of Bombay 12 (1831) 2 D & C 302 — 6 ER 740,

Attorney General v. Winstanley 12 G. T. Nanavaty, Asstt. Govt. Pleader, for Appellant (the State), S. T. Mehta (appointed), for Respondent (Accused).

JUDGMENT. * * * * *

7. The material point, however, to be considered is as to whether the carrying

*(Only portions approved for reporting by High Court are reported here).

of any such lighted torches would come within the meaning and ambit of the words "corrosive substance or of explosives" used in S. 37 (1) (b) of the Act. Be it said here, that this Act is in English. The notification produced at Ex. 4 was undisputedly issued in Gujarati — it being the local language of the State. Clause (b) of subsection (1) of S. 37 of the Act referred to in the Gujarati notification as already set out hereabove viz. "Bali nakhe teva agar salagi uthe teva padartho laene nikalavani" can well be normally understood in English as meaning "carrying inflammatory or combustible substance". The notification has been issued in exercise of the powers under Section 37(1)(b) of the Act by the District Magistrate of Bhavnagar and the question then is as to whether his power or authority to prohibit "carrying of inflammable or combustible substances" would be within the meaning of "corrosive substance or of explosive" used in clause (b) of section 37(1) of the Act. If it does, there would not arise any difficulty in the sense that carrying of lighted torches would be covered, inasmuch as carrying any such burning substance in the form of even a torch already described hereabove, for the reason that it can set fire if applied to any other thing capable of catching fire. The notification would therefore be valid if it meant and could be understood by the public as meaning the same thing as per the words used in clause (b) of Section 37(1) of the Act. If in issuing the notification therefore, he has acted in excess of his authority or power given to him under Section 37(1)(b) of the Act, that clause (2) in the Gujarati notification would be bad in law, with the consequence that for any breach thereof no penal liability of persons carrying such torches that night would arise under Section 135 of the Act.

8. Now it is clear and over which there is no dispute that the lighted torches such as found from the hands of accused nos. 1 to 4 cannot come within the term "explosive". The only point made out by Mr. Nanavaty, the learned Assistant Govt. Pleader for the State, was that the carrying of burning torches would be covered by the words "carrying of any corrosive substance" used in Section 37 of the Act, as the meaning thereof would be as good as "Bali nakhe teva agar salagi uthe teva padartho laene nikalavani" used in clause (2) of the Gujarati notification Ex. 4 in the case. The accused nos. 1 to 4 could therefore, be said to be the persons having committed a breach of notification inasmuch as they were found carrying burning torches on the night of 5-8-64 and they are, therefore, liable for the offence punishable under Section 135

of the Act. He referred to the Shorter Oxford English Dictionary where, according to him, corrosive is said to mean, 'consuming, or destroying, and even refers to 'fires'. On the other hand, it was said to mean 'gnawing, eating away, or destroying gradually' and in no case as meaning in ordinary parlance as carrying 'fire substance'. If any such meaning was intended, the use of words such as "inflammable or combustible substance" would have been in Section 37 of the Act.

9. Now the term "corrosive substance" is not defined either in the Bombay Police Act or even in the Indian Penal Code where we find such a term used in certain sections such as Sections 324 and 326 of the Indian Penal Code. We would, therefore, turn for its meaning to some standard English Dictionaries. In Shorter Oxford English Dictionary, the term "corrosive" is shown to arise out of the word "corrode" and the meaning thereof is given as (1) to eat into; to eat or gnaw away; (2) to wear away or destroy gradually, as if by eating or gnawing away the texture. Then the meaning of the term "corrosive" is given as under:—

A. adj. 1. Having the quality of eating away, consuming, or destroying. 2. fig. a Destructive. b. Fretting, wearing.

1. The corrosive aire of London Evelyn C. fires.

2. b. A pensive and c. desire that we had done otherwise Hooker.

B. sb. A substance that corrodes, an acid, drug, remedy, etc.

fig. In things past cure, care is a corrosive Greene.

C. sublimate: Mercuric Chloride or bi-chloride of mercury ($HgCl_2$), a white crystalline substance which acts as an acrid poison.

From this Mr. Nanavaty laid stress on its meaning as consuming or destroying and further he referred to "C. fires" and thereby contended that the substance that they carried with them on that night was such which was capable of setting fire to or destroy or consume some such thing. It is from that point of view that he said that the words "salgi ute teva" used in the Gujarati notification in clause (2) should be understood and given effect to.

10. Turning next to Webster's New Twentieth Century Dictionary, Second Edition, the term "corrode" from which "corrosive" arises has been given its meaning as "to gnaw to pieces; to eat away by degrees; to wear away or diminish gradually, as if by gnawing; rust, consume; destroy; said of the action of chemicals, and often used figuratively; as, nitric acid corrodes copper. Then corrosive has been given its meaning as a corroding or causing corrosion; often

used figuratively; as, corrosive care, a corrosive ulcer. n. something causing corrosion. While it does refer to the meaning as consume or destroy, it does not refer to 'fires' as we find in the Shorter Oxford English Dictionary. It is not possible to appreciate in what sense "fires" is used therein. The common and normal understandable meaning from the two English Dictionaries can be taken as meaning a substance which would eat away by degrees or wear away or diminish gradually as if by gnawing; rust; consume; destroy; said of the action of chemicals. Even the meaning 'consume or destroy' can hardly be taken to be in relation to any substance which can set fire to as in our view, if that was intended, simple understandable words for the same would be inflammable or combustible or by means of fire and surely not 'corrosive substance' for the same. More usefully we can turn to the Universal Modern Dictionary, into English & Gujarati, where the term "corrosive" has been given its meaning both in English and Gujarati as "adj. eating away" having the power of consuming or impairing:

"Khai nakhanaru sado kare vevu". That wearing away gradually; "Dhime dhime Khavai jati nashak vastu". The term "corrode" has been given its meaning in Gujarati as "Dhime dhime Khai Javu, Khavai Javu, & sadi Javu (Lakadu)." From this it was urged that the rendering of the words "corrosive substance" in Gujarati would not by any stretch of imagination be taken as meaning Bali nakhe teva and all that it means is to eat away by degrees etc., meaning in Gujarati "khai nakhanaru sado kare evu." I am not shown any other Dictionary giving a Gujarati meaning to the English word such as "corrosive" used in Section 37(1)(b) of the Act which tends to suggest giving a meaning as Bali nakhe teva made out by Mr. Nanavaty justifying the Gujarati notification issued by the District Magistrate.

11. We can as well turn to the commentaries of well known authors of the Law of Crimes as to how the term "corrosive substance" is understood as it has been so used in Sections 324 and 326 of the Indian Penal Code. At page 485 below section 324 of the Indian Penal Code, Dr. Hari Singh Gour has explained the term "a corrosive substance" used in Section 324 thus:—

"A corrosive substance is a substance which irritates the system, such as corrosive sublimate, which is a compound of chlorine and mercury, forming a white crystalline solid, an acrid poison of great virulence. Such are the acids which corrode the system if taken internally and in an undiluted state."

Another standard treatise on Law of Crimes we can usefully refer to, is one

by Ratanlal and Dhirajlal, twenty-first edition. At page 874 the term "corrosive substance" has been explained as meaning any substance which irritates the system, e. g., sulphuric acid, corrosive sublimate, etc. In the circumstances, the explanation or meaning attributed to the term "corrosive substance" by these authors do show the same meaning as stated above to be the normal meaning of such term ordinarily understood by the general public.

12. Mr. Mehta invited a reference to certain observations in the Book "The Interpretation of Statutes and General Clauses Acts" by S. N. Bindra, 3rd Edition, 1961, at page 60, and urged that when any meaning has to be given to any terms used in any enactment, it has to be taken as of common understanding of men for that would give the main clue to the meaning given to it by the Legislature. The observations then relied upon by Mr. Mehta run thus:—

"Lord Wensleydale's Golden Rule, according to Bannerjee in his Interpretation of Deeds, Wills and Statutes in British India has been universally accepted as a correct enunciation of the law. He proceeds to say:

In laying down that the ordinary and grammatical sense of the words must be adhered to in the first instance, what is meant is this: Most words have a primary meaning, that is, a meaning in which they are generally used, and a secondary meaning, that is a particular meaning in which they are used in a particular context."

I shall also refer to "Craies on Statute Law" sixth Edition where at page 162 it has been observed as under:—

"There are two rules as to the way in which terms and expressions are to be construed when used in an Act of Parliament. The first rule is that general statutes will *prima facie* be presumed to use words in their popular sense. This rule was stated by Lord Tenterden in *Att.-Gen. v. Winstanlay*, ((1831) 2 D. & C. 302, at p. 310) "the words of an Act of Parliament which are not applied to any particular science or art" are to be construed "as they are understood in common language." Critical refinements and subtle distinctions are to be avoided, and the obvious and popular meaning of the language should, as a general rule, be followed."

From this it was said that the normal and popular meaning which can be easily understood in respect of the words used in Section 37(1)(b) of the Act could be taken to have been understood by the Legislature and, at any rate, that could not have been what the Gujarati notification indicates in clause (2) thereof. The mere fact that carrying of any light-

ed torches such as those found with some of the accused were capable of setting fire or destroying something would not come within the ordinary meaning as understood of the words "any corrosive substance" used in Section 37(1)(b) of the Act. Mr. Mehta in this connection also invited a reference to the case of *Tolaram Relumal v. State of Bombay*, AIR 1954 SC 496, where it has been observed that it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty rather than the one which imposes penalty. It is not competent to the Court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the Legislature. On that basis it was said that even if for a moment, the word "corrosive" as explained in Shorter Oxford Dictionary has any such meaning as to set on fire, it cannot be said that that was the only meaning that could be given to it and that the Legislature had intended only that meaning to be given to those words used in Section 37(1)(b) of the Act. Those words obviously have at any rate two different meanings if one were to go by the Oxford Dictionary. But we do not have to go so far. In my opinion, considering the meaning of the term "corrosive" given in the dictionaries, as also the same term having been explained by the eminent authors on Law of Crimes referred to above, the meaning of the words used in the Gujarati notification issued by the District Magistrate cannot be taken as the correct or the primary or normal meaning that would be given to the words "corrosive substance" used in Section 37(1)(b) of the Act. It is difficult to comprehend as to how the District Magistrate happened to derive and use the words he has chosen to in the Gujarati notification and, at any rate, we are unable to get any clue as to from what dictionary he gave such a meaning to the words "any corrosive substance" used in S. 37(1)(b) of the Act. In my opinion, the words (original in Gujarati omitted—Ed.) used in the Gujarati notification are not equivalent to the words or the expression giving correct or primary or normal meaning of the words corrosive substance used in S. 37(1)(b) of the Act. The use of the words (original in Gujarati omitted) used in the Gujarati notification can therefore be said to have been used in excess of his powers and authority conferred on the District Magistrate under Section 37 of the Act and that way that part of the notification was bad in law. Any breach of that clause in the notification, therefore, cannot make the accused liable under Section 135 of the Act. The learned Magistrate was, therefore, right in ac-

quitting the accused in respect of the offence with which they had come to be charged.

13. In the result, the appeal fails and it is dismissed.

MVJ/D.V.C. Appeal dismissed.

AIR 1969 GUJARAT 69 (V 56 C 14)*

A. D. DESAI AND B. C. THAKOR, JJ.

Koli Trikam Jivraj & another, Appellants v. The State of Gujarat, Respondent.

Criminal Appeal No. 644 of 1966, D-12-1-1968.

(A) Evidence Act (1872), Ss. 3, 18 — Statement of accused — It is not open to Court to dissect statement and pick up part which is incriminating and reject part which is exculpatory.

(Para 13)

(B) Evidence Act (1872), S. 18 — Suggestions put in cross examination.

Suggestions put in cross examination are no evidence at all against the accused and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions. It is possible that in putting suggestions the lawyer of the accused, if he thinks fit and proper, may not put the entire case of the accused in the cross examination of a prosecution witness.

(Para 15)

Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. It is, therefore, evident that role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. AIR 1936 Rang 1, Rel. on. (Para 16)

There is another principle which is equally to be borne in mind that suggestions made in the cross examination of prosecution witnesses cannot be used to fill in the gaps in the evidence of prosecution. Burden lies on the prosecution to prove the guilt of the accused. Such suggestions in any case cannot stand higher than the statement of the accused under Section 342 of the Criminal P. C.

(Para 18)

Cases Referred: Chronological Paras (1936) AIR 1936 Rang 1 (V 23)= 37 Cri LJ 293, Nga Ba Sein v. Emperor 16

K. J. Shethna, for the Appellants; G. T. Nanavati, Assistant Government Pleader, for the State.

DESAI J. :— In Sessions Case No. 2 of 1966, Shri D. A. Desai, Sessions Judge, Bhavnagar, convicted the appellants for having committed an offence punishable under Sections 394, 326 read with section 34 and Section 324 of the Indian Penal Code and sentenced them for an offence under Section 394 of the Indian Penal Code to suffer rigorous imprisonment for 7 years. No order of sentence was passed in respect of offences punishable under Section 326 read with Section 34 and Section 324 of the Indian Penal Code.

2. The prosecution case was that one Bhikha Sukha was a resident of village Khakhoi, Taluka Botad, District Bhavnagar. Bhikha Sukha had purchased vadi land bearing S. No. 60 admeasuring 75 bighas and situated in the said village. Bhikha Sukha has no child. He has a sister who was married to one Premji Prag who originally resided in village Ugamedi. Premji has four sons. After Bhikha Sukha had purchased the vadi land, he brought his brother-in-law Premji Prag and his four sons to village Khakhoi and they settled in the said village. Dharamshi and Talshi, 2 elder sons of Premji were cultivating this vadi land. In the cultivating season of 1964-65 Premji Prag and his sons had raised Juwar, Sugarcane, chillies and cotton crops in the different portion of the said survey number. The cotton crop was raised in an area of about 14 bighas which was situated on the southern boundary of the vadi land. There was a hedge on the southern boundary of this field. Premji Prag and his sons had also raised wheat crop in a tank in the village Bhimdad. Survey No. 60 abutted on the boundary of the revenue limits of village Bhimdad. Premji Prag had dug a water channel from the well in the field upto the tank and the point where the channel passed through the fence there was an opening in the hedge. Premji had engaged one Chhagan Devji as an agricultural servant since 2 years. Dharamshi, Talshi and Chhagan Devji were sleeping in the vadi during the night to keep a watch on the crop. On the date of the incident i. e. on the night between 3rd and 4th December 1965, Dharamshi, Talshi and Chhagan were sleeping in the field. Near the well there was a small shed. Chhagan was sleeping in the shed while Dharamshi and Talshi were sleeping outside in the field. At mid-night time Dharamshi, Talshi and Chhagan woke up on hearing

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the barking of a dog. Dharamshi and Talshi went running in the direction from which they heard the sound. They came near the southern boundary of the field near the cotton crop. They saw one man standing near the opening of the hedge. On seeing Dharamshi and Talshi that man came near them and gave a blow with a stick to Talshi. Talshi fell down on the ground. At that time the appellants and 4 other persons were plucking cotton from the cotton crop and on seeing Dharamshi and Talshi they ran towards them and beat Dharamshi and Talshi. Dharamshi had a dharia with him and Talshi had a spade with him. Dharamshi and Talshi also hit the accused with their respective weapons. Dharamshi and Talshi fell on the ground. The accused and his companions ran away from the place of the incident. Chhagan Devji came near the injured persons. He helped Talshi to get up and Dharamshi, Talshi and Chhagan went near the well. On the way Chhagan asked Talshi as to what had happened and Talshi replied that the appellants and other accused had come to commit theft of cotton crop and that he had identified 4 of them. He gave the names of the 4 accused as Titku, Laghra, Moti and Naja. Chhagan made Talshi to sit on a cot and ran to the village to inform Bhikha Sukha and Premji Pragji. He informed Bhikha Sukha and Premji Pragji that thieves had entered his field to commit theft of cotton crop and that they had caused injuries to Dharamshi and Talshi. Bhikha Sukha came to the vadi on a horse back. Dharamshi informed him in the vadi that 6 kolis of Dhankania village had come to commit theft and caused them injuries. Chhagan and Premji also came to the field. Chhagan yoked the cart and Dharamshi and Talshi were removed in the cart by Bhikha Sukha to Botad Hospital. They reached Botad Hospital at 6-30 a.m. and the injured were admitted in the Hospital. The Medical Officer sent a telephone message to Botad Police Station and informed the Police Officer in charge of the Police Station that two persons from Khakhoi had been admitted in the Hospital. Police Head Constable F. R. Zala who was in charge of the Botad Police Station on receiving the telephone message from the Medical Officer, Botad, directed Police Head Constable M. B. Zala to investigate into the matter. So Head Constable M. B. Zala went to the Hospital and contacted Dharamshi and Talshi. Before he reached the Hospital, Talshi Premji had died. Mr. Zala recorded a complaint of Dharamshi Premji and sent it to the Police Station for registering the offence. After some investigation Mr. M. B. Zala left the Hospital at about 11-30 a.m. It was further the case of the prosecution

that the appellants who were accused nos. 1 and 2 respectively came to the Hospital and they were also admitted therein. The Medical Officer sent information to the Police Station that two Kolis of Dhankania village with the history of assault had been admitted in the Hospital. Mr. F. R. Zala, was the Officer in charge of the Police Station. He directed Police Constable Mr. Gohil to go to the Hospital and to inquire into the matter. Mr. Gohil went to the Hospital and recorded a complaint of accused no. 1 and sent it to the Police Station for registering an offence at the Police Station. Mr. M. B. Zala who was investigating into the complaint filed by Dharamshi went to the village Khakhoi and carried out the investigation at the place. Mr. Gohil after recording the complaint given by accused no. 1 had also gone to Khakhoi for investigation. Mr. M. B. Zala had handed over the investigation to Police Sub Inspector B. T. Sama who also took over the investigation from Mr. Gohil and the investigation in both the cases thereafter was carried on by Police Sub Inspector Sama. On these allegations the appellants along with other 2 accused were charged for having conjointly committed a dacoity and in commission of such dacoity caused murder of Talshi Premji and thus having committed an offence punishable under section 396 of the Indian Penal Code. They were also charged that during the course of commission of the robbery they had caused hurt to Dharamshi Premji and thus committed an offence punishable under Section 394 of the Indian Penal Code. The accused were alternatively charged for having committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The accused were also charged for having committed an offence punishable under Section 324 read with Section 34 of the Indian Penal Code for causing injury to Dharamshi.

3. The defence of the accused no. 1 was that he had not committed any offence and he did not go to the vadi of Premji Pragji at the time of the commission of the offence. On the night of occurrence his bullock had gone away from the vadi land and, therefore, he and accused No. 2 went out in search of the bullock at night. They went in search of the bullock within the revenue limits of village Khakhoi. When they were passing through one field two persons came there, beat them and both of them fell down on the ground. He did not know who those persons were and he did not beat them as he was not armed with any weapon. He denied to have committed theft of cotton crop from the vadi of Premji Pragji. He also denied that he filed a complaint before the police in re-

pect of injuries which he received on that night. He also denied that any Police Officer contacted him in the Hospital. He stated that the contents of the complaint Ex. 27 were false and that a false complaint had been got up by the police to involve him in the case.

4. The defence of accused no. 2 was that he had not committed any offence. He did not know anything about the occurrence. He stated that on the evening just preceding the night of the occurrence he and accused no. 1 had gone in search of the bullock of accused no. 1 which had strayed away. At night time when they were passing through the sim of village Khakhoi, two persons attacked them and both of them fell down on the ground. Thereafter he and accused no. 1 went to their respective houses and on the next day in the morning he and accused no. 1 went to the Botad Hospital. He stated that he had not beat their assailants. He denied to have gone to the vadi of Premji Pragji and of having committed theft of cotton crop and beaten Talshi and Dharamshi.

5. The learned Sessions Judge did not accept the evidence of Chhagan Devji and held that there was no direct evidence to connect the accused with crime. The learned Sessions Judge came to the conclusion that the circumstantial evidence was sufficient to hold the accused guilty for having committed offences punishable under Sections 394, 326 read with section 34 and Section 324 of the Indian Penal Code and convicted them as stated in the earlier part of the judgment. It is against this order of conviction and sentence that the appellants have filed this appeal.

12. Reliance was then sought to be placed on circumstantial evidence to connect the accused nos. 1 and 2 with the crime. The submissions of Mr. Nanavati were that the circumstances (1) that the evidence of Dharamshi, Bhikha and Premji Prag established that soon after the incident Dharamshi had informed Bhikha and Premji that six persons from Dhankania village had come to commit theft and beat Dharamshi and Talshi, (2) that the evidence of Dharamshi and Chhagan with respect to the theft of cotton crop was also supported by the evidence of Amarshi Dayal Ex. 14 and Bachu Rajabhai, Ex. 16, the panch witnesses who proved that cotton pods were scattered in the adjoining field and heap of cotton pods was found lying near the rivulet which was near the field of the deceased, (3) that accused nos. 1 and 2 were found injured early in the morning on the date following the date of the occurrence, (4) that the accused no. 1 had given a complaint Ex. 27, which was

recorded by the Head Constable Gohil wherein the accused no. 1 admitted his presence and the presence of other accused near the scene of offence at the time when the offence was committed, (5) that during the course of cross-examination questions were put to Dharamshi and Premji by the lawyer of the accused which unmistakably indicated that accused no. 1 and accused no. 2 admitted that a fight did take place between them on one side and Dharamshi and Talshi on the other during the night of the occurrence, (6) that inconsistencies in the versions of the incident given by the accused at various stages were sufficient to establish the guilt of the accused.

13. We shall now proceed to consider the submissions of Mr. Nanavati and the circumstantial evidence relied upon by the prosecution. Mr. Shethna did not dispute the circumstance that some six persons of village Dhankania had committed a theft of cotton pods in the field of the deceased on the night of the occurrence and that Dharamshi and Talshi were beaten. Similarly Mr. Shethna did not dispute the second and third circumstances mentioned hereinabove. It is not necessary for us to deal with in detail the evidence on these points. The argument of Mr. Shethna was that these circumstances were innocuous and consistent with the innocence of the accused. In our opinion there is much force in this argument and it is obvious that these circumstances are such that it cannot lead us only to the conclusion that the accused nos. 1 and 2 were the persons who participated in the crime or guilty of having committed the offence. We then come to circumstance no. 4. We have already set out the circumstances in which the complaint was filed by the two appellants. It is well established that the statement made by an accused must be read as a whole and it is not open to the Court to dissect the statement and pick up a part of the statement which is incriminating and reject the part which is exculpatory. Accused No. 1 had stated in his complaint, Ex. 23, as under:—

"Yesterday, . . . at 1-00 p. m. I, Koli Laghra Bhura, Koli Moti Rupa, Bharvad Natha and Bharvad Naja and younger brother of Naja, in all, we six persons had gone to collect cakes of cow dung in the sim of village Khakhoi. We had gathered the cakes of cow dungs on the south of village Khakhoi. It became dark while collecting cakes of cow dung. We tied bundles of cakes of cow dung. I, Laghra Bhura and Koli Moti Rupa were walking ahead from near the field of a Kanbi from the sim of Khakhoi. The above mentioned three shepherds were coming behind us at a distance of twenty-five paces from us with their goats. The Kanbis who are of Khakhoi, whose

names and their fathers' names I do not know. The shepherds came near their fields. Two Kanbis came out from their field. Out of two Kanbis there was a dharia in the hand of one Kanbi and there was a spade in the hand of the other. Both these Kanbis suspected that bundles would be of cotton seeds stolen from their field. So, both these Kanbis attacked on us with a dharia and spade. They hurt me on my nose. They caused hurt on the head, and on fingers of right hand and on the hand of Laghra Bhura with a dharia. I and Laghra Bhura cried that 'they killed us'. Koli Moti Rupa ran away towards Bhimdad. The three shepherds who had sticks in their hands beat both these Kanbis of Khakhoi and fell them down. We both were injured, so we fell down on that very spot. All these three shepherds — Natha, Naja and younger brother of Najaran ran away with their sticks towards Dhankania. Koli Moti Rupa who was with us had informed to Shamji the son of Laghra Bhura, so he had come there with a cart where we had fallen down, before rising of the sun. He placed us in a cart and brought us to Sonevala Hospital at Botad for treatment and admitted us in the hospital."

Applying the aforesaid principle that the statement of the accused must be read as a whole, it is evident that the complaint of the accused contained both inculpatory and exculpatory statements and, therefore, the complaint cannot be used to lend any support to the case of the prosecution that the accused no. 1 had committed the offence. The complaint Ex. 27 given by the accused no. 1 cannot be used as evidence against accused no. 2. Therefore, the averments made in the complaint showing the presence of the accused at the scene of the offence cannot be used as a circumstance against the accused.

14. Mr. Nanavati strongly relied on the fifth circumstance, viz., that during the course of cross-examination questions were put to witnesses Dharamshi and Premji by the lawyer of the accused which unmistakably indicated that accused no. 1 and accused no. 2 admitted that a fight did take place between them on one side and Dharamshi and Talshi on the other during the night of the occurrence. Mr. Nanavati supported this argument by drawing our attention to the cross-examination of the prosecution witnesses Dharamshi, Bhikha and Premji Prag on behalf of the accused. In the cross-examination of Dharamshi it was suggested by the lawyer of the accused that Talshi and he had severely beaten accused nos. 1 and 2 and he was falsely implicating the accused in order to save themselves from a case that might be filed against them. A similar suggestion

was also made in the cross-examination of Premji Prag and the suggestion was as follows:

"Q: Is it true that your two sons beat accused nos. 1 and 2 very severely outside your vadi land?

A.: It is not true that my two sons Dharamshi and Talshi severely laboured accused no. 1, no. 2 outside my vadi. I did not come to know either from Dharamshi or from Chhagan that they had beaten the opponents. It is not true that I wanted to concoct the evidence in this case."

In support of this argument Mr. Nanavati drew our attention to the judgment of the learned Sessions Judge and particularly to the following passages:—

"This line of cross-examination as pointed out earlier would unmistakably show that accused nos. 1 and 2 admit that a fight did take place between them on one side and Dharamshi and Talshi on the other side during the night of occurrence. If that is proper inference to be drawn, then field of inquiry becomes very narrow. Only question then remains is whether that fight took place inside vadi land of Premji Prag or outside it. If it took place inside vadi land of Premji Prag, why accused nos. 1 and 2 came inside vadi land on the night of occurrence and that too at unearthly hour of midnight . . . Evidence against accused nos. 1 and 2 is that they admit that a fight had taken place between them and Dharamshi and Talshi on the other hand. The question asked in the cross-examination of Dharamshi and Premji Prag is to the effect that Dharamshi and Talshi, sons of Premji, beat accused nos. 1 and 2 during the night of the occurrence just outside their vadi land. This question leaves no room for doubt that accused nos. 1 and 2 admit that fight did take place between accused nos. 1 and 2 on the one hand and Dharamshi and Talshi on the other hand. Mr. Shah had urged that statement of accused has to be accepted as a whole or has to be rejected as a whole. That principle does not arise in this case at all because I am not accepting inculpatory part of the statement and rejecting exculpatory part as inherently improbable."

15. To put it shortly Mr. Nanavati in advancing this argument merely repeated the main ground on which the conviction of the appellants was based by the learned Sessions Judge viz., that the accused no. 1 and accused no. 2 admitted their presence at the scene of the offence and that they were beaten by Dharamshi and Talshi. If the lawyer of the accused puts a suggestion to a prosecution witness that a particular event happened, or happened in a particular manner, then it cannot be implied that the lawyer com-

mits himself to such an assertion. Suggestions put in cross-examination are no evidence at all and on the basis of such suggestions no inference can be drawn against the accused that he admitted the facts referred to in the suggestions. It is possible that in putting suggestions the lawyer of the accused, if he thinks fit and proper, may not put the entire case of the accused in the cross examination of a prosecution witness.

16. Moreover the lawyer who appears for the accused keeping in mind the facts of the case that he defends, has the right to take up a defence that he thinks just and proper. In Nga Ba Sein v. Emperor, 37 Cri LJ 293=(AIR 1936 Rang 1), the facts were that the accused was charged for committing murder of his brother-in-law. The defence taken by the accused was that he had not caused the injury. In the Sessions Court the lawyer appearing for the accused openly advised his client to admit the assault and plead the right of private defence but the accused was stubborn and persisted in denying altogether his liability in the crime. The learned Sessions Judge did not allow the lawyer to take up the plea of right of self-defence and the High Court hearing the appeal observed:—

"Moreover, in this particular case it is not correct to say that the right of self-defence was not pleaded. It was pleaded by the pleader who was appearing for the appellant and if the pleader of the accused cannot set up a defence on his behalf, then I would ask what is the use of his appearing at the trial at all. The accused himself may on his own behalf take up a line of defence but it is equally open to his pleader on his behalf to take up another and alternative line of defence."

Therefore, the accused is entitled to the benefit of the plea set up by the lawyer but it cannot be said that the plea or defence which his lawyer puts forward must bind the accused. The reason is that in a criminal case a lawyer appears to defend the accused and has no implied authority to make admissions against his client during the progress of the litigation either for the purpose of dispensing with proof at the trial or incidentally as to any facts of the case. See Phipson's Manual of Evidence, Eighth Edition Page 134. It is, therefore, evident that the role that a defence lawyer plays in a criminal trial is that of assisting the accused in defending his case. The lawyer has no implied authority to admit the guilt or facts incriminating the accused. The argument of Mr. Nanavati that suggestion put by the lawyer of the accused in the cross-examinations of the prosecution witnesses amounts to an admission under

Section 18 of the Indian Evidence Act cannot be accepted.

17. Now in the present case it is in evidence that the question that Dharamshi and Talshi had caused injuries to the appellants was even put to Premji Prag who was not an eye-witness to the incident. It seems question in form of suggestion had been put in the cross-examination of the prosecution witness for question's sake. In their statements under Section 342 accused No. 1 and accused No. 2 stated that on the night of occurrence the bullock of accused No. 1 had gone away from his vadi land and, therefore, they had gone in the search of the bullock, in the field situated within the revenue limits of village Khakhoi. When they were passing through one field two persons came there, beat them and they fell down. The accused did not know who these persons were or to which village they belonged. Thus it was not the case of the accused in their statements that they were beaten near the field of Premji Prag and at the time at which Dharamshi and Talshi were beaten. It was not their case that there was a fight between them and their assailants. The suggestions put by their lawyer in cross examination of Dharamshi and Talshi were thus not adopted by the accused in their statements under Section 342 of the Criminal Procedure Code. It is also to be noted that the attention of the appellants was not drawn while recording their statements under Section 342 of the Criminal Procedure Code to these denials of the suggestions put in the cross-examination of Dharamshi and Premji and no circumstance can be used against the accused unless he has been given an opportunity to explain the same. Thus from mere fact that suggestions were made in the cross examination of the prosecution witnesses to the effect that Dharamshi and Talshi had beaten the appellants outside the vadi land, no inference can be drawn that the accused had admitted the same.

18. There is another principle which is equally to be borne in mind that suggestions made in the cross-examination of prosecution witnesses cannot be used to fill in the gaps in the evidence of prosecution. Burden lies on the prosecution to prove the guilt of the accused. Such suggestions cannot stand higher than the statement of the accused under Section 342 of the Criminal Procedure Code. The statement of the accused under section 342 of the Criminal Procedure Code cannot be used against the accused unless the prosecution proves its case against him by satisfactory evidence. At times it is used only to lend an assurance to the case of the prosecution case but it can never be used to fill in the gap in the evidence of prosecution.

The learned Sessions Judge was obviously, in our opinion, in error in relying on the suggestions put in the cross-examination of prosecution witnesses Dharamshi and Premji by the lawyer of the accused, accepting them as statements of the accused and binding on them, and treating the case put forward therein as a circumstance against the accused. In the present case the evidence led by the prosecution is totally insufficient to prove that the accused had committed the crime and no question of lending assurance to prosecution arises. The circumstance that suggestions were put to the prosecution witnesses in their cross-examinations that Dharamshi and Talshi beat the accused nos. 1 and 2 outside their vadi cannot be used against the accused to fill in the gap in the evidence of prosecution.

20. Thus to summarise the evidence on record it is clear that Dharamshi did not depose that the accused were the assailants. The evidence of witness Chhagan, as we have held, is unreliable. The circumstantial evidence as discussed above is insufficient to prove the guilt of the accused.

21. The result is that the accused are entitled to an acquittal. The prosecution has failed to prove that the accused were guilty of the charge levelled against them. The order of conviction and sentence passed by the learned Sessions Judge, Bhavnagar, in Sessions Case No. 3 of 1966 is, therefore, set aside and the accused are acquitted and ordered to be set at liberty forthwith.

RSK/D.V.C. Orders accordingly.

AIR 1969 GUJARAT 74 (V 56 C 15)

N. M. MIABHOY, C. J. AND
J. B. MEHTA, J.

Mrs. S. M. Thakkar, Appellant v. M.
A. Baqui, Opponent.

Special Civil Appln. No. 1398 of 1965,
D/- 28-4-1967.

Constitution of India, Arts. 283 and 284 — Moneys deposited in Court — Whether Court can order their investment in some other way.

It is noteworthy that, whereas clause (2) of Art. 283, which deals with public moneys, contains provisions not only regarding payment of public moneys into the public account, but, also deals with the questions of their withdrawal and all other matters connected with or ancillary to the matters of custody, payment and withdrawal. Art. 284 deals only with the subject of payment into the public ac-

count but does not deal with the question of withdrawal therefrom or other allied matters. The Constitution, therefore, has made a clear distinction between public moneys on the one hand and moneys which are received or deposited, inter alia, with Courts to the credit of matters mentioned in clause (b) in the matter of withdrawal thereof or such allied matters. There appears to be good reason behind this distinction. Whereas public moneys must be dealt with at all stages in accordance with law, so far as non-public moneys are received or deposited, obviously, they cannot be dealt with at all stages by provision of law but must necessarily be dealt with according to the facts of each particular case. Therefore, the Courts of law are not precluded from passing proper orders in regard to investment of moneys which may lie idle before them, provided of course, in doing so, they do not offend the provisions contained in Art. 284(b). So long as moneys remain received by Court or deposited with it, those moneys must remain in public account. But, if on the facts of a particular case, the parties want that the moneys should be invested in some other way, then, the Court is not entirely helpless in the matter, provided the first step that it takes is that the moneys cease to have their character of receipt by or deposit with the Court.

(Para 2)

N. S. Parghi for N. M. Thakkar, for Applicant.

MIABHOY C. J. :— This petition raises an important question relating to Court deposits, but, unfortunately, having regard to the facts of the case, it is not possible for us to decide that point finally so as to be of any help either to petitioner or to Court depositors in general.

2. The facts leading up to the presentation of the petition are as follows: Petitioner entered into a contract for sale of an immovable property with two persons named (1) Mrs. Dhanhai Lallubhai, and (2) Suleman Lallubhai, and paid Rs. 900 by way of earnest money. Subsequently, she filed Special Suit No. 5 of 1963 in the Court of the learned Civil Judge, Senior Division, Baroda, for specific performance of that contract. At that time, she paid a sum of Rs. 19,100 in cash by way of deposit, to be credited to the above cause. The suit was ultimately compromised on 16th January 1965, by which, the purchase price was fixed at Rs. 47,000/- Petitioner, having already paid Rs. 900 and deposited Rs. 19,100 in Court, deposited a further amount of Rs. 27,000 on 17th May 1965 towards the above cause, thus completing the sale price of Rs. 47,000/-. From out of the amount so lying in deposit, defendants of the above special suit withdrew Rs. 35,000 on 16th June 1965. The result of all the above

transactions was that, a sum of Rs. 11,100/- is lying by way of deposit in the above Court, to the credit of the above cause. Now, it appears that, during the pendency of the above litigation, one Bai Jiji, claiming to be an heir of one deceased Lallubhai, apparently the predecessor-in-title of the two defendants in the special suit, filed Suit No. 1310 of 1961 in the Court of the learned Civil Judge, Junior Division, Baroda, for administering the properties of Lallubhai. That suit was dismissed and a regular Civil Appeal No. 433 of 1963 in the District Court at Baroda was also dismissed. Jijibai thereafter filed a second appeal in this Court, bearing No. 453 of 1965. In that second appeal, she got an order for stay restraining the defendants in the special suit from transferring the suit property so far as the interest of Jijibai was concerned. This order is being interpreted by petitioner as a direction that the amount of Rs. 11,100 is not to be paid to the above two defendants so long as the above suit continues. We are not concerned in the present petition as to whether this particular interpretation of the stay order is correct or otherwise. From the facts aforesaid, it will be noticed that, at least from 16-6-65 till upto date, the sum of Rs. 11,100 is lying idle in Court and that, though petitioner has performed her part of the decretal direction, she is not in a position to get the sale deed executed and to recover possession of the property. From the point of view of the defendants in the above suit also, it is quite clear that the amount of Rs. 11,100 is lying in Court deposit idly without earning any interest. Therefore, it appears that, petitioner made an application on 24th September 1965 before the learned Civil Judge, Senior Division, Baroda, requesting that the above amount of Rs. 11,100 "be ordered to be invested in the Central Bank of India, Baroda Branch, for periods of six months at each time." On the same day, the learned advocate for defendants made an endorsement below that application stating that he had no objection if the amount is deposited as prayed for by petitioner. However, in spite of such consent, the learned Judge rejected the application of petitioner for depositing the amount in the above Bank, by his order dated 28-9-65. That order is impugned in the present petition. In support of the above order, the learned Judge has relied upon an endorsement made by this High Court on the administrative side below a letter of the Legal Department, bearing No. CCD. 1063/5413 dated 22nd October 1963, by which the attention of the High Court was drawn to the provisions contained in Article 284, Clause (a), (sic clause (b)). He thought that the matter was administrative and because the

objection raised by the Legal Department was endorsed by the High Court, he was bound by the order made by the High Court on the administrative side. The grievance of Mr. Parghi is, to some extent, justified, inasmuch as the learned Judge relied upon an administrative endorsement made by the High Court in a Judicial matter. The correct thing to do in such a case was for the learned Judge to interpret or to have regard to the provisions contained in Article 284(b), and then pass a judicial order. Therefore, in order to dispose of the present petition, we have to turn to the provisions of Article 284, clause (b) which is relevant for the purposes of the present petition. Before reading Article 284, it is necessary to refer to the provisions of Article 283, clause (2). It is well known that the Constitution contemplates three funds (1) consolidated fund, (2) contingency fund, and (3) a fund, the amounts of which are to be credited to the public account. We are not concerned with the first two kinds of funds in the present petition. As regards the third kind of fund, clause (2) of Article 283 makes a provision. But that provision is not in respect of all amounts which are to be deposited in public account fund, but it deals only with those public moneys which are to be deposited to that account. Clause (2) of Article 283, inter alia, deals with (1) custody, (2) payment into the public account, and (3) withdrawal thereof. In regard to all these three matters in respect of public moneys which are to be paid into public account, clause (2) says that these matters and all other matters connected with or ancillary to such matters "shall be regulated by law made by the Legislature of the State, and, until provision in that behalf is so made, shall be regulated by rules made by the Governor of the State." Then comes Article 284 which is as follows:

"284. — All moneys received by or deposited with —

(a) any officer employed in connection with the affairs of a State in his capacity as such, other than revenues or public moneys raised or received by theGovernment of the State, or

(b) any court within the territory of India to the credit of any cause, matter, account or persons,

shall be paid within the public account of the State

Now, there is no doubt whatsoever that this is a Constitutional direction which Courts are bound to carry out in regard to moneys received or deposited with them. The direction is clear and unambiguous. The direction is that, all such moneys shall be paid into the public account of the State. Therefore, in so far as petitioner applies to the Civil Court

that the amount of Rs. 11,100 which is lying in deposit with that Court should be invested in a private bank, the prayer is directly opposed to the provision contained in Article 284. From that standpoint, undoubtedly, the order of the learned Civil Judge is perfectly justified. But, however, there is one aspect of the matter which needs to be mentioned. It is noteworthy that, whereas clause (2) of Article 283, which deals with public moneys, contains provisions not only regarding payment of public moneys into the public account, but, also deals with the questions of their withdrawal and all other matters connected with or ancillary to the matters of custody, payment and withdrawal, Article 283 (284?) deals only with the subject of payment into the public account but does not deal with the question of withdrawal therefrom or other allied matters. The Constitution, therefore, has made a clear distinction between public moneys on the one hand and moneys which are received or deposited, *inter alia*, with Courts to the credit of matters mentioned in clause (b) in the matter of withdrawal thereof or such allied matters. There appears to be good reason behind this distinction. Whereas public moneys must be dealt with at all stages in accordance with law, so far as non-public moneys are received or deposited, obviously, they cannot be dealt with at all stages by provision of law but must necessarily be dealt with according to the facts of each particular case. Therefore, the Courts of law are not precluded from passing proper orders in regard to investment of moneys which may lie idle before them, provided of course, in doing so, they do not offend the provisions contained in Article 284(b). So long as moneys remain received by Court or deposited with it, those moneys must remain in public account. But, if on the facts of a particular case, the parties want that the moneys should be invested in some other way, then, the Court is not entirely helpless in the matter, provided the first step that it takes is that the moneys cease to have their character of receipt by or deposit with the Court. Now, on the facts of the present case, we cannot give any direction of the kind which petitioner wants. Petitioner, as already stated, is aggrieved by the order of the Court rejecting her application for depositing the moneys lying in Court as a deposit with a private bank. That, obviously, the Court cannot do. But, in the present case, if both the parties had agreed for the withdrawal of the amount and that way, the amount were to cease to retain its character as a receipt or deposit, then, suitable orders could have been passed by the Court. But, as already stated, petitioner is not inclined to have that recourse for some reason best known

to herself. As we have already pointed out that petitioner has interpreted that stay order granted in Second Appeal No. 453 of 1965 as an injunction restraining the withdrawal of the above deposit. Under the circumstances, in our judgment, no order can be passed in favour of petitioner and the rule must be discharged.

3. Rule discharged.

AKJ/D.V.C.

Petition dismissed.

AIR 1969 GUJARAT 76 (V 56 C 16)

V. R. SHAH, J.

Modi Narandas Chhangalal, Appellant v. Shah Jamnadas Maneklal and another, Respondents:

Appeal No. 1384 of 1960, D/- 1-2-1968, against decision of Asst. J., at Baroda in C. A. No. 1317 of 1958.

(A) Civil P. C. (1908), O. 23, R. 3 — Parties to suit accepting arbitration award after issues were framed in suit but before contention was raised — Acceptance converts it into agreement or adjustment between parties — Court has only to see whether agreement or adjustment is lawful or not and if it is lawful Court is bound to pass decree in terms of settlement and to the extent it settles dispute between parties — If agreement is disputed Court is entitled to enter into enquiry and to pass a decree on basis of its decision — Proviso to S. 47 of Arbitration Act is not attracted in such a case. AIR 1952 Pat 66 & AIR 1953 Cal 690 & AIR 1955 Raj 162, Distingu. AIR 1964 Pat 374 & AIR 1962 Andh Pra 123 & AIR 1953 Mad 781 (FB), Rel. on.

(Paras 6, 7)

(B) Arbitration Act (1940), S. 47, Proviso — Consent to award — It should be given at time when Court is called upon to consider whether award should be accepted as adjustment or compromise (Obiter).

(Para 8)

Cases Referred:	Chronological	Paras
(1964) AIR 1964 Pat 374 (V 51).		
Rameshwarlal v. Mangilal		7
(1962) AIR 1962 Andh Pra 123 (V 49) —		
1961 Andh LT 577, Salima Bibi v. Md. Ibrahim Saheb		7
(1955) AIR 1955 All 353 (V 42) = ILR (1955) 1 All 500 (FB), Moradhwaj v. Bhudar Das		5
(1955) AIR 1955 Raj 162 (V 42) = ILR 1955-5 Raj 580, Phool Narain v. Madan Gopal		5, 7
(1953) AIR 1953 Cal 690 (V 40) = 92 Cal LJ 181, Jugaldas Damodar & Co. v. Pursottam Umedbhai & Co.		5, 7
(1953) AIR 1953 Mad 781 (V 40) = ILR (1953) Mad 677 (FB), Abdul Rahman v. Muhammad Siddiq		7

(1952) AIR 1952 Pat 66 (V 39), Zeaudin v. Abdur Rafique	5, 7
(1952) AIR 1952 Pat 258 (V 39)= ILR 30 Pat 985, Raghunandan Rai v. Sukhlal Rai	5
(1950) AIR 1950 Ori 169 (V 37)= ILR (1950) Cut 1, Indramoni v. Nilamoni	5, 7
M. M. Patel, for Appellant; S. B. Vakil, for Respondents.	

JUDGMENT:— This appeal arises out of the dismissal of Civil Appeal No. 317 of 1958 by the learned Assistant Judge, Baroda. The appellant before me is the original plaintiff and he filed a suit against the two respondents before me to recover an amount of Rs. 5720/- on the basis of a promissory note. While the matter was pending in the trial Court, the parties agreed to refer the matter to an arbitrator. The reference to the arbitrator was not made by the Court, but it was a reference privately made by the parties themselves. The reference to the arbitrator was made on 16th September, 1957 and the arbitrator gave an award on the same day. The learned Assistant Judge has found as a matter of fact that all the parties to the suit have accepted the award after it was made by the arbitrator. After the parties had accepted the award, they did not immediately go to the Court and intimate to the Court about the making of an award or their acceptance thereof. The proceedings in the trial Court continued until the issues were framed. Thereafter, the defendants in the suit made an application to the Court pointing out that the matter was referred by the parties privately to an arbitrator and that the arbitrator has given an award and that the parties have accepted the award. The defendants contended before the trial Court that the suit has been adjusted or compromised between the parties according to the terms of the award and therefore a compromise may be recorded and a decree passed in terms thereof. This contention was based by the defendants on the provisions of Order 23, Rule 3 of the Civil Procedure Code.

2. The plaintiff objected to the Court accepting the award as a compromise and passing a decree in terms of the award. The trial Court negatived his objection and passed a decree in terms of the compromise represented by the award which was accepted by the parties. The plaintiff took an appeal to the District Court at Baroda and the learned Assistant Judge, who heard the appeal came to the conclusion that the parties had accepted the award after it was made and on that basis he came to the conclusion that the award represented a compromise or an adjustment of the suit by the parties. He therefore, upheld the decree made by the

trial Court and dismissed the appeal of the plaintiff.

3. In this Second Appeal, Mr. M. M. Patel, who appears for the appellant contended that mere acceptance of the award after it was made is not a sufficient compliance with the provisions of the proviso to Section 47 of the Indian Arbitration Act, 1940 (hereinafter referred to as 'the Act') and that there should be an acceptance of the award by the plaintiff before the trial Court when the contention raised by the defendants was considered by it. Mr. Patel urged that as the plaintiff has not given such a consent when the trial Court considered the contention of the defendants, the trial Court had no jurisdiction to pass a decree in terms of the award.

4. On the other hand, Mr. S. B. Vakil, who appears for the respondents contended firstly that by accepting the award made by the arbitrator, the same was turned into an agreement between them by the parties and since this agreement compromised or adjusted the suit of the plaintiff and was lawful, the agreement should be accepted as a compromise or adjustment under the provisions of Order 23, Rule 3 of the Code. Mr. Vakil also further contended that the proviso to Section 47 of the Act applies to those cases where the award is "otherwise obtained" that is, obtained otherwise than in accordance with the provisions of the Indian Arbitration Act. But the award obtained in this case is not an award "otherwise obtained" within the meaning of the proviso to Section 47 of the Act. He also urged that the proviso to Section 47 of the Act would have no application to this case. Mr. Vakil, further contended that the consent required by the proviso to Section 47 of the Act can be given at any time after the award is made and it is not necessary that the consent must be given at the time when the court is considering the question of recording a compromise.

5: In support of his argument Mr. Patel relied on number of authorities. He relied on the decisions in the cases of (1) Indramoni v. Nilamoni, AIR 1950 Ori 169, (2) Moradhwaj v. Bhudar Das, AIR 1955 All 353 (FB), (3) Phool Narain v. Madan Gopal, AIR 1955 Raj 162 (4) Zea-uddin v. Abdur Rafique, AIR 1952 Pat 66 (5) Raghunandan Rai v. Sukhlal Rai, AIR 1952 Pat 25 and (6) Jugaldas Damodar & Co. v. Pursottam Umedbhai & Co., AIR 1953 Cal 690. Mr. Patel relied on these rulings in support of his contention that the consent required to be given under the proviso to Section 47 of the Act is a consent that should be given at the time when the Court is hearing the contention that the award is a compromise or an adjustment of the suit and that a decree should be passed upon it

under the provisions of Order 23, Rule 3 of the Code. In some of those cases it has been observed that a consent given outside the Court is not a sufficient consent. However, all these cases differ on facts from the instant case, in that, in none of those cases the parties had accepted the award before the application to consider it as a compromise or adjustment of the dispute was made to the Court. At the time when the contention was raised in the Court that the award should be treated as a compromise or adjustment for the purposes of Order 23, Rule 3 of the Code, the award had retained its character of an award and it was the award itself which was to be considered by the Court; and the effect of parties accepting the award after it was given but before the contention was raised in the Court was not considered in any of these cases because that fact was not present in any of those cases.

6. In the instant case the parties have accepted the award after it was given. It is necessary to consider as to what is the effect of the acceptance of such an award by all the parties to the suit. Does it remain an award even after all the parties to the suit accepted it? In my opinion, it does not remain an award as such, that is, it does not remain a decision of an arbitrator. By reason of the fact that all the parties to the suit have accepted it, the award becomes, as it were, an agreement between the parties or an adjustment of the suit arrived at by all the parties. Order 23, Rule 3 of the Civil Procedure Code gives unlimited latitude to the parties to a suit to settle the disputes between them in any manner they like and they can always put that settlement of dispute before the Court and request the Court to make a decree in terms of that settlement. All that the Court has to do in such a case is to see whether the settlement or the compromise is lawful one or not. If it is a lawful compromise or settlement the Court is bound to pass a decree in terms of the settlement to the extent that it settles the dispute between the parties. The Court is not required to enter upon any enquiry as to what were the means adopted by the parties to arrive at such an agreement or compromise; or who persuaded the parties to enter into such a compromise or adjustment or what were the matters considered by the parties in arriving at such a settlement or compromise. The parties may arrive at a settlement or compromise by the instrumentality of a third person; or they may arrive at such a settlement or compromise on accepting the advice of some persons. When an award is accepted by the parties to a suit all that they do is to make the award an instrument to enable them to come

to an agreement or adjustment of the suit. Once the parties have accepted the award, the award ceases to be a decision of a third person and it assumes the character of an agreement arrived at by the parties to the suit. When, therefore, after accepting the award any party goes to the Court and states to it that the parties have accepted the award and therefore it should be accepted as a compromise or adjustment of the suit, what is put before the Court is that there has been an agreement between the parties to the suit and it should be acted upon. When the other side appears in the Court and says that there has been no such agreement, the Court is entitled to enter into an inquiry as to whether there was an agreement in fact or not, and if the Court is satisfied, despite the objection raised by the other side that there was in fact an agreement or settlement of the dispute between the parties, the provisions of Order 23, Rule 3 authorise the Court to arrive at such a decision and to pass a decree on the basis of that decision. In the instant case, when the defendants told the Court that the parties including the plaintiff have accepted the award, what the defendants intimated in fact to the Court was that the suit is settled or adjusted in a particular manner as expressed in the award made by the arbitrator, and the defendants asked the Court to record that agreement or settlement of the dispute and to pass a decree in accordance with the said award. The Court, therefore, when it recorded a finding that the plaintiff had accepted the award, did in fact record a finding that the agreement alleged by the defendants is proved. In the instant case, therefore, in my opinion, the proviso to Section 47 of the Act does not at all come into play and it is, therefore, not necessary to consider the rulings cited on behalf of the appellant in support of the contention as to whether the consent necessary under the proviso to Section 47 is given or not.

7. Mr. Vakil cited to me the decision in the case of Rameshwar Lal v. Mangi Lal, AIR 1964 Pat 374 where, in almost identical circumstances, the learned Judge of the Patna High Court has arrived at the same conclusion as arrived at by me in this case. The learned Judge has held therein "where parties to a suit agree out of Court to get their dispute referred to arbitration and consent to the award given by the arbitrator, the award can be treated as a compromise between them and a decree can be passed on the basis of such compromise even though one of the parties backs out from the compromise before the Court." So also in the case of Salima Bibi v. Md. Ibrahim Saheb, AIR 1962 Andh Pra 123, the Court has observed as follows:-

"If before the filing of the award, all parties signed on it, the Court is entitled to take it into consideration as a compromise or adjustment of a suit within the meaning of Order 23, Rule 3, Civil Procedure Code.

It is not necessary that the party should consent to the award at the time when the compromise petition is taken up for consideration by the Court.

It does not matter whether the consent is signified outside the Court or before the Court."

The Madras High Court in a Full Bench case in Abdul Rahman v. Md. Siddiq, AIR 1953 Mad 781 has also laid down that if an award which is not obtained in accordance with the provisions of the Indian Arbitration Act is accepted by the parties after it is made, the Court is entitled to accept such an award as a compromise or adjustment of the dispute between the parties for the purposes of Order 23, Rule 3 of the Civil Procedure Code and to base a decree in accordance with the terms of that award. In the case in AIR 1950 Ori 169 (supra), Das J. has observed on page 183 as follows:

"If the award is agreed to, after it is given, it operates as an adjustment and a decree in terms will have to follow under O. 23, R. 3, and if the facts relevant to such a situation are disputed, they will have to be enquired into as in any disputed adjustment."

In my opinion, therefore, the acceptance of the award by the parties to the dispute converts it into an agreement or adjustment between the parties and when the application is made to the Court, the application is not to pass a decree in terms of any award, but the application is to pass a decree in terms of a compromise or adjustment arrived at between the parties under the provisions of Order 23, Rule 3 of the Civil Procedure Code. In this view which I take, it is not necessary to consider the provisions of Section 47 of the Act or the proviso thereof.

8. It is true as contended by Mr. Patel that if the case were to be decided on the basis of the proviso to Section 47 of the Act, the consent should be given at the time when the Court is called upon to consider whether the award should be accepted as an adjustment or a compromise. The language of the proviso to Section 47 of the Act is, in my opinion, very clear and leads to this interpretation only. However, I refrain from entering into any detailed discussion of this question because in my opinion, as I stated earlier, it is not necessary to consider the interpretation of the language of the proviso to Section 47 because that proviso does not apply to the facts of the case. The rulings relied upon

by Mr. Patel and particularly the cases in AIR 1952 Pat. 66, AIR 1953 Cal 690 and AIR 1955 Raj 162 which lay down that the consent necessary under the proviso to Section 47 of the Act must be a consent given before the Court and not earlier, do not deal with a case where the parties to the suit had accepted the award prior to the matter being agitated in the Court. The question, therefore, as to what would be the effect of the parties accepting the award after it is made did not arise in those cases and those cases, are therefore, not helpful to me in the decision of this case.

9. I may mention that Mr. Vakil also urged that this award is not "otherwise obtained" within the meaning of the proviso to Section 47 of the Act. Since it is not necessary to consider the proviso to Section 47 of the Act, this argument need not be considered.

10. No other point has been pressed in this appeal. The result is that the appeal fails and is dismissed with costs. RSK/D.V.C. Appeal dismissed.

AIR 1969 GUJARAT 79 (V 56 C 17)

A. R. BAKSHI AND V. R. SHAH, JJ.

Shri Dawood Mahomed Pathan, Appellant v. Union of India and another, Respondents.

Letters Patent Appeal No. 34 of 1964, D/- 1-9-1967, against decision of Divan, J. in F. A. No. 163 of 1964, D/- 27-7-1964.

Constitution of India, Art. 5 — Domicile — Concept of, explained — Person having domicile in British India prior to 15-8-1947 — He would acquire domicile in India or Pakistan according as his permanent home fell on partition.

The concept of domicile is essentially linked with and is based upon the existence, either actual or deemed, of permanent home of a person. So long as there is one system of law prevailing in a territory within which the spot where a person has his permanent home is included, that person is said to be domiciled in that territory. The limits of that territory may change or may be enlarged depending upon the force of international events. However, the person having his permanent home at one spot, would continue to have his domicile in that country in which, for the time being, the spot where he has his permanent home is included. Halsbury's Laws of England, 3rd Edn. Vol. 7, Para 27 Referred.

(Paras 7, 8, 9)

In order to make it easy to work out the principles of domicile the law assigns what is called a domicile of origin to every person at his birth, namely, to

a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother, and to a foundling the place where he is found. This domicile of origin is attached to a person at the time of his birth by operation of law itself. This domicile of origin continues to attach itself to that person during the rest of his life time until and unless he has abandoned that domicile of origin by acquiring another domicile of his choice. A domicile of choice would be referable to domicile in some country other than the country in which there was his domicile of origin. In order to acquire a fresh domicile by choice, there should be proved actual residence by that person in the new country and also a present intention in that person's mind to make his permanent home in that country. By the term permanent home it is not meant to be a home for ever and for all time to come. What is meant is a home for an indefinite time. AIR 1953 Cal 530 (SB) & 1904 AC 287 & AIR 1966 SC 160, Rel. on. (Para 10)

A's father was born at certain village in district H which since creation of Pakistan, formed territory of that dominion. A's father came to Delhi where in 1940 A was born. In 1940, A was brought to native village in H due to illness of his mother who died there. A was brought up by his uncle and aunt. Since 1943, A's father was in Ahmedabad working in some mills there, but A lived in that village. In 1954 he went with his uncle to Karachi. He came to India in 1958 on a passport from High Commissioner for India in Karachi. He applied for permanent resettlement in India which was rejected. So A filed suit against Union of India and State of Gujarat for declaration that he was citizen of India.

Held that permanent home of A's father continued to be in H. On 15-8-1947 A's father acquired the domicile of Pakistan. At the time of the commencement of the Constitution, i.e. on 15-11-1949, A being a minor could have only the domicile that his father possessed on that date and since his father possessed the domicile of Pakistan on that date, A also possessed that domicile. A person who had a domicile in British India prior to 15-8-1947 would acquire the domicile in India or Pakistan according as the place of his permanent home fell on partition of the country in India or in Pakistan. A, having failed to prove that he was a citizen of India at the commencement of the Constitution of India, his suit was liable to be dismissed. (Paras 11, 12, 14, 16)

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 160 (V 53)=
 (1965) 3 SCR 793, Kedar Pandey
 v. Narain Bikram Sah

(1963) AIR 1963 SC 698 (V 50)= 1962 Supp (1) SCR 933, Hari Shankar v. Rao Girdhari Lal	15
(1955) AIR 1955 SC 36 (V 42)= 1955 Cri LJ 152, Central Bank of India Ltd. v. Ram Narain	12
(1953) AIR 1953 Cal 530 (V 40)= 57 Cal WN 778 (SB), Mrs. Rosetta Evelyn Attaullah v. Justin Attaul- lah	10
(1904) 1904 AC 287=73 LJKB 613, Winans v. Attorney General	10
Arun H. Mehta, for Appellant; G. M. Vidyarthi, Asst. Govt. Pleader, for Res- pondents.	

V. R. SHAH, J. :— This appeal under clause 15 of the Letters Patent arises out of the decision of this Court (Divan, J.) in First Appeal No. 163 of 1964 which was filed against the decision of Mr. R. C. Shelat, Principal Judge, City Civil Court (as he then was), in City Civil Suit No. 2239 of 1961. The facts giving rise to this appeal are as under:

The original plaintiff who is the appellant before us as well as in the First Appeal before Divan, J., brought this suit against the Union of India and the State of Gujarat, the two respondents before us, on August 17, 1961 for a declaration that he is a citizen of India and that he has not lost or abandoned his Indian citizenship and for a permanent injunction restraining the defendants or their servants from prosecuting and/or deporting him from India. The plaintiff's father was born at the village of Tanda in Hazara District. This District of Hazara was a part of British India upto the coming into operation of the Independence Act of 1947. That Independence Act created two sovereign territories out of the territory of British India; namely the dominion of India and the dominion of Pakistan and this District of Hazara has, since the creation of the dominion of Pakistan formed part of the territory of that dominion. The plaintiff's father came down to Delhi with his wife and two children in October 1938. In December, 1939, his wife gave birth to the plaintiff. In February 1940 the plaintiff's mother fell ill in Delhi and she was taken back to their native place, that is, the village of Tanda and there she died in April 1940. The plaintiff, who was then an infant, was brought up at the village of Tanda by the wife of the elder brother of his father. In October 1940 the plaintiff's father came to Ahmedabad for service. He got service in some mills in 1943 and since then he has been living and serving in Ahmedabad. The plaintiff himself lived at the village of Tanda with his uncle upto the year 1954. In 1954 he went with his uncle to Karachi and he was doing some labour work there. In 1953 he obtained a pass-port

and applied for obtaining a visa for coming to Ahmedabad from the office of the High Commissioner for India in Karachi. He came to India on that Pass-port. He thereafter applied for a permit for permanent resettlement in India, but he came to know in August 1960 that his application has been rejected. He, therefore, filed the suit for the reliefs stated above.

2. The trial Court dismissed the suit of the plaintiff on the ground that the plaintiff was not proved to be a citizen of India on January 26, 1950. In the first appeal before Diwan, J. the plaintiff sought to make out his case of Indian citizenship on the basis of Article 5 of the Constitution of India. The case before Diwan J. was that his domicile at the commencement of the Constitution was that of his father, as he was a minor then. His further case was that his father having been resident in Ahmedabad since 1940 to 1949, his father had before commencement of Constitution acquired the domicile of India. It was therefore contended before Diwan J. that the plaintiff had a domicile in the territory of India and he was born in India and therefore under Article 5 of the Constitution, he was an Indian citizen at the commencement of the Constitution. Diwan J. rejected this contention and came to the conclusion that the learned trial Judge was right when he held that the plaintiff has not established his claim of being the citizen of India under Article 5 of the Constitution. Diwan J. accordingly dismissed the appeal of the plaintiff. It is against that decision of Diwan J. that this Letters Patent Appeal has been filed by the plaintiff.

3. At the hearing of this appeal before us the only point that was pressed on behalf of the appellant was that he has become an Indian citizen at the commencement of Constitution under Article 5 of the Constitution. The plaintiff can bring his case within Article 5 of the Constitution, if he is able to prove that at the commencement of the Constitution he had his domicile in the territory of India and further prove any one of the three alternative facts mentioned in clause (a), (b) and (c) of that Article. Cl (a) requires that the person claiming the benefit of Article 5 should be one born in the territory of India. It is not disputed that the plaintiff was born at Delhi in December 1939. Therefore, if the plaintiff proves that he had his domicile in the territory of India at the commencement of the Constitution, then he is entitled to succeed in his plea.

4. The contention on behalf of the appellant-plaintiff is that reading Article 394 of the Constitution with the preamble thereof, it is clear that the commencement of the Constitution referred

to in Article 5 is as of November 26, 1949. The plaintiff's case is that he was a minor on that day and therefore he could not have an independent domicile of his own, but his domicile on that day would be the same as that of his father. His further contention is that on that date his father had a domicile in India and therefore his domicile was also in India. Mr. Mehta, learned Advocate for the plaintiff-appellant argued that the domicile of the plaintiff's father at the time when he came to Delhi in 1938 was in British India, because the village of Tanda was a part of the territory of British India. This domicile in British India of the plaintiff's father continued to remain with him until the Independence Act of 1947 was passed and British India was partitioned into the two dominions of India and Pakistan, on August 15, 1947. Mr. Mehta's contention is that since from that date, "British India" ceased to exist on the map of the world and the British Indian domicile of the plaintiff's father came to an end on August 15, 1947 and he would acquire in place of the domicile in British India, the domicile in either of the Dominions of India or Pakistan. Mr. Mehta's further contention was that, since prior to August 15, 1947 the plaintiff's father was habitually resident in India from 1939 onwards, he acquired, in place of his British Indian domicile, a domicile in the territory of India. He contended that he became domiciled in the territory of India on August 15, 1947 because he got that domicile on account of the partition of the territory of British India. In other words, his argument was that his domicile which was in British India prior to August 15, 1947 became transferred in the territory of India after that date. His alternative argument was that since 1940 when he came to Ahmedabad, he has been residing in this city continuously upto the date of the filing of the suit by the plaintiff and that he has made his permanent home in Ahmedabad and therefore also his domicile after August 15, 1947 would be in the territory of India and not in the territory of Pakistan.

5. On behalf of the respondents it was contended that the plaintiff's father had his domicile of origin in the District of Hazara and since Hazara formed part of the dominion of Pakistan on and after August 15, 1947, the plaintiff's father had his domicile in Pakistan from that date. It was also urged that the plaintiff's father has not acquired any other domicile namely, the domicile in India after August 15, 1947. Therefore, at the time when the Constitution of India commenced, that is, on November 26, 1949 the plaintiff's father had his domicile in Pakistan and consequently the plaintiff had also his domicile in

Pakistan. It was therefore urged that the plaintiff cannot get the benefit of Article 5 of the Constitution.

6. It is necessary therefore to determine first as to what is the essential content of the concept of domicile. The rule about domicile is evolved on account of the universal recognition that questions affecting the personal status of a human being should be governed constantly by one and the same law, irrespective of where he may happen to be or where the facts giving rise to the question may have occurred.

The early concept of what is meant by the territorial domicile has been mentioned by Cheshire in his Private International Law, sixth edition, in Chapter VII as follows:

"By domicile", said Lord Cranworth in 1858 'we mean home, the permanent home, and if you do not understand your permanent home I'm afraid that no illustrations drawn from foreign writers will very much help you to it."

"Indeed, it may be said that the earlier English Judges were content to equate domicile with home in the sense in which the man in the street, untroubled by legal subtleties, would understand that word. Just over a hundred years ago, Kindersley V. C. propounded a definition that for facile comprehension and application it would be difficult to better."

"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself, and his family, not for a more special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

The early concept of domicile was linked with the place where the person had his permanent home. Therefore the basic fact from which concept of domicile is evolved has reference to the place where the person has his permanent home. The concept of domicile has its origin in the necessity to determine the system of law whereby his personal status of a human being should be governed. If, therefore, the place where the person has his permanent home is a part of a particular country, the system of law governing the personal status of a human being in that country would be the system of law whereby that person would also be governed. This result is expressed by stating that that person has his domicile in the country in which the spot where he has his permanent home lies. Cheshire states on page 172 as follows:

"Domicile denotes the relation between a person and a particular territorial unit possessing its own system of law."

In Halsbury's Laws of England, Third Edition, Volume 7, in paragraph 26, it is stated:

"A person's domicile is that country in which he either has or is deemed by law to have his permanent home. Domicile is generally identified with home, but whereas a person may have no home or more than one, the law requires him to have a domicile and one only."

Further on in the same paragraph it is stated: "All those persons who have, or whom the law deems to have, their permanent home within the territorial limits of a single system of law are domiciled in the country over which the system extends; and they are domiciled in the whole of that country, although their home may be fixed at a particular spot within it."

7. From the above statements it is clear that the concept of domicile is essentially linked with and is based upon the existence, either actual or deemed, of permanent home of a person. So long as there is one system of law prevailing in a territory within which the spot where a person has his permanent home is included, that person is said to be domiciled in that territory. The limits of that territory may change or may be enlarged depending upon the force of international events. However, the person having his permanent home at one spot, would continue to have his domicile in that country in which, for the time being, the spot where he has his permanent home is included.

8. Another established principle is that "every person at birth becomes a member both of a political and of a civil society. The former determines his political status or nationality, on which depends his allegiance to a sovereign; the latter determines his civil status. This means that the law which governs the civil society into which he is born, the law of his domicile of origin, is attached to his person and remains so attached, wherever he goes, unless and until he ceases to be a member of that society; and this he can only do by becoming a member of another civil society; or changing his domicile, upon which the law of the new domicile becomes attached to him in the same manner." (vide paragraph 27 of Halsbury's Laws of England, Third Edition, Volume 7).

9. There is no dispute before us that the plaintiff's father was a native of Tanda village in Hazara District and that the domicile of the plaintiff's father was in British India because Hazara District was a part of British India. Mr. Mehta, however, contended before us that it would not be correct to say that the plaintiff's father had his domicile in Hazara District. His argument was that

the domicile is in a country and not in a particular portion of that country. In so far as the argument goes, we think that Mr. Mehta is right. Since the concept of domicile is evolved in order to fix the system of law which would govern the personal status of a person as a human being, it is necessary to include in that concept the relation between the permanent home of that person and the single system of law which prevails within the territory within which the place of his permanent home lies. This relation is expressed by stating that the domicile of that person is in that country or territory which has a single system of law governing the personal status of a human being which territory includes the place where that person's permanent home is.

10. In order to make it easy to work out the principles of domicile, the law assigns what is called a domicile of origin to every person at his birth, namely, to a legitimate child the domicile of the father, to an illegitimate child the domicile of the mother, and to a foundling the place where he is found. This domicile of origin is attached to a person at the time of his birth by operation of law itself. This domicile of origin continues to attach itself to that person during the rest of his lifetime until and unless he has abandoned that domicile of origin by acquiring another domicile of his choice. A domicile of choice would be referable to domicile in some country other than the country in which there was his domicile of origin. In order to acquire a fresh domicile by choice, there should be proved actual residence by that person in the new country and also a present intention in that person's mind to make his permanent home in that country. By the term 'permanent home' it is not meant to be a home forever and for all time to come. What is meant is a home for an indefinite time. These principles relating to acquisition of domicile of origin and of choice are well settled (vide Mrs. Roseta Evelyn Attaullah v. Jestin Attaullah, AIR 1953 Cal 530 (SB); Winans v. Attorney General 1904 AC 287; Kedar Pandey v. Narain Bikram Seh, AIR 1966 SC 160).

11. It is with reference to these well-established principles relating to the law of domicile that we proceed to test the arguments advanced by Mr. Mehta on behalf of the appellant. There cannot be any dispute that in 1935 when the plaintiff's father came from his native place in Tanda village in Hazara District to Delhi, his domicile was in British India, because the place where his permanent home was at that time was in British India. He was therefore domiciled in British India, which was a unit of territory governed by a single sys-

tem of law. It is true that in British India different legal rules applied to different classes of the population according to their religion, race or caste but nonetheless it was the territorial law of British India that governed each person domiciled in British India, notwithstanding that Hindu law would apply to one case and Mohammedan law would apply to another. Therefore, even though the personal status of the plaintiff's father would be governed by the Mohammedan law as applied to the natives in Hazara District that system of law applied to him because that was a part of the territorial law of British India. The single system of law which governed the personal status of the plaintiff's father in 1938 was the system of law as administered in British India. It is also not disputed that the unit of territory known as British India, was effaced from the map of the world by the Independence Act of 1947. The British sovereignty over that unit of territory known as British India, came to an end on August 15, 1947 and the whole of the territory of British India which existed prior to August 15, 1947 was divided into two portions and each portion became, by that Act, a sovereign State. Therefore, on August 15, 1947 since the territorial unit named British India ceased to exist and there was no place on the map of the world which could be known as British India, there could not remain a system of law which prevailed in British India and hence the domicile of the plaintiff's father in British India based on his permanent home in Hazara District came to an end. The plaintiff's father on and after August 15, 1947 could not say that he was domiciled in British India since that country was divided into the two sovereign countries of the dominion of India and the dominion of Pakistan. The plaintiff's father must have his domicile either in the Indian dominion or the Pakistan dominion. The dispute in this case is centered round the question as to what should be held to be the domicile of the plaintiff's father after he ceased to have the British India domicile on August 15, 1947. The contention of Mr. Mehta, as we stated above, is that since the plaintiff's father was habitually residing in Ahmedabad from 1940 onwards, the plaintiff's father would get the domicile in India in substitution of his domicile of origin in British India. He has based this contention on a submission that the domicile is in a particular country and that the place of the permanent home in that country has no relevance in fixing the domicile. According to Mr. Mehta, all persons habitually residing in Indian dominion on August 15, 1947 would automatically get the domicile in India in substitution of their domicile in

British India. In our opinion this submission of Mr. Mehta is not well founded. This submission ignores one of the essential factors which is decisive in settling the domicile of the plaintiff's father. The plaintiff's father was domiciled in British India because he had his permanent home in Hazara District which formed a part of British India prior to August 15, 1947. It was solely on account of this geographical fact namely that Hazara District was a part of British India which assigned a domicile in British India to the plaintiff's father and it was on that account that when the plaintiff was born in 1939 in Dobli, he obtained a domicile in British India as the domicile of his origin as that was the domicile of his father at that time. On partition of the country on August 15, 1947 the domicile of the plaintiff's father would still be referable to the place where his permanent home was on 15-8-47; and if his permanent home was in Tanda village in Hazara District, then the plaintiff's father would acquire on and after 15th August, 1947, the domicile of that country of which Hazara District formed part, namely, a domicile in Pakistan. That domicile in Pakistan would continue to remain with the plaintiff's father until it was shown that he had changed that domicile by acquiring a fresh domicile of choice. It is the alternative contention of Mr. Mehta on behalf of the appellant that the plaintiff's father had changed his permanent home prior to 1947. We will consider that contention later on. But at this stage we are dealing with the case on the basis that there has been no change of permanent home by the plaintiff's father at any time. We are considering the contention of Mr. Mehta that merely because the plaintiff happened to be residing since 1940 in Ahmedabad that fact alone would on August 15, 1947, invest him with the domicile in India rather than with the domicile in Pakistan in place of his original domicile in British India. For considering this contention we proceed, therefore, on the basis that the plaintiff's father had not changed his permanent home at any time up to the time when the plaintiff filed this suit in 1961. Since the domicile is always referable to the place of permanent home and since in this case the permanent home of the plaintiff's father continued to be in Hazara District it follows in our opinion that on August 15, 1947 when the British Indian domicile of the plaintiff's father came to an end, he acquired in substitution of that domicile, the domicile of that country in which his permanent home was on August 15, 1947, that is, the plaintiff's father acquired in substitution, the domicile of Pakistan. The plaintiff being a minor would continue during his minority to possess that domi-

cile which his father possessed at the relevant time. At the time of the commencement of the Constitution that is on November 26, 1949, the plaintiff being a minor could have only the domicile that his father possessed on that date and since his father possessed the domicile of Pakistan on that date, the plaintiff also possessed that domicile.

12. It was, as we stated above, the contention of Mr. Mehta before us that the plaintiff's father cannot be said to have his domicile in Hazara District, but he has his domicile in the British India and therefore the fact that his father had a permanent home in Hazara District would not be relevant in considering the question as to which domicile the plaintiff's father acquired in substitution of his original domicile on August 15, 1947 when the British India was divided into the two sovereign dominions of India and Pakistan. A reference to the case of Central Bank of India Ltd. v. Ram Narain, AIR 1955 SC 36 is of some value in dealing with this contention of Mr. Mehta. In that case the respondent Ram Narain was carrying on business at Mailai in Multan District and was allowed a cash credit limited upto a certain amount by the Central Bank of India Ltd. The account was secured against stocks which were to remain in possession of the borrowers as trustees on behalf of the Bank. On account of the disturbances that followed in the wake of the partition of the country the Bank's godown-keeper at Mailai left Mailai in September 1947 and there was no one in Mailai to safeguard the Bank's godown after October 1947. In January, 1948 the Agent of the Multan branch of the appellant Bank visited Mailai and he discovered that stocks pledged by Ram Narain against the cash credit agreement had disappeared. The Bank ultimately lodged a prosecution against Ram Narain on 18th April 1950 for having committed offences punishable under Sections 380, 454 and 411 of the Indian Penal Code before the District Magistrate at Gurgaon, in which District Ram Narain had migrated from Multan District, after 10th November 1947. A question arose in the course of that prosecution as to whether the Court in Gurgaon District which was a part of India could try the offences committed by Ram Narain in Multan District after August, 15, 1947 and before November 10, 1947. The answer to this question depended on whether Ram Narain was a citizen of India at the relevant time. Dealing with this point the Supreme Court observed as follows on page 40:

"In these circumstances, if one may use the expression, Ram Narain's domicile of origin was in the district of Multan and when the district of Multan fell by the partition of India in Pakistan, Ram

Narain had to be assigned Pakistani Domicile till the time he expressed his unequivocal intention of giving up that domicile and acquiring Indian domicile and also took up his residence in India."

It is true, as pointed out by Mr. Mehta, that in that case Ram Narain was since prior to August 15, 1947 living in Multan which fell in Pakistan, while in the instant case the plaintiff's father had been living in Ahmedabad since before the date of partition of the country. However, the decision of the Supreme Court shows that in considering what domicile a particular resident of British India acquired on partition of that country on August 15, 1947, it is necessary to see as to what was the place of his permanent residence on August 15, 1947. The Supreme Court has used the expression that Ram Narain was "domiciled in Multan District" prior to August 15, 1947 and therefore it was held that he obtained Pakistani domicile because Multan District fell by partition in Pakistan. On the basis of this decision of the Supreme Court it can well be said in this case also that the plaintiff's father had his domicile in Hazara District prior to August 15, 1947 and since Hazara District fell in Pakistan on partition of the country, the plaintiff's father acquired Pakistani domicile on August 15, 1947. We, therefore, hold that a person who had a domicile in British India prior to August 15, 1947 would acquire the domicile in Indian dominion or Pakistan according as the place of his permanent home fell on partition of the country in India or in Pakistan.

13. Mr. Mehta's second contention on this point was developed as follows:—

Prior to August 15, 1947 there was one State, namely British India. On August 15, 1947 this State of British India divided its territory into two portions and ceded one portion of the territory to the new State of the dominion of India and the second portion of its territory to the new State of the dominion of Pakistan. British India was therefore a ceding State and the dominions of India and Pakistan were the acquiring States and Mr. Mehta submitted that there was cession of territory by British India to the dominion of India so as to bring into existence the new State of the dominion of India. Mr. Mehta then submitted that when cession of territory takes place all persons residing in that ceded territory acquired domicile in that new State. For this purpose he relied upon paragraph 219 on page 551 on Treatise of International Law, volume 1 by Oppenheim. The relevant portion of paragraph 219 on which Mr. Mehta has relied, reads as follows:—

"As the object of cession is sovereignty over the ceded territory, all such indivi-

duals domiciled thereon as are subjects of the ceding State become ipso facto by the cession subjects of the acquiring State. The hardship involved in the fact that in all cases of cession the inhabitants of the territory who remain lose their old citizenship and are handed over to new sovereign whether they like it or not, has created a movement in favour of the claim that no cession shall be valid until the inhabitants have by a plebiscite given their consent to the cession."

In our opinion, this paragraph does not refer to the change in or acquisition of domicile. It refers to the change in, or acquisition of citizenship. It also refers to the change of the political status of a person rather than his civil status. There is no doubt that the concept of citizenship and the concept of domicile are two entirely different things. The concept of citizenship is designed to fix the political status of the person which would include his rights as a citizen of the country including his tie of national allegiance. The concept of domicile, as we stated above, is not necessarily linked with the citizenship of the country. It is quite possible that a person may be domiciled in one country and be the citizen of another country. This distinction is clearly mentioned in paragraph 30 in the case reported in AIR 1953 Cal 530 mentioned above. Paragraph 219 relied upon by Mr. Mehta lays down as to what happens to the citizenship of the residents of a ceded territory. It lays down a general rule that the inhabitants of the ceded territory acquire the citizenship of the new State provided (1) these inhabitants are domiciled in the ceded territory and (2) they are the subjects of the ceding State. In our opinion, paragraph 219 does not support the contention of Mr. Mehta. We, therefore, reject the contention of Mr. Mehta that on the partition of the country on August 15, 1947, the plaintiff's father acquired a domicile in India merely because he was residing in Ahmedabad from a date prior to August 15, 1947. We come to the conclusion that since his permanent home was in Hazara District he acquired the domicile in Pakistan on August 15, 1947.

14. Mr. Mehta's alternative contention was that prior to August 15, 1947 the plaintiff's father had made Ahmedabad his permanent home and therefore on August 15, 1947, the place where the father of the plaintiff had his permanent home fell into the territory of India and therefore the plaintiff's father was possessed of the domicile in the territory of India on Nov. 26, 1949. If Mr. Mehta could satisfy the Court that the plaintiff's father had his permanent home in India from the date prior to November 26, 1949, he would certainly be justified in asking us to hold that at the time of the commence-

ment of the Constitution, the plaintiff had a domicile in the territory of India. Upto August 15, 1947, since Hazara District and Ahmedabad were parts of the same unit of territory namely British India, it would not be correct to say that there would be any change of domicile by the plaintiff's father because in any event, the domicile would still remain in British India. So far as the different provinces in British India are concerned, it cannot be said that a person can be domiciled in a particular province of British India. All that can be said is that a person had changed his permanent home from one part of British India to another part of British India. In such a case though there will be a change in the place of permanent home, there will be no change in domicile. Nonetheless, the change in the permanent home will be a decisive factor when the partition of the country took place and the domicile of persons, who were residents in British India prior to August 15, 1947 was required to be fixed afresh. In order to decide whether they get, in substitution, the domicile in India or the domicile in Pakistan it will be necessary to fix the places of their permanent homes. If the plaintiff's father were able to show that he had changed his permanent home to Ahmedabad prior to August 15, 1947, then it would be a decisive factor to say that on August 15, 1947 his place of permanent home fell in the territory of India. Now, the terms "permanent home" or "fixed habitation" which are generally used to enable one to ascertain the country of domicile, are not equivalent to mere 'residence'. The term 'residence' would imply merely the physical presence of the person at a particular spot in a particular country. The residence may be for various purposes and it may be temporary or for an indefinite period. In order that 'residence' may amount to 'permanent home' or 'fixed habitation' it is necessary that, in addition to residence, there should be certain attendant circumstances which would indicate that the residence in consequence of setting up a permanent home, that is for an indefinite time. Mr. Mehta submitted that the plaintiff's father has been residing in Ahmedabad since 1940, when he came here upto the date of the suit, that is upto 1961; and he urged that this long residence is itself sufficient to show that his father had his permanent home in Ahmedabad and therefore he has his domicile in the territory of India. Mr. Mehta relied upon the following passage on page 174 in Cheshire's Private International Law, Sixth Edition:

file which grows in strength with the length of the residence. Indeed, a residence may be so long and so continuous that, despite declarations of a contrary intention, it will raise a presumption that is rebuttable only by actual removal to a new place."

It was urged on the strength of this paragraph by Mr. Mehta that this long residence by the plaintiff's father in Ahmedabad raises a presumption in favour of the plaintiff's father having his domicile in the territory of India and since there is no rebuttal of this presumption, the plaintiff must succeed in his case. In our opinion, this paragraph cannot be read so as to mean that mere long residence without anything more gives rise to such a presumption. Later on, on the same page Cheshire observes as follows:

"On the other hand, time is not sole criterion of domicile. Long residence does not constitute nor does brief residence negative domicile. Everything depends upon the attendant circumstances, for they alone disclose the nature of the person's presence in a country. In short, the residence must answer a qualitative as well as a quantitative test."

In our opinion the residence which gave rise to a presumption in favour of the plaintiff's father should be long residence coupled with such circumstances as would indicate that the plaintiff's father had made up his mind to give up his permanent home at Tanda and to have his permanent home at Ahmedabad. A man may reside in a particular place for a variety of reasons. In this particular case, the plaintiff's father had been residing in Ahmedabad because he has got his service and means of livelihood in Ahmedabad. His residence in Ahmedabad therefore is on account of a special purpose. It may well be that when the purpose of his residence in Ahmedabad comes to an end, he may leave Ahmedabad and go away to some other place or return back to his native village in Hazara District. It is therefore obligatory on the plaintiff to prove not only that his father has been residing in Ahmedabad since 1940 but also to prove that his father had made up his mind prior to November 26, 1949 to make Ahmedabad his permanent home. It is only on proof of such circumstances that the plaintiff can say that he has acquired the domicile in the territory of India at or before that date. The facts proved in this case are that the plaintiff's father came to Ahmedabad in 1940 and got service in some mills in 1943 and has ever since remained in Ahmedabad and has not gone back to his native place. It is also proved that he married in 1946 and that all along he has been serving in some mills at Ahmedabad. The learned

"This much is clear, however, that a person's residence in a country is prima facie evidence that he is domiciled there. There is a presumption in favour of domi-

trial Judge as well as Diwan J., have considered the facts of this case and have come to a definite conclusion that it is not proved that the plaintiff's father made Ahmedabad his permanent home at any time. As we stated above, his presence in Ahmedabad is because he has got his means of livelihood there. From the record of the case no other reason for the presence of the plaintiff's father has been brought out. It was pointed out that he married in 1946 and presumably as he says, that he has never gone back to his native place, that marriage was solemnised in Ahmedabad. The evidence on record does not make out any such circumstance which would indicate that the plaintiff's father has been residing here because he has chosen to make Ahmedabad his permanent home. The plaintiff's father in his evidence did not even state that he had abandoned his original domicile and had permanently settled at Ahmedabad. There are concurrent findings of both of the trial Judge and of Diwan J., on this point and having considered the facts of the case, we are in respectful agreement with these findings. We, therefore, come to the conclusion that it is not proved that the plaintiff's father had made Ahmedabad his permanent home at any time. He, therefore continued to have his domicile in Pakistan at the time of the commencement of the Constitution and the plaintiff therefore fails to prove that at the time of the commencement of the Constitution he was domiciled in the territory of India. He, therefore, fails to prove that he was a citizen of India at the commencement of the Constitution of India.

15. During the course of his arguments, Mr. Vidyarthi, learned Assistant Government Pleader, contended that in an appeal under clause 15 of the Letters Patent, this Court cannot go into the questions of fact decided by the learned Judge against whose decision the appeal is preferred. In our opinion, this contention is not correct. Clause 15 of the Letters Patent gives a right of appeal against the decision of a single Judge of this court except in such cases which are expressly excepted from the operation of clause 15. That clause does not lay down any qualification or limitation as to upon which points the appeal can lie or as to which points the Court can decide. An appeal is usually a creation of statute and unless the statute creating the appeal puts a limitation upon the subject matter of the appeal or the powers of the appellate Court, the scope and ambit of the appeal before the appellate Court is co-extensive with the scope and ambit of the dispute which was heard by the Judge against whose judgment the appeal is preferred. As for example, the Civil Procedure Code, by Sec-

tion 100 provides for a second appeal, to the High Court, but lays down that such an appeal can lie only in respect of points of law. When therefore, a second appeal is concerned, questions of fact cannot be agitated before the appellate Court. If an appeal under Clause 15 of the Letters Patent is filed against the decision of this Court in a second appeal, the Court hearing the Letters Patent appeal could not enquire into any question of facts because the Judge hearing the second appeal against whose judgment the appeal under the Letters Patent is filed also could not go into any question of facts. An appeal is generally a rehearing of the matter in order to decide whether the judgment appealed against is correct or not. Therefore, unless the statute imposes any restriction either as regards the subject matter of the appeal or the power of the appellate court, the appellate Court is required to cover the same ground over again as was covered before the Judge against whose judgment the appeal is preferred. In this particular case Diwan J. was hearing a first appeal and he was therefore competent to decide not only questions of law but also questions of fact. Since clause 15 of the Letters Patent appeal does not lay down any limitation of any sort either as regards the subject matter of the appeal or the powers of the appellate Court, the appellate Court hearing the appeal under the Letters Patent is bound to hear the appeal both on questions of law and questions of fact, which were agitated before the learned Judge against whose judgment the appeal is preferred. In the case of Hari Shankar v. Rao Girdhari Lal, AIR 1963 SC 698 it has been observed as follows:

"A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way, as has been done in second appeals arising under the Code of Civil Procedure."

In our opinion, in this particular case, the contention of Mr. Vidyarthi that this court cannot go into the questions of fact cannot be accepted.

16. In view of the conclusions to which we have reached, the plaintiff fails to prove that he was domiciled in the territory of India at the commencement of the Constitution within the meaning of Article 5 of the Constitution and therefore he fails to prove that he was a citizen of India at the commencement of the Constitution. No other point was raised before us.

17. In the result, therefore, the appeal fails and is dismissed with costs.

AIR 1969 GUJARAT 88 (V 56 C 18)

A. R. BAKSHI, J.

Ganibhai Kusalbhai and another, Petitioners v. State of Gujarat and others, Respondents.

Spl. Civil Applns. Nos. 835 and 901 of 1963, D/- 20-3-1968.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88D — Enquiry under the section is quasi judicial — Person whose exemption is to be revoked has to be given an opportunity.

Section 88D requires in the first instance gathering of data on the two facts mentioned in sub-clause (iv) of sub-section (1) and to appreciate the evidence so collected and to arrive at a decision as regards the existence of the objective facts mentioned in sub-clause (iv) of sub-section (1). Although, therefore the holding of an inquiry does not appear to have been specifically provided for in Section 88D, it does not necessarily follow that the function to be performed under Section 88D, and the order to be passed under that Section is merely of an administrative nature. The satisfaction that is required under S. 88D, is in respect of certain facts as regards the existence of which a quasi-judicial inquiry was already made. It is not a case in which there would be at no stage of the proceeding any lis or dispute as regards the existence of the facts on which the authority has to get satisfied. The authority acting under Section 88D cannot legally pass an order under that Section without hearing the petitioner and the High Court has power to interfere with the order that is passed under that Section. AIR 1966 SC 81, Rel. on.

(Paras 8 and 9)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), S. 88C — Enquiry under the section is quasi judicial.

A proceeding under Section 88C for the grant of an exemption can be started by making an application and on receipt of such application a notice has to be given to the tenants of the land and after holding an inquiry, the Mamlatdar is required to decide whether the land is exempt from the provisions of Sections 32 to 32R and it is on the strength of such a decision that a certificate under Section 88C is issued to the person who has made the application. Such an order that is passed under Section 88C is appealable as provided in Section 74(1)(w) and is revisable under Section 76 by the Revenue Tribunal. Before, therefore, a certificate under S. 88C could be granted, it would be necessary for the applicant to establish his eligibility to exemp-

tion and to show that the land does not exceed an economic holding and that the total annual income of the applicant including the rent of such land does not exceed Rs. 1,500/- The applicant will have to supply the necessary data which would be liable to be challenged and tested by the tenants in the course of the inquiry that the Mamlatdar would make under S. 88C. This necessarily involves an inquiry and the assessment of the data supplied by the parties in respect of the requirements necessary to be established under sub-section (1) of Section 88C and it is only when the Mamlatdar comes to the conclusion on an appreciation of the data placed before him that the ingredients of sub-section (1) of Section 88C have been established that he could issue a certificate under sub-section (4) of Section 88C. The effect of such a certificate is to grant an exemption from the operation of Sections 32 to 32R and to stop the process contained in those Sections operating in favour of the tenants. Thus the certificate granted under sub-section (4) of Section 88C is the result of a quasi-judicial inquiry and is granted only in cases where certain objective facts have been established and after the parties whose rights are likely to be affected by the grant of the certificate have had an opportunity of an inquiry and a hearing.

(Paras 5 & 6)

(C) Constitution of India, Arts. 226 and 227 — Quasi judicial enquiry — Essentials.

It is not necessary in order to constitute a judicial or quasi-judicial function exercised by an authority that it should be a full-fledged Court. It is not necessary that in all cases the proceedings must have the formalities of the practice and procedure followed in a Court of law. If the authority has to decide a question on the appreciation of evidence and assessment of the data before it, if the authority has not to act in accordance with any question of policy or expediency and if the provisions are such that they require the satisfaction of the authority about the existence of objective facts after an assessment of the evidence on those facts, then it would be difficult to say that the function that would be performed by the authority passing an order and the proceedings adopted under that section were merely of an administrative character.

(Para 9)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 81 (V 53)= (1965) 3 SCR 536, Dwarka Nath v. I. T. Officer

9

M. C. Shah, for Petitioner; G. T. Nana-vati Asstt. Govt. Pleader with K. L. Tal-sania Addl. Govt. Pleader, for Respondent No. 1 (in Spl. C. A. No. 901 of 1963);

N. N. Gandhi, for Petitioner; G. M. Vidyarthi Asstt. Govt. Pleader with K. L. Talsania Addl. Govt. Pleader, for Respondents (in Spl. C. A. No. 835 of 1963).

ORDER:— These are two petitions challenging the order passed by the State Government in exercise of the powers conferred by sub-section (1) of Section 88D of the Bombay Tenancy and Agricultural Lands Act, 1948, (hereinafter referred to as the Act). Since both these petitions involve a similar question, they were heard together and this judgment will cover the subject matter of both the petitions.

2. The petitioner in Special Civil Application No. 901 of 1963 is the owner of certain lands situated at Vadod in the Anand Taluka and he made an application before the Mamlatdar, Anand, under Section 88C of the Act for the grant of an exemption certificate and a certificate dated 19th October 1959 was granted to him under that section by the Tenancy Aval Karkun of Anand. That certificate granted under section 88C was revoked by an order dated January 1963 passed by the Under Secretary to the Government of Gujarat, Revenue and Agriculture Department, by virtue of the powers under sub-section (1) of Section 88D of the Act. In the order that was passed under that Section it was stated that the State Government was satisfied that the annual income of the petitioner exceeded Rs. 1500 and that, therefore, the State Government directed that with effect from the date of the order the lands shall cease to be exempt from the provisions of Sections 32 to 32R of the Act from which they were exempt under Section 88C of the Act and that the certificate granted to the petitioner under Section 88C by the Mamlatdar of Anand in respect of the lands should stand revoked. According to the petitioner the order passed under Section 88D of the Act is a judicial order and before passing such an order it was incumbent on the State Government to hear the petitioner and to give him an opportunity of being heard. According to the petitioner the revocation of the certificate rendered the petitioner's land liable to compulsory sale under Section 32 of the Act and affected the property rights of the petitioner and it was incumbent on the State Government to hold an inquiry and to hear the petitioner before an order under Section 88D was passed. The petitioner also urged in his petition that the order under Section 88D was passed without hearing him and without giving him an opportunity of being heard and that the order was passed in contravention of the principles of natural justice. In the affidavit-in-reply to the petition it was stated that a tenant of land Survey No. 416 (Paiki) of Vadod had made an application

on 28th December 1961 with a request to revoke the exemption certificate granted to the landlord under Section 88C on the ground that the landlord's income exceeded Rs. 1,500/- . That application was sent to the Collector for report and a statement of the petitioner was recorded in the course of an inquiry held by the Tenancy Aval Karkun. Thereafter, as the Government was satisfied from the records that the annual income of the petitioner exceeded Rs. 1,500, the certificate granted to him was revoked. The further defence that was revealed in the affidavit-in-reply was that it was not necessary to hold a further inquiry if the facts were clear from the record and that it was not incumbent upon the State Government to give an opportunity to the petitioner of being heard when in fact the facts of the case were clear from the record of the case on the petitioner's own admission that his income exceeded Rs. 1,500/-.

3. It thus appears that the petitioner was granted a certificate of exemption under Section 88C of the Act on 19th October 1959 and thereafter it appears, a tenant made an application to revoke the certificate and the papers were sent to the Collector for report and the petitioner was called and his statement was recorded by the Aval Karkun. Thereafter the impugned order was passed under sub-section (1) of Section 88D of the Act revoking the certificate that was granted to the petitioner under Section 88C by the Mamlatdar of Anand. The order revoking the certificate was passed under the signature of the Under Secretary to the Government of Gujarat, Revenue and Agriculture Department.

4. In Special Civil Application No. 835 of 1963 the petitioner is the landlord of certain agricultural lands situated at Dhandhuka, District Ahmedabad. The petitioner applied to the Mamlatdar, Dhandhuka, for an exemption certificate in respect of the lands under Section 88C of the Act and the Mamlatdar granted the exemption certificate in favour of the petitioner on 24th September 1958. On 1st January 1962 a tenant made a representation to the State Government stating therein that the income of the landlord had exceeded Rs. 1500/- and that therefore the certificate granted to the petitioner should be revoked. That application as it appears from the affidavit-in-reply filed by the Under Secretary to the Government of Gujarat, Revenue Department, was forwarded by the Government to the Collector of Ahmedabad for inquiry and report and later on it was sent to the Mamlatdar by the Collector on 11th April 1962. The Mamlatdar issued notice to the petitioner and his tenants to appear before him to adduce evidence in support of their pleas. Accordingly

the parties appeared on 28th April 1962 and the Mamlatdar, Dhandhuka, held an inquiry by recording the statements of witnesses and allowing the parties to cross-examine them. After completing the inquiry the Mamlatdar submitted his report to the Collector and the Collector submitted his report, to the Government. After perusing the facts of the case and also the inquiry papers and the report, the Government as stated in the affidavit-in-reply was satisfied that the annual income of the petitioner had exceeded Rs. 1,500/- and that, therefore, the State Government by its order dated 1st January 1963 directed that the certificate granted to the petitioner under section 88C should stand revoked. According to the petitioner he had no notice of the inquiry before passing the impugned order and no show-cause notice was issued before the order was passed and the petitioner had no opportunity of being heard before the respondent No. 1, Under Secretary to the Government of Gujarat, Revenue Department, under whose signature the order was passed. According to the petitioner while exercising the powers under Section 88D of the Act for withdrawing an exemption granted by the Mamlatdar, the State Government was acting judicially and the authority which passed the order was bound to follow the principles of natural justice. The case of the respondent appears to be that an opportunity of hearing was in fact given and that there was no breach of the principles of natural justice made by the State Government while passing the order under Section 88D. It was also contended that the Under Secretary to the Government of Gujarat, Revenue and Agriculture Department was not a Tribunal and that, therefore, a petition under Article 227 of the Constitution of India was not maintainable.

5. The first question that would arise for consideration in these two petitions is what is the nature of the proceedings taken under section 88D of the Act. Are they proceedings merely of an administrative nature as was contended on behalf of the Government or are the proceedings of a judicial or a quasi-judicial nature as was contended on behalf of the petitioner? The answer to this question would depend upon the nature of the provisions and the effect that would be produced by an action taken under those provisions. It would, therefore, be necessary to examine some of the relevant provisions of the Act. Section 31 of the Act provides for the landlord's right to terminate the tenancy for personal cultivation and non-agricultural purpose. Sub-sections (1) and (2) of Section 31 are as under :—

"31.(1) Notwithstanding anything contained in Sections 14 and 30 but subject to sections 31A to 31D (both inclusive) a landlord (not being a landlord within the meaning of Chapter III-AA) may, after giving notice and making an application for possession as provided in sub-section (2), terminate the tenancy of any land (except a permanent tenancy), if the landlord bona fide requires the land for any of the following purposes:—

- (a) for cultivating personally, or
- (b) for any non-agricultural purpose.

(2) The notice required to be given under sub-section (1) shall be in writing, shall state the purpose for which the landlord requires the land and shall be served on the tenant on or before the 31st day of December 1956. A copy of such notice shall, at the same time, be sent to the Mamlatdar. An application for possession under section 29 shall be made to the Mamlatdar on or before the 31st day of March 1957."

The termination of tenancy under Section 31 as will be seen from the Section itself is subject to Sections 31A to 31D. Section 31A prescribes the conditions of termination of tenancy and Section 31B(1) provides that in no case a tenancy shall be terminated under Section 31 in such manner as will result in leaving with a tenant, after termination less than half the area of the land leased to him. Sections 32 onwards relate to purchase of land by tenants. Section 32 provides that on the first day of April 1957, every tenant shall, subject to the provisions mentioned in the Section be deemed to have purchased from his landlord, free of all encumbrances, the land held by him as tenant, if the conditions mentioned in Section 32 were satisfied. The other Sections in the group of sections from Section 32 to Section 32R provide for matters relating to the purchase of land by tenants, determination of price of land to be paid by the tenants, mode of payment of price and other incidental matters. In order to exempt from the operation of Sections 32 to 32R, it would be necessary to make an application to the Mamlatdar for a certificate of exemption and on receipt of such an application, the Mamlatdar, after giving notice to the tenant or tenants of the land hold an inquiry and decide whether the land leased by such person is exempt from the provisions of Sections 32 to 32R and if the Mamlatdar decides that the land is so exempt, he shall issue a certificate in the prescribed form to such person. The necessary requirements for being eligible to the exemption are that it would be necessary to establish that the land does not exceed an economic holding and that the total annual income including the rent of such land does not exceed Rs. 1,500/-. This has been provid-

ed for in Section 88C of the Act which reads as under:—

"88C. (1) Save as otherwise provided by the Bombay Tenancy and Agricultural Lands (Gujarat Amendment) Act, 1960, nothing in Sections 32 to 32R (both inclusive) shall apply to lands leased by any person if such land does not exceed an economic holding and the total annual income of such person including the rent of such land does not exceed Rs. 1,500/-.

Provided that the provisions of this sub-section shall not apply to any person who holds such land as a permanent tenant or who has leased such land on permanent tenancy to any other person.

(2) Every person eligible to the exemption provided in sub-section (1) shall make an application in the prescribed form to the Mamlatdar within whose jurisdiction all or most of the pieces of land leased by him are situate, within the prescribed period for a certificate that he is entitled to such exemption.

Provided that where such person is a widow she may make such application before the 1st day of July 1961 notwithstanding that the period prescribed under this section has expired.

(3) On receipt of such application, the Mamlatdar shall, after giving notice to the tenant or tenants of the land, hold inquiry and decide whether the land leased by such person is exempt under sub-section (1) from the provisions of Sections 32 to 32R.

(4) If the Mamlatdar decides that the land is so exempt, he shall issue a certificate in the prescribed form of such person."

Any proceeding under Section 88C for the grant of an exemption can be started by making an application and on receipt of such application a notice has to be given to the tenants of the land and after holding an inquiry, the Mamlatdar is required to decide whether the land is exempt from the provisions of Sections 32 to 32R and it is on the strength of such a decision that a certificate under Section 88C is issued to the person who has made the application. Such an order that is passed under Section 88C is appealable as provided in Section 74(1)(w) and is revisable under Section 76 by the Revenue Tribunal. Before, therefore, a certificate under Section 88C could be granted, it would be necessary for the applicant to establish his eligibility to exemption and to show that the land does not exceed an economic holding and that the total annual income of the applicant including the rent of such land does not exceed Rs. 1,500/- The applicant will have to supply the necessary data which would be liable to be challenged and tested by the tenants in the course of the inquiry that the Mamlatdar would

make under Section 88C. This necessarily involves an inquiry and the assessment of the data supplied by the parties in respect of the requirements necessary to be established under sub-section (1) of Section 88C and it is only when the Mamlatdar comes to the conclusion on an appreciation of the data placed before him that the ingredients of sub-section (1) of Section 88C have been established that he could issue a certificate under sub-section (4) of Section 88C. The effect of such a certificate is to grant an exemption from the operation of Sections 32 to 32R and to stop the process contained in those Sections operating in favour of the tenants.

6. The certificate granted under sub-section (4) of Section 88C is thus the result of a quasi-judicial inquiry and is granted only in cases where certain objective facts have been established and after the parties whose rights are likely to be affected by the grant of the certificate have had an opportunity of an inquiry and a hearing. The grant of such a certificate has an important effect on the property rights of the landlord and the tenants as could be seen from the provisions contained in Sections 32 to 32R. Such a certificate which has been granted after a proper inquiry could be revoked under Section 88D of the Act. It would here be relevant to quote the provisions of that Section:—

"88D. (1) Notwithstanding anything contained in Sections 88, 88A, 88B and 88C, if the State Government is satisfied —

(i) in the case of an area referred to in clause (b) of Section 88, that the chances of non-agricultural or industrial development are remote, or that after the eviction of tenants from any land in such area, the land has not been used for a non-agricultural or industrial purpose,

(ii) that the lands transferred by a Bhoojan Samiti are not cultivated personally by the transferees or are alienated by them,

(iii) in the case of lands referred to in clause (b) of section 88B, that the trust is unable to look after the property or has mismanaged it or that there are disputes between the trust and the tenants and

(iv) in the case of lands referred to in Section 88C, that the annual income of the person has exceeded Rs. 1,500 or that the total holding of such person exceeds an economic holding,

the State Government may, by order published in the prescribed manner, direct that with effect from such date as may be specified in the order such land or area, as the case may be, shall cease to be exempted from all or any of the provisions of this Act from which it was exempted under any of the sections aforesaid, and any certificate granted

under section 88B or 88C, as the case may be, shall stand revoked.

(2) Where any such land or area ceases to be so exempted then in the case of a tenancy subsisting on the date specified in the order issued under sub-section (1), the landlord shall be entitled to terminate such tenancy under section 31, within one year from such date and the tenant, unless his tenancy is so terminated, shall have a right to purchase the land within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy. The provisions of Sections 31 to 31D (both inclusive) and sections 32 to 32R (both inclusive) shall, so far as may be applicable, apply to such termination of tenancy and to the right of the tenant to purchase the land."

Sub-clause (iv) of sub-section (1) of Section 88D requires that the State Government before withdrawing the exemption granted under Section 88C should be satisfied that the annual income of the person has exceeded Rs. 1,500/- or that the total holding of such person exceeds an economic holding. In the inquiry under Section 88C the relevant authority was to be satisfied that the land did not exceed an economic holding and that the total annual income of such person did not exceed Rs. 1,500/- and in a proceeding under Section 88D, the State Government, before it could pass an order under Section 88D, is required to be satisfied that the annual income of the person has exceeded Rs. 1,500/- or that the total holding of such a person exceeds an economic holding, a finding which would disentitle the person in whose favour a certificate had already been granted under Section 88C from claiming an exemption. The very nature of the proceeding under Section 88D is such that the proceeding under that section could start only after an order under Section 88C was already passed. If an order under Section 88D is made, it would set at naught the previous order that was passed as a judicial or a quasi-judicial order. Sub-clause (iv) of sub-section (1) of Sec. 88D further requires satisfaction by the State Government on the objective facts mentioned therein. At the time when an inquiry under Section 88C was made, the authority acting under that Section had also to be satisfied as regards the existence of the two objective facts mentioned in the Section and since the rights of the tenants were likely to be affected, it was necessary before passing an order under Section 88C, to issue notices to tenants and to hear both the parties. There would thus be a lis between them which would be decided on the data supplied by the parties and on the objective satisfaction of the authority that the requirements of

eligibility to exemption were satisfied. The same points of dispute as regards the total holding and the annual income would be before the authority passing an order under Section 88D(1)(iv) and the authority passing an order under that sub-section would be required to be satisfied about those objective facts before it would decide to revoke the certificate granted under Section 88C. In a proceeding under Section 88D also, therefore, the question of eligibility to exemption would be of paramount consideration.

7. As we have seen, Sections 32 to 32R relate to certain property rights relating both to landlords and tenants. Those Sections confer certain rights on the tenants which would to some extent affect the property rights of the landlords. An exemption from the operation of Sections 32 to 32R granted in favour of the landlord would make him exempt from the operation of Sections 32 to 32R and his property would be saved from the operation of those sections. As soon as such an exemption is revoked, the immunity from the operation of those sections would be set at naught and although such a person whose exemption certificate has been revoked has been given a right to terminate the tenancy under Section 31 within one year, his rights will to some extent continue to be affected. In the first instance his right to terminate the tenancy is restricted to the period of one year only and even if he does so he would not be able to get more than half the area of the land. There is no doubt that the granting of a certificate of exemption under Section 88C does confer advantages in relation to property rights and by virtue of an order under Section 88D such advantages would not be available to the landlord such is the consequence of the revocation of the certificate granted under Sec. 88C. Section 88D thus aims at taking away those property rights which have been acquired after making an inquiry as to the existence of objective facts.

8. The aforesaid discussion shows that the object of Section 88D is not merely to collect data for making an order in an administrative matter. Section 88D requires in the first instance gathering of data on the two facts mentioned in sub-clause (iv) of sub-section (1) and to appreciate the evidence so collected and to arrive at a decision as regards the existence of the objective facts mentioned in sub-clause (iv) of sub-section (1). Although, therefore, the holding of an inquiry does not appear to have been specifically provided for in Section 88D, it does not necessarily follow that the function to be performed under Section 88D and the order to be passed under that Section is merely of an admi-

nistrative nature. The satisfaction that is required under Section 88D is in respect of certain facts as regards the existence of which a quasi-judicial inquiry was already made. The dispute of the same nature would exist in a proceeding under Section 88D as existed at the time when an inquiry under Section 88C was made and similar property rights would be involved also in proceedings under Section 88D. Whether the authority acting under a particular provision of law acts administratively or judicially has to be gathered from the relevant provisions and from the cumulative effect of the nature of the rights affected, the manner of the disposal provided for, the nature of the power conferred and the criterion required to be adopted. No hard and fast rule could be formulated which would apply invariably to every case and to every provision. Various factors would require to be examined while coming to the conclusion whether a particular function is of a judicial or an administrative character. The power to revoke a certificate already granted has been conferred on the State Government by a statutory rule and the exercise of such a power is in respect of a dispute the result of which would affect the rights of the parties. An order passed under Section 88D would have the effect of nullifying an order that has been passed after a quasi-judicial inquiry and it is important to bear in mind that the order under Section 88D could be passed only after satisfaction on an objective fact which would require determination after the assessment of the data placed before the authority who passes the order under Section 88D. These are the distinctive features of the power conferred on the State Government under Section 88D.

9. The authority that is to make an order under Section 88D has been invested with an authority to pass an order under that Section under a statute and that authority has been given the power to so determine the question on its being satisfied as regards the facts mentioned in the Section. There is thus a duty cast upon the authority passing an order under Section 88-D to consider the data that is before it in order to come to the conclusion as to whether certain facts exist. Although therefore the Section by itself does not prescribe any formality or procedure, it does appear that the authority deciding the question under Section 88-D will be required to consider the data that is laid before it and to consider the evidentiary material in order to arrive at a conclusion as regards the existence of the facts on the basis of which the authority could pass an order under that Section. While taking an action under S. 88D the authority has not to act as a matter of expediency or as a matter of administrative

policy. This is not a case in which there would be at no stage of the proceeding any lis or dispute as regards the existence of the facts on which the authority has to get satisfied. Reference may in this connection be made to the observations made by the Supreme Court in Dwarka Nath v. I. T. Officer, AIR 1966 SC 81. It is not necessary in order to constitute a judicial or quasi-judicial function exercised by an authority that it should be a full-fledged Court. It is not necessary that in all cases the proceedings must have the formalities of the practice and procedure followed in a Court of law. If the authority has to decide a question on the appreciation of evidence and assessment of the data before it, if the authority has not to act in accordance with any question of policy or expediency and if the proceedings are such that the decision taken would affect property rights and if the provisions are such that they require the satisfaction of the authority about the existence of objective facts after an assessment of the evidence on those facts, then having regard to the cumulative effect of all the factors already considered hereinabove, it would be difficult to say that the function that would be performed by the authority passing an order under Section 88-D and the proceedings adopted under that Section were merely of an administrative character. On the other hand these factors show beyond doubt that the proceedings are of a judicial or quasi-judicial character and the authority acting under that section was bound to give an effective hearing to the party against whom the order was purported to be passed. It is, therefore, not possible to accept the argument of the learned Assistant Government Pleader that the authority acting under Section 88-D could have legally passed an order under that Section without hearing the petitioner and that the High Court had no power to interfere with the order that was passed under that Section since the authority passing the order was not a tribunal within the meaning of Article 227 of the Constitution of India.

10. Now it is an admitted position in both the petitions that the authority that passed the impugned orders had not heard the petitioners in both the special civil applications. It also appears that no notice was issued by the Under Secretary to the Government asking the petitioners to explain why an action under Section 88-D should not be taken against them and why the certificates granted to them under Section 88-C should not be revoked. It further appears that the Under Secretary to the Government had not heard any of the petitioners as regards the material that was gathered against them and placed before the authority for

its consideration. It does not appear that after the report of the Collector or the Mamlatdar, if any, the petitioners were heard and their explanation taken on the facts that were collected. There is, therefore, no doubt about the fact that the Under Secretary to the Government had given no opportunity to any of the petitioners of a hearing by him while taking a decision to pass an order under Section 88-D. All that appears to have been done is that a notice seems to have been issued by the Mamlatdar and the petitioner appears to have been called and his statement was recorded. In the second petition it appears that some evidence was taken but even so, the petitioners were never asked by the Government or by the Under Secretary to offer any explanation as regards the material on the basis of which action was purported to be taken. No hearing appears to have been given by the Government before cancelling the certificates and it cannot be said from the mere fact that a statement of the petitioner was recorded or that some evidence was taken by the Mamlatdar that the Government had given an effective hearing to the petitioners before cancelling the certificate. The revocation of the certificates was an action of such a nature as would affect the property rights of the petitioners and these rights would be prejudicially affected if the petitioners were not heard and their explanation was not taken by the Government on the material that was being considered by the Government while taking an action under Section 88D and while cancelling the certificates the petitioners had obtained under Section 88C. Since none of the petitioners has got a hearing before the Government and the authority that passed the order under Section 88D, the order revoking the certificate under that Section cannot stand and must be set aside.

11. Special Civil Application No. 901 of 1963 is allowed and the order Exhibit "B" dated January 1963 passed under Sec. 88D revoking the certificate granted under Section 88C is quashed and the rule is made absolute with costs. Special Civil Application No. 835 of 1963 is also allowed and the order dated 1st January 1963 passed under Section 88D revoking the certificate granted under Section 88C is quashed and the Rule is made absolute with costs.

GGM/D.V.C.

Petition allowed.

AIR 1969 GUJARAT 94 (V 56 C 19)*

N. G. SHELAT, J.

Vasava Narottam Unju, Appellant v.
Shah Ambalal Maganlal, Respondent
Second Appeal No. 1535 of 1960, D/-2-
12-67, against decision of Dist. J., Godhra,
D/- 4-7-1960.

Civil P. C. (1908), S. 96 — Right of appeal — Transfer of territory under Notification of State Government after decree in suit — In the absence of any provision making the notification retrospective, appeal preferred in a Court empowered to entertain appeal prior to such transfer is maintainable — Notification CPR 1259/8897/43 D/- 15-10-59.

Right of appeal is not merely a procedural matter but it is a substantive right and such a right can only be taken away by express provision to that effect. Such a right cannot be allowed to be taken away retrospectively unless expressly provided for by the Legislature. A right of appeal arises to a party with the institution of the suit and, at any rate, at the date when the decision has been given by the Court, so as to consider the authority of the superior Court having right to hear the appeal in respect of any such case. The notification No. CPR 1259/8897/43, issued by Government under S. 22A of the Bombay Civil Courts Act and published in the Bombay Government Gazette on 15-10-59 whereby certain territories were transferred to another division does not affect any pending cases or cases decided by the Court prior to the Notification coming into force or in any way affecting the jurisdiction of the appellate Court in respect of the decisions in those suits. It merely stated that particular villages were transferred from one division to the other and no more. Thus if on the basis of such transfer of villages, jurisdiction in filing original suit after 16-10-1959, was to be sought, it had to be on that basis, but it could not have a retrospective effect so as to affect pending matters or matters decided before it came in force.

Thus a suit was decreed on 9-10-59 by Court at K having jurisdiction over the place of residence of defendant. That place was transferred under the notification to another division so that from 16-10-59 it was no longer within the jurisdiction of Court at K. Defendant preferred an appeal on 10-11-59 to the District Court at G which had jurisdiction to hear appeals against decrees passed by Court at K. The appeal was dismissed. Defendant in second appeal challenged the jurisdiction of Court at G to entertain and hear appeals. Held that the institution of the suit was

*Only portions approved for reporting by High Court are reported here.

proper and that continued till the decision of the suit and the right of appeal arose on 9-10-1959. The Notification issued under the Bombay Civil Courts Act did not exist and therefore, in any view of the matter, the right to appeal under S. 96, CPC was to the District Judge at G which Court had the jurisdiction over the Court at K. The District Court at G was authorised to hear the appeal over the decision of the Court at K. That jurisdiction of the District Court had not been affected by any express provision and the District Court was not in any way wrong in entertaining the appeal and deciding the same. AIR 1957 Tra-Co 43 & AIR 1943 FC 24 & AIR 1956 SC 87 & AIR 1951 Bom 270 & AIR 1957 Raj 336, Rel. on; (1906) ILR 28 All 93 & AIR 1915 Mad 362, Dist. (Paras 12 and 3)

Cases Referred: Chronological Paras

- (1961) AIR 1961 SC 1655 (V 48) =
- (1962) 2 SCR 333, Javer Chand v. Pukhraj Surana 15
- (1957) AIR 1957 Raj 336 (V 44) = ILR (1957) 7 Raj 858, Doongarmal v. Roop Singh 8
- (1957) AIR 1957 Tra-Co 43 (V 44) = ILR (1956) Tra-Co 1094, Saithu Muhammad Rowther v. Meemi Kadir 4
- (1956) AIR 1956 SC 87 (V 43) = (1955) 2 SCR 1117, Ramanna v. Nalapparaju 6
- (1953) AIR 1953 Bom 189 (V 40) = 55 Bom LR 59, Prabhakar Bhaskar v. Usha Prabhakar 7
- (1951) AIR 1951 Bom 270 (V 38) = 52 Bom LR 871, Raghunath Hanumant v. Sadashiv 7
- (1943) AIR 1943 FC 24 (V 30) = ILR 1943 KFC 21, Venugopala v. Krishnaswami 5
- (1933) AIR 1933 Lah 148 (2) (V 20) = 34 Pun LR 1052, Kasan Shah v. Atta Ullah 15
- (1915) AIR 1915 Mad 362 (V 2) = ILR 37 Mad 477, M. Subbayya v. M. Rachayya 11
- (1906) ILR 28 All 93 = 2 All LJ 576, Allah Dei Begum v. Kesari Mal 1, 10

K. C. Shah for K. M. Shah, for Appellant; S. C. Shah, for Respondent.

ORDER:— Mr. Shah, the learned Advocate for the Appellant contended that the learned District Judge, Godhra, who decided the appeal, had no jurisdiction to entertain and decide the same. He pointed out that the suit was filed in the Court of the Civil Judge Junior Division at Kalol by reason of his having jurisdiction to entertain the suit as the defendant resided at Chandpur within the jurisdiction of the said Court, having regard to Section 20, clause (a) of the Civil Procedure Code. That Chandpur, according to him, remain-

ed no longer within the jurisdiction of either that Court or of the District Court, when appeal against the decision in suit was preferred inasmuch as that village of Chandpur has been transferred from that Division and put into a different Division by reason of a Notification No. CPR 1259/8897/43, published in the Bombay Government Gazette on 15-10-1959 whereby the Government of Bombay, in exercise of its powers conferred by Section 22 of the Bombay Civil Courts Act, 1869, directed that the authorities specified in column (1) of the schedule to annexure... In Column 1 of the schedule the villages are set out and one of them is Chandpur, a place of residence of the defendant. Thus, according to him, the District Court which decided the appeal had no jurisdiction to entertain and decide the same. In support of his contention, he invited a reference to a case of Allah Dei Begam v. Kesri Mai, (1906) ILR 28 All 93, where it has been held that: "where a certain area is transferred by a Government Notification from the jurisdiction of one District Judge into the jurisdiction of a different District Judge, an appeal preferred after the date on which the notification takes effect must be received and entertained by the District Judge into which jurisdiction the area from which the appeal comes has been transferred." On the other hand, it has been contended by Mr. Shah, the learned Advocate for the respondent that the said Notification in no way takes away the authority or jurisdiction of the District Court, Panchmahals of entertaining an appeal against any decision given by a Court subordinate to it, and therefore, it continues to have the same authority over any such decision till the final termination of that case. Apart from that position, he also contended that having regard to the question of such territorial jurisdiction involving local limits of any particular Court, it has to be considered having regard to S. 21 of the Code of Civil Procedure; and if no such objection has at all been raised in that respect before the Court passes a decree, it is not permissible to raise any such question in the Court of appeal or revision unless there has been a consequent failure of justice.

2. In order to consider as to whether the District Court at Godhra was within its powers to hear this appeal, we have to turn to S. 96 of the Civil P. C. which provides that save where otherwise expressly provided in the body of the Code of Civil Procedure or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decision of such

Court. We have, therefore, to see whether the District Court, Panchmahals, had an authority to entertain and hear appeals from the decisions of the Court of the Civil Judge, Junior Division, Kalol. Such an authority of the District Court arises out of S. 8 of the Bombay Civil Courts Act, 1869, which provides that except as provided in Sections 16, 17 and 26, the District Court shall be the Court of Appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force. Now it is clear that sections 16, 17 and 26 do not come in the way and at the same time it is an undisputed fact that in absence of any such notification, dated 15-10-1959 the District Judge at Panchmahals had the authority to entertain and hear the appeal from the decree passed by the Court of the Civil Judge, Jr. Dn., at Kalol, which was subordinate to it. But the question is whether that authority or power is affected by the Notification so as to justifiably say that on the day when it was filed, it had no such authority in view of the provisions of any law for the time being in force. In other words was the law at that date so changed as to take over the authority of the District Court Panchmahals and give the same authority to the District Court, Baroda as urged before this Court?

3. Now, the suit was decided by the Court of the Civil Judge, Junior Division at Kalol, on 9-10-1959 and the Court had jurisdiction to decide the same. The Notification whereby the village of Chandpur came to be transferred from the jurisdiction of the Civil Court at Kalol to that of Vaghodia, Baroda District, was to take effect from 16-10-1959. The defendant has however preferred an appeal in the Court of the District Judge, Panchmahals, at Godhra, thereafter i. e. on 10-11-1959. Thus only at the date when he filed the appeal against the decision of the Civil Judge, Junior Division, Kalol, in that suit, that village of Chandpur was no longer within the territorial limits of the District of Panchmahals as also of the jurisdiction of the trial Court. It is on that ground that the contention is raised by the learned Advocate for the appellant that if a suit were to be filed against a defendant, after that Notification became effective from 16-10-1959, the trial Court had no jurisdiction and when that is so, the appeal against any such decision in a suit filed after 16-10-1959, would lie to the District Judge at Baroda. Therefore, according to him, the District Court at Godhra had no jurisdiction to hear the appeal instituted in that Court. Now as already observed above that Notification does not provide for withdrawing the authority of the District Court, Panchmahals,

or transferring the authority in that respect to the District Court at Baroda in respect of any such suits either pending in Kalol Court, or appeals pending in Godhra Court. Nor does it provide any change in respect of such decisions in suits in relation to the filing of appeals after 16-10-59, to the Court of appeal. The Notification merely says that particular villages are transferred from one division to the other and no more. Thus if on the basis of such transfer of villages, jurisdiction in filing original suit after 16-10-1959, was to be sought it had to be on that basis but it cannot have a retrospective effect so as to affect pending matters or matters decided before it came in force. It cannot, therefore, be said that the jurisdiction of the District Court was in any way so restricted or taken away in respect of any such particular matters as is sought to be urged by Mr. Shah for the Appellant.

4. A reference was invited to the decision in Saithu Muhammad Rowther v. Meemi Kadir, AIR 1957 Tra-Co. 43, where a similar question as the one raised before this Court had arisen. The facts of the case were that a Notification was published by the Government on 12-8-1955, in exercise of the powers conferred by S. 11 of the Travancore-Cochin Civil Courts Act. It brought about certain changes in the territorial jurisdiction of several courts as specified in that Notification. One of such changes was to transfer Chowara village from the jurisdiction of the Ernakulam Munsiff's court to the jurisdiction of the Perumbavoor Munsiff's Court with effect from 17-8-1955. There was nothing in that notification suggesting that it intended any change in the jurisdiction which the Ernakulam Munsiff's Court had properly exercised in relation to Chowara village up to the appointed date, i. e. 17-8-55. The appeals against the decrees passed by the Ernakulam Munsiff's court in the suits which were all properly entertained by that Court prior to 17-8-1955, were preferred to the Anjikaimal District Court having appellate jurisdiction over the Ernakulam Munsiff's Court. The contention was that the appeal lay not in that Court but to the Perumbavoor District Court. It was then held; that the Court in which a suit has been properly instituted retains its jurisdiction to deal with the suit at all stages upto its logical termination unless the case is transferred to another Court by order of a superior Court or unless such jurisdiction is vested by the express provision of law. It has been further observed that this position holds good not only in the matter of the trial of the suit, but also in the matter of appeals and also of the execution of the decree that may be passed in the suit. The observations further go to the effect that this is not

the Jammu and Kashmir Bank Ltd. and certain other banks, to acquire immovable property other than land.

30. Section 140 of the Transfer of Property Act, as it now stands after its amendment by the aforesaid two Acts, reads as follows:

140. Nothing contained in Irshad, dated 29th Maghar 1943 or any law, rule, order, notification, regulation hidayat, ailan, other circular, robkar, Yadshad, Irshad, State Council resolution or any other instrument having the force of law prohibiting or restricting the transfer of immovable property in favour of a person who is not a permanent resident of the State shall apply:

(a) a mortgage of immovable property other than land as defined in the Jammu Kashmir Alienation of Land Act, Samvat 1995, in favour of J and K State Financial Corporation established under the State Financial Corporation Act, 1951, or the Jammu and Kashmir Bank Ltd, or a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934, and having an office for transacting the business of banking in the State.

(b) a transfer of immovable property situate at Katra and the villages contiguous to it in favour of the Vishwayatan Yogashram Society registered under the Societies Registration Act, 1860 (Central Act No. 21 of 1860), affected in furtherance of the declared purposes of the society.

31. There is also nothing in the Jammu and Kashmir Grant of Permanent Resident Certificate (Procedure) Act, 1968, which may impel me to come to a different finding.

32. The conclusion therefore is irresistible that the mortgage of an orchard in the instant case is invalid and cannot be enforced.

33. For the foregoing reasons, I find no force in this appeal which is dismissed but in the circumstances of the case without any order as to costs.

34. ANANT SINGH J.: I agree, although, I would like that the Legislature could suitably amend the law admitting the Bank or as a matter of that, any suitable concern into the fold of State Subject.

35. J. N. BHAT J.: I agree and further endorse the desire expressed by my learned brother Hon'ble Anant Singh Justice.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 JAMMU AND KASHMIR 33
(V 56 C 9)

J. N. BHAT, J.

Buta and another, Appellants v. Kaka and others, Respondents.

Second Appeal No. 98 of 1966, D/- 23-3-1968, against order of Dist J., Jammu D/- 30-11-1966.

(A) Tenancy Laws — J. & K. Tenancy Act (2 of 1980 Smt) S. 15A, proviso — Mortgage of land with delivery of possession — Induction of tenant on mortgaged land by mortgagee — Eviction of tenant by mortgagor on redemption — When possible.

A mortgagee can let out the mortgaged land and induct tenants also upon the same. But once the mortgage is redeemed, the rights of all, holding under the mortgagee in any form, ipso facto come to an end, the general rule being that a person cannot transfer a better right than he himself possesses. (Para 5)

Where it is proved that the mortgagor was in personal cultivating possession of the land at the time it was mortgaged and that he had no other land except the one under mortgage, the proviso to S. 15A entitles the mortgagor to eject the tenant from the mortgaged property on its redemption, even if the tenant, inducted by the mortgagee, be a protected tenant. AIR 1964 Punj 369, Rel. on. AIR 1964 SC 1320 and AIR 1966 SC 1721, Dist.

(Para 6)

(B) Tenancy Laws — J. & K. Tenancy Act (2 of 1980 Smt), Ss. 2(5), 15A proviso, 85 first group (d) — Induction of tenant by mortgagee on mortgaged land — Tenancy ends with redemption of mortgage — No relationship of tenancy between mortgagor and tenant within meaning of S. 2(5) — Eviction of tenant of mortgagee under S. 15A — Civil Court has jurisdiction to pass decree — Section 85 first group (d) is not attracted. (Para 7)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1721 (V 53)=

(1966) 3 SCR 676, Prabhu v. Ramdeo 3, 4

(1964) AIR 1964 SC 1320 (V 51)=

1963-3 SCR 1, Dohyalala v. Rasul Mahomed 3

(1964) AIR 1964 Punj 369 (V 51)=66 Pun LR 427, Dalip Singh Hazara

Singh v. Punjab Government 5

(1952) AIR 1952 SC 205 (V 39)=1952 SCR 775, Mahabir Gope v. Harbans

Narain Singh 5

G. L. Gupta, for Appellants; R. C. Gupta, for Respondents.

JUDGMENT: In this case, which was instituted in the Court of Munsiff R. S. Pora and decreed by him as well as by the District Judge, Jammu by means of

IL/JL/E251/68

their orders dated 31-5-1965 and 30-11-1966 respectively this second appeal was preferred in this court, which was decided by his Lordship, the Hon'ble Chief Justice Wazir on 3rd of March 1967. His Lordship was pleased to remit two issues to the trial court and these issues ran as under:

(1) Whether defendants Nos. 6 and 7 were in cultivating possession of the land since 1955 and had acquired the status of protected tenants? OPD

(2) If the above issue is decided in favour of the defendants, whether their rights of protected tenants will cease under proviso 2 to Section 15-A of the Tenancy Act and they will be liable to be dispossessed.

The trial court then recorded some evidence and made a report against the appellants. The District Judge sent the record of this case to this court without making any comment on the report of the trial court. Later his Lordship, Chief Justice Wazir again on 29-11-1967 directed the District Judge to record his finding on the report of the Munsiff. The District Judge ultimately by his order dated 10-1-1968 concurred with the finding of the trial court. The case was again sent to this court and has been placed before me.

2. I have heard the arguments of the learned counsel for the parties. Mr. G. L. Gupta, the learned counsel for the appellant-tenants argues that the appellants are protected tenants of this land and they cannot be ejected from this land. All that can be held in favour of the mortgagors is that a decree for redemption of mortgaged property can be passed in their favour. The appellants shall be tenants under them. They are prepared to pay the share of the produce which they are bound to pay under law to the mortgagors. They cannot be physically ejected from this land. On the other hand it is argued that the mortgagors were in possession of this land when they mortgaged it with the mortgagees on 12-5-1972. The mortgagees remained in possession and they may have inducted the appellants as tenants. As soon as a decree for redemption of mortgage is passed against them, the rights of the tenants also come to an end. Reliance is placed by the learned counsel for the respondent on Section 15-A of the Tenancy Act. Section 15-A defines what a protected tenant is. But the second proviso to this section says:

"Provided further that the right of protected tenancy of a tenant holding under a lessee or a mortgagee, shall also cease on the expiry of the lease or mortgage, as the case may be, if the lessor or the mortgagor was in self-cultivating occupation of such land immediately before such

land was leased or mortgaged and such land including the other land in his personal cultivation does not exceed the size of the holding specified for a landlord in clause (a) of Section 45 of the Act".

According to the learned counsel for the respondents the mortgagor was himself in cultivating possession of this land when it was mortgaged with the mortgagees. For this he relied upon the concurrent finding of the fact of two lower courts and argued that that finding was conclusive and could not be re-opened. Apart from that he argued that there was overwhelming evidence to show that the mortgagor Haku was in possession of the land when he mortgaged it on 12-5-1972 with Nathu and Vadawashah. In this mortgage deed the land is described as being the proprietary land of the mortgagor as well as in his possession. It further recites that the possession of the land was handed over to the mortgagees and they were at liberty either to till it themselves or through other persons. This recitation is proved to be correct and further it is proved from the evidence in this case that the possession of this land remained with the mortgagor till 4th Sawan 1985. These are the findings of fact (based on cogent evidence) of the two lower courts. Therefore clearly on the day of the mortgage in 1972 the land was in cultivating possession of the mortgagor. Mr. G. L. Gupta has however tried to distinguish between possession and cultivating possession. The land mortgaged is an agricultural land. Therefore possession of this land would mean nothing but cultivating possession. It is not a vacant piece of land which could be symbolically also possessed. Therefore there is not much force in the argument of the learned counsel for the appellants on this point.

3. Under second proviso to S. 15-A of the Tenancy Act, the appellants have lost their right of protected tenants as soon as the mortgage stands redeemed. The decree passed by both the courts below is therefore perfectly correct and is based on a correct interpretation and application of law. Mr. G. L. Gupta however referred me to two authorities namely AIR 1964 SC 1320 and AIR 1966 SC 1721. But a bare perusal of those authorities would clearly indicate that these cases have no application to the facts of the present case. In the first authority AIR 1964 SC 1320 the Bombay Tenancy and Agricultural Lands Act (57 of 1948) defines the word 'tenant' as "an agriculturist who holds land on lease and includes a person who is deemed to be tenant under the provisions of this Act". Their Lordships have laid down:

"The Act seeks to encompass within its beneficent provisions not only tenants

who held land for purpose of cultivation under contracts from owners but persons who are deemed to be tenants also. A person claiming the status of a deemed tenant need not have been cultivating land with the consent or under the authority of the owner. The relevant condition imposed by the statute is only that the person claiming the status of a deemed tenant must be cultivating land 'lawfully'. All persons other than those mentioned in Cls. (a), (b) and (c) of S. 4 who lawfully cultivate land belonging to other persons whether or not their authority is derived directly from the owners of the land must be deemed tenants of the lands. A tenant inducted on the land by the mortgagee in possession is such a tenant."

Their Lordships at the same time remarked that the tenant who had been inducted by the mortgagee in possession would ordinarily be liable to ejection on the extinction of the mortgage.

4. Similarly in AIR 1966 SC 1721 their Lordships laid down that those people who had been inducted as tenants into the agricultural land by the mortgagee had become entitled to rights of Khatedar by virtue of S. 15 of the Rajasthan Tenancy Act (3 of 1855) and therefore they could be ejected. In this way the rights of tenants under the Transfer of Property Act stood improved under the particular terms and language of that Act.

5. Therefore neither of these authorities helps Mr. G. L. Gupta's case. On the other hand there is an authority of the Punjab High Court reported as AIR 1964 Punj 369 which again is based on a Supreme Court authority AIR 1952 SC 205. The general rule is that a person cannot transfer a better right than he himself possesses. 'A' becomes a mortgagee and enters upon some land. He inducts the tenant on this land. When his mortgage is redeemed, the right of the tenant comes to an end because the mortgagee cannot create an encumbrance on the land which he held under the mortgage. During the term of his mortgage he can utilise the property as a prudent man will enjoy his own property. He can let it out and induct tenants also upon the same. But once the mortgage is redeemed, the rights of all holding under the mortgagee in any form ipso facto come to an end.

6. In the Punjab authority it was held that a tenant of a mortgagee ceases to be so on the redemption of the mortgage unless the tenant's case comes under any exceptions. In this State the difficulty was envisaged by the Legislature and therefore they put a proviso under section 15-A of the Tenancy Act. This proviso saves the mortgagor's rights to eject

a tenant even if he be a protected tenant from the mortgage property on its redemption if at the time of executing the mortgage deed, the mortgagor was in personal cultivating possession of the land. In this case it has been held proved by both the courts below and on very cogent evidence that the land was in personal cultivation of the mortgagor at the time it was mortgaged. It is further proved that the mortgagor has no other land except the one, which is the subject matter of this suit. Therefore he is fully protected under the provisions of S. 45-A (Sic 15A) of the Tenancy Act. The mortgagor is therefore entitled to the decree which has been passed in his favour.

7. Another argument of Mr. G. L. Gupta was that the appellants were definitely the tenants of this land and even if they were liable to be ejected, the proper forum was the Revenue Court and not the Civil Court. A suit for ejection against a tenant would not lie in a Civil Court. This case was covered by, according to Mr. Gupta, S. 85, first group (d) of the Tenancy Act which says "Suits by landlord to eject the tenant". According to Mr. Gupta, as soon as the mortgage was extinct, the mortgagor was the landlord vis-a-vis the tenant, because the tenants-appellants actually till the land and hold it as tenants under the mortgagee. According to Mr. Gupta the relationship of landlord and tenant came into existence between the mortgagor and the tenants-appellants. But in my opinion this argument is not well founded for two reasons:

Firstly under S. 15-A the protected tenancy of the tenant ceased in this land as soon as a decree for redemption of the mortgage is passed in favour of the mortgagor. Therefore when the right of the appellants in this land ceases, the relationship of tenant and landlord comes to an end. Furthermore the relationship of a landlord and a tenant is a personal relationship. Section 2(5) of the Tenancy Act defines a tenant as a person who holds land under the State, or under another person, and is or but for a special contract in that behalf would be, liable to pay rent for that land, to the State or to that person....." Therefore tenancy is a personal relationship between two persons, one of whom is called the landlord and the other tenant. Two conditions are necessary, the tenancy must exist vis-a-vis particular landlord and the tenant must be liable to pay rent unless there is a special contract to the contrary and that liability must be vis-a-vis a particular landlord. Here admittedly the tenants-appellants were never the tenants of the mortgagor. He had not engaged them in the land as tenants. There was no contract between the mortgagor and the appellants, nor

was there any contract to pay rent or not to pay rent for this land. Therefore strictly speaking the appellants were not tenants qua the mortgagors. The deeming provision as appeared in the Rajasthan and Bombay Acts also is not in the State Tenancy Act.

8. For these reasons therefore I again repeat that the decree of the trial Court affirmed by the lower appellate Court is rightly passed. There is no force in this appeal, which is dismissed with costs.

BNP/D.V.C.

Appeal dismissed.

**AIR 1969 JAMMU AND KASHMIR 36
(V 56 C 10)**

J. N. BHAT, J.

S. L. Saraf, Petitioner v. M. S. Qureshi and another, Respondents.

Election Petn. No. 1 of 1967, D/- 13-6-1968.

(A) Evidence Act (1872), Ss. 101-104 — Scope — If no or insufficient evidence is given, party who has to prove his case in order to succeed in an action, must fail. (Obiter). (Para 20)

(B) Representation of the People Act (1951), S. 100 — Scope — Returned candidate should not be unseated unless petitioner proves his case very very clearly. (Para 20)

(C) Representation of the People Act (1951), S. 22(2) (as amended in 1956) — Powers of Asstt. Returning Officer — Nomination paper suffering from inherent defect apparent on face of nomination paper — Held on facts that its rejection by Returning Officer or even by Asstt. Returning Officer was not improper. (1955 Ed) 1 Doabia's Election Cases 186, Rel. on. (Para 31)

(D) Representation of the People Act (1951), S. 36(2)(a) — Rejection of nomination paper — Oath should be made and subscribed to before the date of the scrutiny: AIR 1968 SC 1064, Foll.; AIR 1968 Mys 18, Held no longer good law. (Para 36)

(E) Civil P. C. (1908), Pre. — Interpretation of Statutes — Court only interprets law as it stands — It does not amend the law — Law as laid down by Supreme Court becomes law of land. (Para 36)

(F) Representation of the People Act (1951), S. 100(1)(c) — Scope — Improper rejection of nomination paper — Election can be declared void on this ground alone — It is not necessary further to prove that election of returned candidate is materially affected. (Para 37)

(G) Representation of the People Act (1951), S. 129 — Standard of proof —

Standard of proof for establishing corrupt practice should be that of criminal case: 1963-Doabia's Ele-Cas 218 (AP) and 1961-Doabia's Ele-Cas. 185 (Kerala) and 1962-Doabia's Ele-Cas. 181, Rel. on. (Para 39)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 1064 (V 55)=
Civil Appeal No. 1692 of 1967, D/ 22-1-1968, Pashupati Nath Singh v. Harihar Prasad Singh 36

(1968) AIR 1968 Mys 18 (V 55)=13 Law Rep 153, K. K. Hushenhan v. Siddavanhalli Nijalingappa 36

(1963) 1963 Doabia's Ele Cas 218=Spl. Appeal No. 34 of 1963 (AP), D. Murlidhar Reddy v. Prafulla Reddy 33

(1962) 1962 Doabia's Ele Cas 181= Election Case No. 213 of 1961, Nanda Kishore v. Himanshu Sekhara Pandhi 39

(1961) 1961 Doabia's Ele Cas 14= Special Appeal No. 8 of 1958 (AP), V. B. Raju v. V. Ramachandra Rao 39

(1961) 1961 Doabia's Ele Cas 185= Election Petn. No. 1 of 1960 (Kerala), Gopala Kurup v. Samuel Arulappan Paul 39

(1955 Ed) 1 Doabia's Ele Cas 186, R. B. Bisweswarlal Halwasya v. Bahup Rang Lal Jajodia 31

(1927) 111 Indian Ele Petns 178 (1834-1935) 1 Doabia's Ele Cas 45, Peare Lal v. Amba Prasad 30

T. R. Bhasin, P. L. Handoo and R. N. Kaul, for Petitioner; A. K. Sen, O. N. Tikkoo, and K. N. Raina, for Respondents. A. N. Raina for Intervener.

ORDER: Shri Sham Lal Saraf, the petitioner, seeks to challenge the election of respondent No. 1 Shri Mohammad Shafi Qureshi to the Parliamentary Constituency Anantnag, Kashmir in the last general elections of 1967. The petitioner and the two respondents M/s. Mohammad Shafi Qureshi and Rughu Nath Vaishnavi respondent No. 2 sought to contest this election. The petition recites that the petitioner is a resident of the State of Jammu & Kashmir, and is registered as a voter in the Parliamentary Constituency Srinagar District. The registered voters of the Parliamentary constituencies in the State of Jammu and Kashmir were called upon to elect their representatives to the House of People. The nomination papers were to be filed before the Returning Officer (hereinafter referred to as R. O. in this judgment) between the hours of 11 O'clock to 3 P.M. each day from 13th of January 1967 to 20th of January 1967. The petitioner belongs to the National Conference party and the respondent No. 1 to the Indian National Congress party, both of which parties were recognised by the Election Commission. On 20th January 1967, accompanied by his proposer,

the petitioner went to file his nomination papers in the office of the R. O., who was the Deputy Commissioner/District Magistrate Anantnag. He found the R. O. absent from his office. The matter was telephonically reported to the Deputy Electoral Officer by the petitioner's proposer. At about 2 P.M. the Assistant Returning Officer (hereinafter referred to as A. R. O. in this judgment) of this Parliamentary Constituency, who was the Assistant Commissioner Anantnag, came to his office. The petitioner along with his proposer approached him to accept the nomination paper of the petitioner and accept the necessary election deposit. This gentleman was not inclined to accept the nomination paper of the petitioner for a pretty long time and on the insistence of the petitioner's proposer told the petitioner and his proposer that he would accept the nomination paper only if the R. O. would not come to his office till 10 minutes to 3 P.M. The A. R. O. accepted the nomination paper of the petitioner at 2-55 P.M. and recorded on the back of the nomination paper that he had accepted it because of the insistence of the petitioner. The A. R. O. signed it as Assistant Commissioner and he was persuaded by the petitioner's proposer to put three letters 'A. R. O.' meaning Assistant Returning Officer, with the words Assistant Commissioner. The election deposit was made by the petitioner and a receipt obtained from the Assistant Returning Officer. During the night of the 20th January 1967 the petitioner received a telegram from the A. R. O. designating himself as R. O. informing the petitioner that the scrutiny of his nomination paper would be taken up on 21st instant at 11 in the morning. This telegram was unintelligible to the petitioner but it confirmed the suspicions that the R. O. had earlier on the same day manoeuvred his absence from his office according to a plan and there was something more up his sleeve for the 21st January 1967, the date of the scrutiny. The petitioner's proposer informed the Chief Election Commissioner New Delhi about the happenings till 2-45 P.M. on 20th January 1967. The Dy. Chief Electoral Officer, Srinagar, was also informed on telephone. On 21st January 1967 the petitioner reached the office of the R. O. much before 11 O'clock and waited along with his proposer and other friends and colleagues in his office. As soon as the R. O. entered the room the petitioner's proposer sought permission of the R. O. to allow the petitioner to read and subscribe to the oath of allegiance as required by Art. 84 of the Constitution of India. The R. O. did not agree but surprised the petitioner and his proposer by telling them that the scrutiny of the nomination papers of the petitioner would be conducted by the A. R. O.

where the nomination papers of the petitioner were lying at that time. The petitioner's proposer pointed out to the R. O. that the A. R. O. had no jurisdiction to conduct the scrutiny when the R. O. was present in his office and it would be very strange that the scrutiny of the nomination papers of the petitioner would be effected by the Assistant Returning Officer and that of the two other candidates by the R. O. There was no warrant in law for such a procedure. Respondent No. 1, the candidate of the Congress party entered the room of the R. O. and sought an adjournment of the proceedings before him for half an hour as he had to present himself before the A. R. O. for the scrutiny of the nomination paper of the petitioner. The insistence of the petitioner or his proposer before the R. O. for conducting the scrutiny of his nomination paper by him proved of no avail and they therefore went to the A. R. O., whose room is adjacent to the room of the R. O. The petitioner, his proposer and other colleagues found the papers of the petitioner before the A. R. O. and the respondent No. 1 asked the A. R. O. to conduct the scrutiny of the nomination papers of the petitioner. It was pointed out by the petitioner's proposer to the A. R. O. that he had no jurisdiction to conduct the scrutiny and his action would be illegal and without jurisdiction. They demanded that the question of jurisdiction should be decided first. The A. R. O. after hearing the parties overruled this preliminary objection of the petitioner and his proposer pertaining to jurisdiction and started conducting the scrutiny. The petitioner and his proposer requested the A. R. O. to permit the petitioner to make and subscribe to the oath as required by the Constitution but he did not permit the petitioner to do so. On a perusal of the nomination paper of the petitioner by the respondent No. 1, the respondent No. 1 raised an objection to the nomination paper of the petitioner that as there was no oath form attached with the nomination paper of the petitioner, the nomination paper was liable to be rejected. This found favour with the A. R. O. and the A. R. O. verbally pronounced the order of rejection of the nomination paper of the petitioner. The petitioner further states that he is a citizen of India and has been a member of the J & K Legislative Assembly for over a decade and was elected to the Lok Sabha in the year 1962 and owed and owes unfaltering faith to the Constitution of India and regards every mandate of the Constitution as something which a citizen of India should feel proud to live and die for. By rejecting the nomination paper of the petitioner, the result of the election has been materially affected. The order of the A. R. O. is without

Jurisdiction and is baseless in law. Respondent No. 2 was also a duly nominated candidate, his nomination paper was also improperly rejected by the R. O. and for that reason too the election of the respondent No. 1 was liable to be set aside. As the A. R. O. had no authority to conduct the scrutiny of the nomination paper of the petitioner it is prayed that the election of the respondent No. 1 be declared void and set aside, and appropriate costs be awarded. The petitioner deposited Rs. 2,000 as security in terms of S. 117 of the Representation of the People Act, 1951.

2. This petition was sought to be amended by the petitioner by means of his application dated 15-6-67. The amendment sought to be effected by means of this application will be mentioned a little later after I summarize the written statements of the two respondents.

3. Respondent No. 1 filed his first written statement on 26-5-1967. The pleas raised in the written statement of the respondent No. 1 in reply to the petition of the petitioner are as follows:

The petitioner was not a duly proposed candidate for election to the Parliament from the Anantnag Constituency because his nomination paper was not accompanied by the requisite oath form. The respondent No. 1 does not know what time the petitioner reached the office of the R. O. on the first day nor does he know about the telegraphic communication between the petitioner and the Electoral Officer of the constituency. The R. O. of the Anantnag Parliamentary constituency was also the District Magistrate of Anantnag. As far as the respondent No. 1 knows, the law and order situation in Tral was getting bad on 20th January 67 and the Returning Officer being in-charge of the law and order in the entire District had to go personally to Tral and, for some time he was not in his office. He had duly authorised one of his A. R. Os.—there were more than one for this Constituency—to receive the nomination papers for election to the Parliamentary constituency. The petitioner did not go to the authorised R. O. and insisted upon the unauthorised A.R.O. to receive his nomination paper. The nomination paper of the petitioner was not accompanied by the requisite oath form or a certificate to that effect as required by law. It was not a proper nomination form. The petitioner had tried to magnify the small matters which had no bearing on the election of the respondent No. 1. The telegram alleged to have been sent by the A. R. O. to the petitioner on 20th January 1967 must have been issued in confirmation of the earlier information communicated to the petitioner about the

scrutiny to be held on 21st of January 1967. On 21st of January 1967 the date fixed for scrutiny of the nomination papers, the R. O. having had to deal with the deteriorated law and order situation at Tral where there had been firing and some deaths as a result thereof, was not sure about his being able to attend to the scrutiny personally. He had on the previous day authorised the A. R. O. who received the nomination paper of the petitioner, to start on 21st January 1967 the scrutiny of the nomination papers filed both before the R. O. and the A. R. O. in case the R. O. could not, due to circumstances stated above, be personally present to do so. The R. O. had specifically authorised the A. R. O. to carry on with the scrutiny till such time as the R. O. returned and the R. O. came to his office when the petitioner's nomination paper had been duly scrutinized by the A. R. O. and the order of rejection announced. The R. O. was not in his office till 11 A.M. on 21st January 1967. The A. R. O. started the scrutiny as authorised and directed by the R. O. After that the R. O. came and called for the other unscrutinized nomination papers from the A. R. O. and scrutinized them personally. When the R. O. was unavoidably absent to effect the scrutiny, the A. R. O. was justified to conduct the scrutiny. No permission to read and subscribe to the oath was ever sought by the petitioner. It is in the alternative pleaded that even if an attempt was made to make and subscribe to the oath after the question of jurisdiction was decided against the petitioner, that would not render the nomination paper of the petitioner valid. But as a matter of fact no offer to take and subscribe to the oath was made. Even when the respondent No. 1 took the objection on account of the absence of the oath forms, no offer was made to take and subscribe to the oath. The petitioner's claim that he has been a member of the Legislative Assembly for over a decade or of the Lok Sabha since 1962 has no bearing as the essential pre-requisite for being eligible to stand for an election to the Lok Sabha is to make and subscribe to the oath which the petitioner did not do. The fact that the nomination paper of the respondent No. 2 was wrongly rejected is denied. It is stated that the respondent No. 2 also had failed to make and subscribe to the oath as required by the Constitution nor had he filed any oath form with the nomination papers. The nomination papers of the respondent No. 2 and of the petitioner were properly rejected. The petition deserved dismissal with costs.

4. The respondent No. 2 in his written statement filed on 26th May 1967 admitted most of the contentions in the petition and added in reply to Para 20

of the petition which is the paragraph pertaining to the rejection of his nomination paper in the petition as follows:

5. That he was a duly nominated candidate and his nomination paper was improperly rejected by the R. O. He stated that he took the oath and read out the same and subscribed to it as prescribed by law in this behalf and each and every requirement laid down by the Constitution in this respect was duly complied with by the respondent No. 2 and the certificate to this effect was recorded by the R. O. on each one of the four oath forms which the said R. O. took into his custody on 19th January 1967 along with the four nomination papers of the respondent No. 2. It may be stated that the respondent No. 2 and the respondent No. 1 both filed their nomination papers before the R. O. on 19th January 1967. This respondent had shown to the R. O. at the time of the presentation of his nomination paper, the electoral roll of Srinagar Parliamentary constituency containing the name of the respondent No. 2 and he was asked to present it at the time of scrutiny. On the day of scrutiny he found that the four oath forms presented by him on the 19th of January 1967 before the R. O. along with the nomination papers had been removed and his nomination paper was rejected on the ground that he had failed to make and subscribe to the oath. No other ground was mentioned by the R. O. while rejecting his nomination paper. The R. O. had later on falsely and fraudulently stated in his order that the respondent No. 1 had failed to produce the electoral roll. The respondent No. 2 had complained to the Chief Election Commissioner of India about the tampering of the record and making false and fraudulent additions in the said order of rejection. This respondent also presented copies of letters sent by him to various gentlemen and dignitaries.

6. The learned advocate of the respondent No. 1 by means of his application dated 13th June 1967 presented on 14th June 1967 sought permission to amend his written statement. The amendments sought were as under:

"(a) The readiness to take the oath on the date of scrutiny or the refusal of the Returning Officer not to administer oath on the date of scrutiny is not relevant to the scope of enquiry and does not constitute a ground for the improper rejection of the nomination paper.

(b) The rejection for the non-compliance of the provisions of S. 51 of the Constitution does not constitute improper rejection of the Nomination paper."

7. The petitioner also by means of his application dated 15th June 1967 present-

ed on 16th June 1967 sought permission to amend certain paragraphs of his petition. The petitioner sought to amend paras 19, 20, 23 and 11 of the petition. In paras 19, 20 and 23 in substance the following words were sought to be added:

"The election of respondent No. 1 is void because of improper rejection of the petitioner's nomination paper, and non-compliance with the provisions of Constitution and of the Representation of the People Act 1951, and the orders made under this Act by the Returning Officer and the Assistant Returning Officer by which the result of the election in so far as it concerns the respondent No. 1 who is a returned candidate has been materially affected."

And in para 11 the words "a little before 11 A.M." were sought to be added after the words "the Returning Officer entered the room."

8. These applications were opposed by the other side but ultimately were disposed of by my order dated 26th June 1967 which is a detailed one. I permitted the petitioner as well as the respondent No. 1 to make the amendments as prayed for by them. Consequently amended pleadings were put in.

9. Another application was moved by the learned counsel for the respondent No. 1 on 6th of June 1967 that the name of the respondent No. 2 be struck off from the proceedings under Order I Rule 10 of the Code of Civil Procedure but this application was not seriously pressed by the respondent No. 1 subsequently.

10. An application was moved by Syed Mr. Quasim on 23rd of May 1967 for being added as an Intervener. This was opposed by the petitioner and the respondent No. 2 but ultimately by my order dated 1st of June 1967 I permitted Syed Mir Quasim to be added as an Intervener for the limited purpose of arguing the law points raised in this case. But in view of the subsequent developments and the authority of the Supreme Court as that point has lost importance it is not mentioned in detail.

11. Respondent No. 1 further put in an application on 3rd of July 1967 for review of my order dated 26th of June 1967 but that application was rejected by me on 11th of July 1967.

12. The respondents filed their written statements to the amended petition of the petitioner on 4th July 1967 and 27th June 1967. After this chequered career issues in this case were struck on 11th of July 1967. Issue No. 8 was recast by means of my order dated 11th of August 1967. The final issues on which evidence was led by the parties, which arose from the pleadings of the parties, are as under:

1. Was not the A. R. O. empowered to receive the nomination papers of the petitioner? O. P. R. I.

2. Whether the R. O. was unavoidably absent from his headquarters on 21st January 1967 on account of law and order situation in Tral and had therefore authorised the A. R. O. to start the scrutiny of the nomination papers in case the R. O. could not be personally present on spot on 21st of January 1967 at 11 A. M.? O. P. R. I.

3. (a) On proof of issue 2, whether the scrutiny of the nomination paper of the petitioner by the A. R. O. was without jurisdiction? O. P. P.

(b) If issue No. 2 is not proved, is the scrutiny of the nomination paper of the petitioner by the A. R. O. valid and proper? O. P. R. I.

4. Whether on 21-1-1967 on entry of the R. O. into his office a little before 11 A. M. the proposer of the petitioner got up and sought permission of the R. O. for allowing the petitioner to read and subscribe to the oath of allegiance as required by Art. 84 of the Constitution of India? O. P. P.

5. Whether on the request of the proposer of the petitioner to allow the petitioner to make and subscribe to the oath of allegiance, the R. O. did not permit the petitioner to make and subscribe to the oath, and directed the petitioner to present himself for scrutiny before the A. R. O.? O. P. P.

6. If issues 4 and 5 or both are proved, what is the effect on this election petition? OPP

7. Did the R. O. on 21-1-1967 adjourn the scrutiny of the nomination paper of respondents Nos. 1 and 2 for half an hour on the request of respondent 1 to enable him to be present at the scrutiny of the nomination paper of the petitioner by the A. R. O.? O. P. P.

8. When after the A. R. O. had rejected the contention of the petitioner with regard to the jurisdiction of the A. R. O. to conduct the scrutiny of the nomination paper of the petitioner, did the petitioner's proposer seek permission of the A. R. O. for enabling the petitioner to read and subscribe to the oath as required by the Constitution of India?

9. Whether the A. R. O. rejected this request of the petitioner's proposer? If so, what is its effect on the election petition? O. P. P.

10. Was the nomination paper of the petitioner improperly rejected by the A. R. O.? O. P. P.

11. Was the nomination paper of respondent 1 improperly accepted by the R. O.? O. P. P.

12. Was the nomination paper of respondent 2 improperly rejected by the Returning Officer? O. P. P.

13. Whether the rejection of the nomination paper of the petitioner being based on a constitutional disqualification is a valid ground for rejection of the petitioner's nomination paper? O. P. R. I.

13. After the issues were framed the parties filed their list of witnesses, the petitioner on 29th of July 1967 and the respondent No. 1 on 28th of July 1967. The respondent No. 2 did not produce any evidence nor furnish any list of witnesses, nor did he intend to do so, vide his statement dated 13th of September 1967. He did not after some time follow or attend the proceedings even. Evidence of the petitioner started from 9th of August, 1967.

14. Before I discuss the evidence or record my finding on various issues, I have to offer an explanation for the delay in the disposal of this election petition. The *Interim orders passed in this petition* are detailed and self-speaking. But what was mainly responsible for the length of time that this case took was that the evidence of the petitioner was closed on 13th of September 1967. The respondent No. 1's evidence started from 29th of September 1967. Then there were some disturbances in the Valley which did not permit the respondent No. 1's witnesses to be examined in Kashmir, the witnesses being the Deputy Commissioner and Assistant Commissioner and Station House Officer who were reported to be busy with law and order situations. Later on the case was taken to Jammu where the witnesses could not turn up because of bad weather, the Banihal road being blocked for a pretty long time. The evidence of the respondent No. 1 could not be finished in Jammu, as the respondent No. 1, who is a Deputy Minister in the Union Cabinet had gone out of India. The evidence of respondent No. 1 however was recorded on 13th and 14th of May 1968. An adjournment was sought for arguing the case.

15. The petitioner produced three witnesses, M/s. Plary Lal Handoo, Syed Nizum-ud-Din, Raghunath Vaishnavi respondent No. 2 and appeared himself as his own witness. Similarly the respondent No. 1 produced three witnesses namely Syed Muzaffar Indrabi Assistant Commissioner Anantnag, A. R. O., Mr. M. A. Khaliq Deputy Commissioner-cum-District Magistrate, Anantnag, R. O., and Hakim Ghulam Rasul Station House Officer, Awantipora and himself also appeared as his own witness. The statements of witnesses are very very long and no useful purpose would be served in summarizing these lengthy statements. The statements of different witnesses will be discussed while discussing the relevant issues that would both save time and duplication of labour.

16. According to me issues 2 to 7 are connected. They pertain to the alleged absence of the R. O. from his Headquarters on 21st of January 1967 at 11 A.M., the time of his coming to office that day, and the matters upto the time the nomination paper of the petitioner was taken up for scrutiny by the A. R. O. Issues 8, 9 and 10 pertain to the part played by the A. R. O. in this case and his competence to hold the scrutiny and rejection of the nomination paper of the petitioner by him. Issue No. 11 pertains to the improper acceptance of the nomination paper of the respondent No. 1 and issue No. 12 pertains to the improper rejection of the nomination paper of the respondent No. 2 by the R. O. Issue No. 13 is more or less a constitutional issue. Therefore these issues will be discussed according to the grouping above mentioned.

17. Now beginning with issue No. 1, this issue was not seriously pressed by the respondent No. 1's learned counsel at the time of arguments. But the basis of this issue is the endorsement of the A. R. O. on the back of the nomination paper of the petitioner wherein he has stated that he was not one of the officers mentioned in Column 6 of the Notification issued to receive the nomination papers, but it was on the insistence of the petitioner that he had received this nomination paper. This endorsement which is marked as Ex. PW1/5 is entirely misconceived. It is admitted by the R. O. in his statement of 6th March 1968 that a notification was issued on 2nd of January 1967 by the Election Commission wherein the Deputy Commissioner Anantnag had been designated as the R. O. of this Constituency and another notification of the Commission dated 29th of December 1966 had mentioned the Assistant Commissioner as the A. R. O. Mr. Pearey Lal Handoo, the petitioner's witness also states that there was a Notification making all the R. Os. of the Assembly Constituencies as the A. R. Os. for the Parliamentary Constituency. Mr. Indrabi A. R. O. also admits that there was a notification that all the R. Os. of the Assembly constituencies would be A. R. Os for the Parliamentary Constituency. This A. R. O. was undoubtedly and admittedly R. O. for some Assembly Constituencies of Anantnag. Therefore this issue is decided against the respondent No. 1 and it is held that the A. R. O. was legally competent to receive the nomination paper of the petitioner, because admittedly according to the case of both the parties the R. O. was not present at the relevant time in his office.

18. Out of the next group of issues which comprises issue Nos. 2 to 7 certain factual findings have to be recorded and then in the light of those findings it can be possible to record findings on the different issues in this group. In fact this

group is according to me, on ultimate analysis, the storm centre in this case. According to the respondent No. 1 the R. O. was unavoidably absent from his headquarters on 21st of January 1967 on account of the law and order situation in Tral. He had authorised the A. R. O. to conduct the scrutiny of the nomination papers in his absence and until his arrival in office. He did not return to his office till about 12 noon. By the time the R. O. arrived in his office, the A. R. O. had conducted the scrutiny of the nomination paper of the petitioner and finding that no oath had been taken and subscribed to, he had rejected this nomination paper. At the time the R. O. came to his office the scrutiny of the two other nomination papers of the respondents Nos. 1 and 2 had not yet been effected by the A. R. O. The R. O. called back the papers from the A. R. O. and completed the scrutiny of the nomination papers of the respondents.

19. According to the petitioner the R. O. purposely kept himself away from his office till some minutes before 11 A.M., the time fixed for scrutiny of the nomination papers; came to his office 3 or 4 minutes to 11 A. M. The petitioner and his proposer went to him and asked him to administer the oath to the petitioner and permit him to make and subscribe the same but the R. O. directed the petitioner and his proposer to go to the A. R. O. for the scrutiny of his nomination paper. This was objected to by the petitioner and his proposer. It was pointed out to the R. O. that as the R. O. was present in his office, the A. R. O. had no jurisdiction to conduct the scrutiny of the nomination papers. Respondent No. 1 entered the office of the R. O. and asked him to adjourn the scrutiny of his nomination paper for half an hour during which time he would attend to the scrutiny of the nomination paper of the petitioner before the A. R. O. The R. O. rejected the contentions both of the petitioner's proposer and the petitioner and directed them to appear before the A. R. O. for scrutiny of the nomination paper of the petitioner.

20. Before discussing the evidence produced by the parties in this case, I would like to remark that more evidence could have been produced by either party to prove their contentions but that has not been done. The result is that I have to confine my findings on the evidence produced by the parties whatever it is. I might further incidentally remark that it is settled law that if no or insufficient evidence is given, the party who has to prove his case in order to succeed in an action, must fail. In election matters there are numerous authorities for the proposition that a returned candidate should not be unseated unless the petitioner proves

the case very very clearly. Reference may be made to Doabia's Election Cases 1966 page 192, Case No. 24 Rajinder Singh Versus Manga Ram and ors. etc.

21-28. (Then after discussing the evidence His Lordship proceeded:)

29. The finding on issue No. 2 is returned in favour of the respondent No. 1. Part (a) of the issue No. 3 cannot be held in favour of the petitioner. The scrutiny was performed by the A. R. O. of the nomination paper of the petitioner under proper authority of the R. O.

30. About part (b) of issue No. 3 Mr. Bhasin's argument is that the scrutiny conducted by the A. R. O. of the nomination paper of the petitioner is entirely without jurisdiction and on that ground alone the election of respondent No. 1 should be set aside. In support of this contention Mr. Bhasin has cited two authorities, one known as Agra District Case, Case No. 3 reported in (1864-1935) 1 Doabia's Ele Cas 45, Pears Lal v. Amba Prasad known as Manipuri (H. M. R.) Case No. 22 reported in 'Reports of the Indian Election Petitions, 1927 by ELL Hamond, Vol. 111 at p. 178. In the Agra District case Babu Ram one of the candidates presented his nomination paper at the Bungalow of the Returning Officer Mr. Williamson, on the 3rd Sept. 1930 along with the amount of security some time before 3 P. M. The Returning Officer however, returned his nomination paper for presentation to Mr. Hari Shanker. Babu Ram presented his nomination paper at 3-5 P.M. to Mr. Hari Shankar. On the date of scrutiny that is on the 4th September, 1930 the Returning Officer rejected the nomination paper of Babu Ram, accepted those of others. It was argued that the Returning Officer not being unavoidably prevented from performing his functions, the nomination papers could not be received by Mr. Hari Shanker. This contention was upheld in this case the Returning Officer being present had taken the nomination paper and then returned for presentation to Mr. Hari Shanker, the finding that it was not proper presentation is very well justified (sic). In the Manipuri case (T. Gulab Singh v. Raj Bahadur Karajit Misra) the petitioner T. Gulab Singh, Rai Bahadur Kharajit Misra and one Bhagwan Dial were candidates for election and filed their nomination papers. On 23-10-1926 owing to the illness of the District Magistrate, Mir Ali Raza, Senior Deputy Collector Mainpuri performed the scrutiny of nomination papers. He declared that the nomination paper of the petitioner was invalid on certain grounds and accepted the nomination paper of the two other candidates. The officers competent to receive the nomination papers were the Joint Magistrate or the Senior Deputy Collector Mainpuri. It was discovered

that Mir Ali Raza was not a joint Magistrate and therefore the Tribunal held that Mir Ali Raza was not capable of performing the functions of a Returning Officer which relate to the acceptance of a nomination paper or to the scrutiny of nomination. His acceptance of the nomination paper of Rai Bahadur Misra was held improper. This case also is distinguishable. Although in view of my finding on issue No. 1 this question, which is more or less academic in nature has lost its importance and does not arise for consideration in this petition yet I would like to make the following remarks:

31. As will be clear from my finding on other issues the nomination paper of the petitioner had to be rejected under the Constitution and the law because the petitioner had not made and subscribed to the oath upto 21st of January 1967 i.e. the date of the scrutiny. The A. R. O. was not an officer entirely without jurisdiction. He had authority from the R. O. to conduct the scrutiny vide Ex. D. W 1/2. Under Section 22 Representation of the People Act, 1951 an A. R. O. is competent to perform all or any of the functions of the A. R. O. subject to the control of the R. O. Before the amendment in this subsection in the year 1956 by Section 10 o Act 27 of 1956, the A. R. Os. were no permitted to accept the nomination paper or to conduct the scrutiny of the nomination papers or to count the votes but after that amendment the only prohibition remains with respect to the scrutiny of the nomination papers. That can be done only when the R. O. is unavoidably prevented from performing such functions. But as I said earlier, the A. R. O. is not an officer completely devoid of authority, he has authority to do all acts even to scrutinize the nomination papers subject to certain limitations. When the nomination paper of a particular candidate suffers from an inherent defect which is apparent on the face of the nomination paper, its rejection by the R. O. or even by A. R. O. is not, in my opinion at all improper. I am fortified in this view of mine by (1955 Ed) Doabia's Ele Cases p. 186, case No. 34 R. B. Biswaswari Halwasya v. Babu Rang Lal Jajodia, in which the Election Tribunal has held while dealing with issue No. 3 as follows: "There was no returning Officer on the 8th October 1923 in this constituency. Under Schedule I of the Regulations, however, Jatindranath Banerjee was empowered to do all the duties of the Returning Officer. It is pointed out that under the control of the returning officer and that he could not receive nomination papers and hold a scrutiny under regulation 3 he could only act unless the Returning Officer was 'unavoidably prevented' from performing these functions. The words in an English case were 'incap-

able of acting' and Lord Campbell thought that they might cover a case of this kind. (Queen v. Owens, Vol. 121 English Reports, p. 36). The Personal Assistant had not usurped the office. He took up his duties when the Returning Officer became incapable of acting". Want of title in the person acting as Returning Officer will not vitiate an election which is otherwise valid". Parker, p. 61. "Elections made under usurping Returning Officers when there has been the form of an election have been uniformly supported" (Heyw Bo. 62). Turning to the Bengal Electoral Rules it would appear that non-compliance with the rules and regulations is not enough. The petitioner has to show that the result of the election has been materially affected by such non-compliance. If the petitioner's nomination was bad, his name goes out on that ground. If his nomination was good he succeeds on that ground and not by reason of the fact that the Personal Assistant acted as the Returning Officer."

Issue No. 4. As I have held that the R. O. was not in his office at 11 O'clock on 21st January 1967, the question of the petitioner or his proposer seeking permission for the petitioner to make and subscribe to the oath does not at all arise. This issue is decided against the petitioner.

Same applies to issue No. 5 and that also is decided against the petitioner.

32. In view of this finding, issue No. 6 does not arise in this case. Issue No. 7 also does not arise and both these issues are decided against the petitioner.

(After discussing evidence (Prs. 33-34) on record His Lordship proceeded:)

35. The A. R. O. has refused to permit the petitioner to make and subscribe to the oath on 21st January 1967. Issue No. 8 is found in favour of the petitioner.

36. I must now take up issues 9 and 10 together. So far as the question of fact is concerned, I have held that the A. R. O. rejected the request of the petitioner and his proposer to allow the petitioner to make and subscribe to the oath more than once before the scrutiny. But the question still remains whether the nomination paper of the petitioner was wrongly rejected which is the subject matter of issue No. 10. It appears that the petitioner and most other people had an idea that oath could be made and subscribed to even upto the time of scrutiny. For this there seems to be sufficient justification as will presently appear. First let us see on what date the petitioner sought to make and subscribe to the oath Nizam-up-Din P. W. states that no attempt was made by the petitioner or by his proposer to make and subscribe to the oath before the A. R. O. on 20th January

1967 because the A. R. O. had refused to receive the nomination paper vide his statement dated 8th September 1967. Mr. Saraf, the petitioner in his statement dated 11th September 1967 states "since it was open to me to make and subscribe to the oath even immediately before the scrutiny started and secondly the attitude of A. R. O. who was so hostile towards me that prevented me from making an attempt from taking an oath. I did not make any attempt to take the oath before the authorised officer at Srinagar because I was otherwise busy and I knew the procedure....." Similarly Mr. Vishnavi states in his statement dated 11th Sept. 1967 while this argument was on I read out the relevant section to the A. R. O. to the effect that as the question of jurisdiction was being discussed and the scrutiny had not started yet, the petitioner was within his right to seek permission to take and subscribe to the oath. So it is common ground or rather proved from the evidence of the petitioner himself that he offered to make and subscribe to the oath on the morning of 21st January 1967. I said earlier that there seems to be some justification for this belief in the mind of the petitioner and his well-wishers and even other people. A publication entitled "General Elections 1967"— Hand-book for Returning Officers 1966 at page 19 contains:

"The oath or affirmation should be made and subscribed before the R. O. takes up the scrutiny of nomination papers at the election on the date fixed by the Election Commission for scrutiny of nomination papers at that election. The candidates however, would be well advised to do it at the time of presenting their nomination papers to you."

Then in para 6 on the same page it further lays down:

".....If the oath or affirmation is not made and subscribed before the scrutiny of a candidate's nomination paper, the candidate will be held by you as not qualified to stand for the election. You will reject his nomination paper at the time of scrutiny. The onus of proving to your satisfaction that the candidate has made or subscribed the oath or affirmation prior to the time of scrutiny of the nomination paper is on the candidate himself."

Reading of these paras would indicate that the Election Commission contemplated that the oath could be made and subscribed to even immediately before the scrutiny. This belief misled the petitioner in not making and subscribing to the oath before the date of scrutiny. The point to be determined now is when should an oath be made and subscribed to or in other words can it be made on the date of scrutiny or should it be done

before the scrutiny. The learned counsel for the respondent No. 1 relied upon the latest Supreme Court authority Pashupati Nath Singh v. Harihar Prasad Singh, Civil Appeal No. 1692 of 1967 decided by the Supreme Court on 22nd of January 1968=(AIR 1968 SC 1064). This point came up for consideration in that case and their Lordships remarked as under:

"The short question which arises in this appeal is whether it is necessary for a candidate to make and subscribe the requisite oath or affirmation as enjoined by clause (a) of Art. 173 of the Constitution before the date fixed for scrutiny of nomination paper. In other words is a candidate entitled to make and subscribe the requisite oath when objection is taken before the Returning Officer or must he have made and subscribed the requisite oath or affirmation before the scrutiny of nomination paper commenced? The answer to this question mainly depends on the interpretation of S. 36(2) of the Act."

Then their Lordships after reproducing some provisions of the Representation of the People Act, 1951, held:

"It will be noticed that under Section 36(2) of the Act, one of the grounds on which a nomination paper can be rejected is that on the date fixed for the scrutiny of nominations, the candidate is not qualified for being chosen to fill the seat under Art. 173 of the Constitution."

Further on their Lordships held that:

"The words "having been nominated" in this form clearly show that the oath or affirmation cannot be taken or made by a candidate before he has been nominated as a candidate."

Then repelling a further contention on behalf of the learned counsel for the petitioner Mr. Gokhale, their Lordships held that:

"It seems to us that the expression "the date fixed for scrutiny" in S. 36(2)(a), means "on the whole of the day on which the scrutiny of nomination has to take place". In other words the qualification must exist from the earliest moment of the date of scrutiny....."

And then after quoting some English authorities their Lordships have finally held:

"In this connection it must also be borne in mind that law disregards, as far as possible, fractions of the day. It would lead to a great confusion if it were held that a candidate would be entitled to qualify for being chosen to fill a seat till the very end of the date fixed for scrutiny of nominations. If the learned counsel for the petitioner is right, the candidate could ask the Returning Officer to wait till 11-55 P.M. on the date fixed for the scrutiny to enable him to take the oath."

Further on their Lordships observed:

"This in our view does not mean that the oath or affirmation can be taken and subscribed on the date fixed for scrutiny. It seems to us that the nomination paper does not provide for the statement about the oath because the oath or affirmation has to be taken after a candidate has been nominated."

In this authority their Lordships have clearly laid down that oath should be made and subscribed to before the date of the scrutiny. They have further held that the petitioner must be qualified i.e. he must have subscribed to the oath from the very earliest moment of the day of scrutiny. Mr. Bhasin tried to distinguish this authority on the ground that the facts of the case before their Lordships of the Supreme Court were different. In that case even up to the time of scrutiny a candidate had not made or subscribed to the oath. When at the time of scrutiny an objection was raised, the candidate had not made or subscribed to the oath, he offered to do so but that request of his was rejected. Mr. Bhasin says that in this case the scrutiny had not started. Therefore the petitioner was in law authorised to make and subscribe to the oath before the scrutiny started. In fact he tried his best to do the same before the A. R. O. many times right from the time he appeared before him at 11 A. M. He further relied on a Mysore authority reported as AIR 1968 Mys 18 which deals with this point. But I am afraid in view of the clear pronouncement of the law by their Lordships of the Supreme Court, portions of which have been quoted in extenso above, I cannot accept the interpretation sought to be put either by Mr. Bhasin or by the Mysore authority however eloquent and cogent the reasoning of the Mysore High Court authority might be in the words of Mr. Bhasin. Mr. Bhasin tried to address a further argument that under Article 324, the supervision, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State vested in the Commission i.e. Election Commission and according to him the Election Commission had issued the instructions under this Article in the form of the Hand-book; the relevant passage from page 19 of the said book have been quoted above. Therefore, according to Mr. Bhasin the law as it existed on the 21st of January 1967 was that oath could be taken and subscribed to at any time before the scrutiny. This argument is ingenious but is not legally sound. The law was not different on 21st January 1967 from what it now is after January 22, 1968 when the Supreme Court decided the case AIR 1968 SC 1064. Their Lordships of the Supreme Court only interpreted

the law as it stood then and as it stands now, there was no amendment in the law. Under Article 141 of the Constitution of India, the law laid down by the Supreme Court shall be the law of the land and shall be binding on all of us. Further under Article 327 of the Constitution of India the Parliament is empowered to make provisions with respect to elections to Legislature "subject to the provisions of this Constitution". Parliament may from time to time by law make provisions with respect to all matters relating to or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State....." The Representation of the People Act has been enacted under this provision of the Constitution by the Parliament and therefore that would be the law governing the subject. Any other interpretation put upon the law by the Election Commission or for the matter of that by any other authority against the interpretation put on the law by the Supreme Court is of no consequence. Moreover this Hand-book is only as a sort of administrative guide and has not the force of any law. If on the authority of this Supreme Court judgment, the petitioner had not made and subscribed to the oath till 21st of January 1967, the date of scrutiny, his nomination paper was rejected; it was rightly rejected because he had not fulfilled the requirement of law as laid down in Article 84(a) of the Constitution of India. Therefore issue No. 10 is decided against the petitioner and it is held that as the petitioner had failed to make and subscribe to the oath before the day of scrutiny, his nomination paper was rightly rejected by the A. R. O. This was an inherent defect in his nomination paper and the A. R. O.'s action in rejecting his nomination paper was legally right though in arriving at this conclusion recourse has been taken to untruths and falsehood.

37. An alternative argument has been advanced on behalf of the respondent No. 1 for rejection of the nomination paper of the petitioner. It has been argued that the refusal by the R. O. or the A. R. O. would be a non-compliance with the provisions of the Constitution or the Representation of the People Act or Rules and orders made thereunder and therefore unless it is proved by the petitioner that the result of the election in so far as the returned candidate is concerned, was materially affected, the election of the respondent No. 1 cannot be set aside. In my opinion this argument deserves to be mentioned simply to be rejected. The learned counsel for the respondent No. 1 entirely ignores the provisions of Section 100(1)(c) of the Representation of the People Act, which lays down that an election should be declared void on the simple

ground that any nomination paper has been improperly rejected. If the nomination paper of the petitioner on facts had been held to be improperly rejected, that by itself would be sufficient to declare the election of the respondent No. 1 as void.

Issue No. 11. This issue was not at all pressed by the learned counsel for the petitioner. The respondent No. 1 has been properly nominated. He is a registered voter in the Srinagar Parliamentary Constituency, has presented a copy of the electoral roll of that constituency along with his nomination paper, has paid the requisite election deposit of Rs. 500/- before filing his nomination paper, has made and subscribed to the oath and got a certified copy from the R. O. to that effect. No objection was taken by anybody to his nomination paper. Therefore his nomination paper has been rightly accepted and therefore this issue is decided against the petitioner.

38. Then we come to another contentious issue i.e. rejection of the nomination paper of the respondent No. 2. In para 20 of the petition, the petitioner has made a simple statement that respondent No. 2 was also a duly nominated candidate and his nomination paper was also improperly rejected by the R. O. etc. etc. When the respondent No. 2 filed his written statement on 26-5-1967, he narrated certain facts in reply to this para in his written statement. The case of the respondent No. 2 briefly put is that on 19th January 1967 he presented four nomination forms of his which are Ex. P.W. 4/6, 4/7, 4/8 and 4/9 along with these he presented four oath forms. On the day of scrutiny the oath forms were missing from his nomination forms. After some controversy with the R. O., his nomination paper was rejected because no oath form was found attached to them. This was the only ground of rejection conveyed to this respondent at that time. Later on the R. O. had fraudulently and falsely added another ground that the respondent No. 2 had failed to present the Electoral Roll of the constituency wherein he was registered as a voter for rejecting his nomination paper. In support of this case of the respondent No. 2, the only evidence on record is the statement of the respondent No. 2. It is admitted by him that Ghulam Mohamad Genai, a candidate for the Assembly Constituency of Devsar was also with him when he presented the nomination papers. That Ghulam Mohammad Genai, has not been produced. As against this testimony of the respondent No. 2 there is the statement of the R. O. The learned counsel for the respondent No. 1 has argued that there is a presumption under Section 114, illustration (E) of the Evidence Act that all official acts will be presumed to have been regularly perform-

ed. There is a statutory presumption in favour of the version of the R. O. that there was no oath form present at the time of the scrutiny of the nomination paper of the respondent No. 2. The presumption in law shall be that no such oath forms were presented. This is further strengthened by the positive statement of the R. O. On the other hand it is argued that respondent No. 2 is an Advocate of the Supreme Court and his statement should be believed as against the R. O., whose conduct has been most shady and doubtful in most of the election matters conducted in his District. It has been argued that this gentleman, Mr. A. K. Malik has managed to see the ruling party candidates returned uncontested in most of the seats in his District, and therefore his statement should not be believed. I do not mean to express any opinion on these arguments because the conduct of this officer will be discussed in the election petitions which are admittedly pending in this very Court before other Hon'ble Judges. My comments shall be strictly confined to the credibility or otherwise of this R. O. to the facts of this case. Each case will have to be decided on its own merits and circumstances. Therefore I shall not very much draw upon the legal presumption so much relied upon by learned counsel for the respondent No. 1 but shall consider the other pieces of evidence produced by either side in this case. As I stated earlier that Ghulam Mohammad Genai who could be expected to throw light on this contention of the respondent No. 2 has not been produced. Further the learned counsel for the petitioner has put in the cross-examination of the R. O. the two certificates issued by this R. O. one to Ghulam Mohammed Genai and the other to Shri Manoharnath Kaul which are marked as Ex. D. W. 2/18 and 2/19. If Ghulam Mohamad Genai could secure a certificate from the R. O. about his having made and subscribed to the oath, there is apparently no reason why the respondent No. 2 should not have secured the same. The respondent No. 2 states that he was the legal adviser of Ghulam Mohammad Genai. The respondent No. 2 should have insisted on this certificate being issued to him. Oath forms were not removed from Ghulam Mohammad Genai's nomination papers, according to respondent No. 2 they were removed from his nomination papers although all the nomination papers of the respondent No. 2 and Ghulam Mohammad Genai were presented on the same day. Respondent No. 1 has also been given the certificate of his having made and subscribed to the oath by this R. O. which has been produced in this case & is Ex. D. W. 4/1.

39. The learned counsel for the respondent No. 1 has cross-examined the respondent No. 2 at length about his political convictions and activities. In cross-examination Mr. Vaishnavi has stated that he was a member of the political conference and its aim was not to make Kashmir accede to Pakistan. The Policy statement was made in June 1953. Kashmiries should be given the right to decide the question of accession by the exercise of their free will as was contained in the resolution of the Security Council and other commitments made by the two States of India and Pakistan and respondent No. 1 was also an active member of this conference. The political conference still considers the question of accession undecided even up to the present moment because Government of India has been carrying on negotiations with the Govt. of Pakistan. The Constitution of India does not recognize the accession of Kashmir with India as final because of Article 370 and some other sections. So far as my personal view is concerned, legally speaking Kashmir is a part of India, but as a political issue it is very much on the nerves of Government of India, and Pakistan and the people of Kashmir. I resigned from Political Conference in June or July 1964. The object of the political conference was that the will of the people should be ascertained". The objective of the political conference was always to allow the people of Kashmir to express their views". "I was detained in Jall for about 5½ years with intermediate periods on parole." In reply to another question Mr. Vaishnavi states "one of my objectives after being elected was to demand the release of Sheikh Mohammad Abdullah and other prisoners which was part of my demand for grant of civil liberties and secondly there should be a round table conference of Government of India, Pakistan and people of Kashmir to have the issue of accession settled". Vide statement of the respondent No. 2 dated 13th Sept. 1967. It is suggested that the respondent No. 2 did not believe in the accession of Kashmir to India and therefore he did not purposely make and subscribe to the oath. I need not go into all these questions. I am deciding this election petition on the evidence before me. Mr. Rughnath Vaihnnavi's charges against the R. O. are very grave. They constitute a corrupt practice also under S. 123(7) of the Representation of the People Act. These allegations disclose the offence of a very serious nature under the ordinary penal law besides disclosing an offence under S. 129 of the Representation of the People Act. It is settled law that the standard of proof for establishing a corrupt practice should be that of a criminal case. Reference be made to Doabia's Election Cases 1964 page 218 D. Murlidhar Reddy v. Prafulla Reddy Special Appeal No. 34 of 1963 decided by the Andhra Pradesh High

Court. Another authority Doabia's Election Cases 1961, page 14, V. B. Raju v. Ramachandra Rao, Special Appeal No. 8 of 1958 decided by the Andhra Pradesh High Court. Another judgment of the Kerala High Court Gopala Kurup v. Samual Arulappan Paul Election Petition 1 of 1960, reported in Doabia's Election Cases, 1961 page 185. A Division Bench of that court held that:

The burden of proving the alleged corrupt practices is on the election petitioner and the allegations should be proved beyond any reasonable doubt. If any reasonable doubt arises after the evidence has been scrutinized the benefit thereof should go to the person charged."

See also Doabia's Election Cases, 1962 page 181, Election case No. 2/3 of 1961, Nanda Kishore Rath v. Himanshu Sekhara Pandhi.

40. Keeping the pronouncements on this subject by the various Courts in view, I think without straightway disbelieving Mr. Vaishnavi or accepting the testimony of the R. O., Mr. A. K. Malik it will not be safe and proper for me to hold the story related by Mr. Vaishnavi as proved. In fact this story is not proved. It is important to note in this behalf that the petitioner, who must have known about these facts which according to Mr. Vaishnavi were very much advertised by him, did not make any specific allegations about this matter in his petition. He contented himself by making a brief reference to the improper rejection of the nomination paper of the respondent No. 2. A legal argument has been raised on behalf of the respondent No. 1 that as these allegations of Mr. Vaishnavi are the allegations of a serious corrupt practices, they should have been specifically mentioned in the election petition. They should not have been enquired into because Mr. Vaishnavi in his written statement has made these allegations after the time for filing an election petition had expired. Mr. Vaishnavi, as already stated, filed the written statement on 26th of May 1967. The result of the election was declared on 21st of January 1967. The limitation for filing the election petition is 45 days from the date the election of a returned candidate is announced under S. 81 of the Representation of the People Act. This written statement was filed much after the time fixed for filing an election petition. In view of my finding on the factual side, I need not go into this legal argument at all. The other contention of Mr. Vaishnavi is that the R. O. rejected his nomination paper only on the ground of absence of oath forms, but later fraudulently and falsely entered another ground of non-presentation of the electoral roll of the Constituency where this respondent

was entered as a voter at the time of scrutiny in his order, copy whereof was supplied to this respondent. In this behalf an attempt was made by the learned counsel for the petitioner to cross-examine the respondent No. 1 by confronting him with a newspaper cutting of Khidmat, the official organ of the Congress party, dated 22-1 1967. In this paper Mr. Qureshi respondent No. 1 is alleged to have addressed a Press Conference. According to the learned counsel for the petitioner the address that he made to the newspaper people is reproduced within inverted commas and the learned counsel for the petitioner tried to suggest that this ground of rejection namely the non-presentation of the relevant electoral roll by the respondent No. 2 at the time of scrutiny does not find place in that statement. Mr. Qureshi has not admitted the correctness of this press statement. There is no proof adduced by either the petitioner or the respondent No. 2 that this statement was actually made by the respondent No. 1. Therefore nothing can be made out of this statement. Similarly respondent No. 1 tried to put in a statement alleged to have been made by the petitioner along with M/s. Trilochan Dutt and G. L. Dogra on 2-2-1964, in Jammu in the statement of the respondent No. 1 a copy whereof has been placed on the file and is Ex. DW 4/2. In my opinion neither the alleged press conference of respondent No. 1 nor this alleged statement of the petitioner, can be used in evidence, the first as not having been proved, the second has neither been proved nor put to the petitioner. Therefore I ignore both these statements. However I need not go into this allegation because in my opinion this is also as serious a charge as the first namely removal of oath forms and is criminal in nature. The same remarks will apply mutatis mutandis to this part of the case also.

41. With these findings, I have no option but to hold that the nomination paper of the respondent No. 2 was not improperly rejected. Therefore this issue is decided against the petitioner. I would however like to make a suggestion to obviate such disputes in future. The nomination paper should at a proper place have a column for the enclosure attached with the same. If the authorities consider this suggestion worthwhile, the necessary addition may be made in the nomination forms.

Issue No. 13. In view of my findings on issue No. 10 this issue does not require any specific finding.

42. The result is that this election petition fails and is dismissed.

43. Before concluding I have to place on record my highest appreciation, for

whatever it is worth, for the great ability, dexterity, with which this case was argued by Mr. Bhasin, the learned counsel for the petitioner and the hard labour he has put in.

44. The last point to be considered is about the costs. In my opinion the petitioner had a very good case but for the exposition of the law in the latest authority of the Supreme Court referred to above. In my opinion he has only exaggerated the part attributed to the R. O. on 21st January 1967. Therefore in my opinion he should be made liable for nominal costs. I therefore direct that while I dismiss this petition of the petitioner, he will pay only the costs incurred by the respondent No. 1 on his witnesses. The rest of the costs will be borne by the parties in view of the peculiar features of the case.

45. The substance of this order shall be intimated to the Election Commission and the Speaker of the Lok Sabha immediately and an authenticated copy of this judgment shall be sent as soon as possible to the Election Commission as per terms of Section 103 of the Representation of the People Act.

VGW/D.V.C.

Order accordingly.

**AIR 1969 JAMMU AND KASHMIR 48
(V 56 C 11)**

JASWANT SINGH, J.

Waris Ali, Applicant v. Ahad Mir and others, Respondents.

Civil Revn. No. 6 of 1967, D/- 30-1-1968.

Limitation Act (1908) S. 23 and Arts. 47 and 142—Civil P. C. (1908) S. 12 and O. 9, R. 9 — Criminal P. C. (1898) Section 146(1) — Magistrate attaching land in dispute under S. 146(1) and directing parties to resolve dispute as to possession by civil Court — Suit for declaration as to possession — Dismissal for non-appearance — Subsequent suit for same relief — Held, under directions of Magistrate land was to continue to remain under attachment till determination of right of plaintiff by competent court and continuance of attachment was to be treated as continuance of original wrong and so long as attachment continued, cause of action also continued — Subsequent suit was, therefore, not barred under O. 9, R. 9 read with S. 12 of Civil P. C. AIR 1952 All 427 and AIR 1956 Pat 143 and AIR 1959 Punj 252, Rel. on. — Same was also not time barred as S. 23 applied and not Arts. 47 and 142. Case law discussed. (Paras 7 and 8)

Cases Referred:	Chronological Paras
(1964) AIR 1964 Andh Pra 109 (V 51)=	
ILR (1965) Andh Pra 104, Smt.	
Venkatratnam v. Venkatanarasoya-	
mma	
(1959) AIR 1959 Punj 252 (V 46)=61	
Pun LR 264, Manohar Lal Behari	
Lal v. Onkar Das	
(1956) AIR 1956 Pat 143 (V 43),	
Mukha Singh v. Ramchariter Singh	
(1952) AIR 1952 All 427 (V 39), Hing	
Raj Singh v. Raja Bhagwati Bux	
Singh	
(1938) AIR 1938 Pat 212 (V 25)=4 BR	
558, Ghamandi Misser v. Jagarnath	
Misser	
(1933) AIR 1933 Pat 224 (V 20)=ILR	
12 Pat 261, Jurawan Singh v.	
Ramsarekh Singh	
(1929) AIR 1929 Mad 38(2) (V 16)=	
111 Ind Cas 152, Alagaraswami Thevan	
v. Ramabhadra Naidu Guru	
(1922) AIR 1922 Cal 419 (V 9)=ILR	
49 Cal 544, Pannalal Biswas v.	
Panchu Ruidas	
(1916) AIR 1916 Cal 751 (V 3)=22 Cal	
LJ 283, Brojendra Kishore v.	
Bharat Chandra	
(1907) ILR 30 Mad 12=16 Mad LJ	
541, Ramaswami Ayyar v. Muthu-	
sami Ayyar	
(1903) ILR 26 Mad 410, Rajah of	
Venkatagiri v. Isakapalli Subbiah	
(1876) ILR 1 Mad 309, Akilandammal	
v. Periasami Pillai	

S. A. Salaria, for Applicant; Ishwar Singh, for Respondents.

ORDER: This is an application to revise the order dated 31-12-1966 passed by the learned Sub Judge, Rajouri, whereby he decided the two preliminary issues struck in civil suit No. 8 of 1966 entitled Ahad Mir and three others versus Waris Ali and another in favour of the respondents Nos. 1 to 4 and held that the suit was neither barred under Order 9 Rule 9 Civil Procedure Code nor was it barred by time.

2. The facts giving rise to the present petition are: In April 1960 Akbar, the father of Mohammad Din, respondent herein, instituted proceedings under Section 145 of the Criminal Procedure Code in respect of land in dispute in the court of the Sub Divisional Magistrate, Rajouri. The learned Magistrate upon being satisfied that there existed a dispute which was likely to cause a breach of peace made an interim order attaching the land. At the conclusion however of the proceedings the learned Magistrate appears to have been unable to make up his mind as to which of the parties was in possession of the land at the material point of time. Consequently (vide his order dated 6-11-1962) he directed that the plaintiffs-respondents should get their rights with respect to the land in dispute adjudicat-

considerable discussion at the Bar about the applicability of Section 3 (3B) to the instant case, the learned Advocate-General contending that it was an application while the several counsel appearing for the writ petitioners maintaining that it will alone apply for the reason that Section 3 (3) is a general provision the operation of which is excluded in regard to foodgrains, edible oilseeds and edible oils by the special provision Section 3 (3B) on the principle generalis specialibus non derogant. In my view the contention of the learned Advocate-General that Section 3 (3B) would apply only in the eventuality contemplated by the opening part of Section 3 (3A) of the Act cannot be accepted. There are two reasons which have persuaded us to take this view. The first is that the essential commodities in respect of which these two provisions operate are not the same. Section 3 (3A) deals with foodstuff in any locality while Section 3 (3B) deals with any grade or variety of foodgrains, edible oilseeds or edible oils. If Section 3 (3B) is intended to cover all the foodstuff mentioned in Section 3 (3A) the difference in the wording in the two provisions would not be there. The second reason is that Sec. 3 (3A) contemplates the regulation of the price at which the foodstuff shall be sold in any locality to any of the persons mentioned in Section 3 (2) (f) of the Act. On the other hand, Section 3 (3B) provides for sales either to the Central Government or a State Government to an officer or agent of such Government. Section 3 (3B) cannot apply to the case of sale to such other persons or class of persons who may be specified in the order issued under Section 3 (2) (f) of the Act. In the appeals before us, the direction issued is to sell the paddy to the State Government. I am therefore of the view that to the cases before us Section 3 (3B) will alone apply and not Section 3 (3) of the Act. The purpose of Section 3 (3B) of the Act is to enable the Central Government or the State Government to fix the prices for procurement of substantial stocks of foodgrains, edible oilseeds and edible oils at prices specially fixed for release at reasonable prices particularly in areas hit by scarcity. The attempt of the Advocate-General to distinguish Sections 3 (3) and 3 (b) on the grounds that the former deals with general orders and the latter deals with individual orders cannot also stand.

51. The fixation of price in the latter part of Clause 7 of the Levy Order is for the paddy which the rent receiver or cultivator is required to sell to the Government or agent or the person as the case may be. The orders requiring the respondents to sell the paddy to the State Government therefore amount to acqui-

sition or requisition of paddy in which case the latter part of Clause 7 of the Levy Order will have to be tested in the light of Article 31 (2) of the Constitution. The principle is well settled that the law providing for compensation should be a just equivalent for the property acquired or requisitioned. Article 31 (2) of the Constitution provides that the law under which the acquisition or requisition is made should provide for compensation and should either fix the amount of the compensation or specify the principles on which and the manner in which the compensation is to be determined and given. In my view, the principle and the manner in which compensation is to be determined and given in respect of foodgrains, edible oilseeds and edible oils are provided for by Section 3 (3B) of the Act. The relevant part of the Section dealing with compensation says:

"..... notwithstanding anything contained in sub-section (3), there shall be paid to that person such price for the foodgrains, edible oilseeds or edible oils as may be specified in that order having regard to—

(i) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils; and

(ii) the price for such grade or variety of foodgrains, edible oilseeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which that order applies."

"Post-harvest period according to the Explanation to Section 3 (3B) of the Act in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence.

52. If so what has to be decided is only whether the latter portion of clause 7 amounts to a fixation of the compensation in accordance with the principles stated in Section 3 (3B). The Maximum Prices Orders of 1965 referred to in Clause 7 of the Levy Order are passed by the State Government under Section 3 (2) (c) of the Act fixing the maximum price at which paddy or rice can be bought or sold. The learned Single Judge has upheld the validity of the Maximum Prices Orders of 1965. An attempt was made before us on behalf of the respondents to challenge the Maximum Prices Order of 1965 on the ground of delegation outside permissible limits for the reason that the Act itself does not afford or formulate the guidelines for the fixation of the maximum price. The submission was that Section 3 (2) (c) of the Act is bad because of the conferment of an absolute and unbridled discretion in the Central Government or

its delegate in the matter of controlling prices. I do not think that I can countenance this contention. In the nature of things it is impossible for any legislature to afford the guide lines in regard to the fixation of prices at which essential commodities which are varying in nature may be bought or sold in the different localities in the Union. The fixation of prices will have to depend on conditions which vary from State to State and the factors which have to be taken into account in fixing the prices will also be varying depending upon the nature of the commodity and the availability of the same and the legislature cannot be expected to take note of such details. An effective answer to the contention of the respondents is furnished by the decision of the Supreme Court in *Union of India v. Bhanomal Gulsarimal Ltd.*, AIR 1960 SC 475, where their Lordships had to consider the question whether Clause 11B of the Iron and Steel (Control of Production and Distribution) Order, 1941, issued by the Central Government under the Essential Supplies (Temporary Powers) Act, 1946, violates Article 19 (1) (f) and (g) of the Constitution. Clause 11B empowers the controller to fix the maximum prices at which iron or steel may be sold (a) by a producer, (b) by Stock-holder including a Controller Stock-holder and (c) by any other person or class of persons. The question considered was whether Clause 11B is bad because of the absence of any guidance for fixation of prices in the legislative enactment itself. Their Lordships observed:

"It is obvious that by prescribing the maximum prices for the different categories of iron and steel, Clause 11B directly carries out the legislative object prescribed in Section 3 because the fixation of maximum prices would make stocks of iron and steel available for equitable distribution at fair prices. It is not difficult to appreciate how and why the Legislature must have thought that it would be inexpedient either to define or describe in detail all the relevant factors which have to be considered in fixing the fair price of an essential commodity from time to time. In prescribing a schedule of maximum prices the Controller has to take into account the position in respect of production of the commodities in question, the demand for the said commodities, the availability of the said commodities from foreign sources and the anticipated increase or decrease in the said supply or demand. Foreign prices for the said commodities may also be not irrelevant. Having regard to the fact that the decision about the maximum prices in respect of iron and steel would depend on a rational evaluation from time to time

of all these varied factors the Legislature may well have thought that this problem should be left to be tackled by the delegate with enough freedom, the policy of the Legislature having been clearly indicated by Section 3 in that behalf. The object is equitable distribution of the commodity, and for achieving the object the delegate has to see that the said commodity is available in sufficient quantities to meet the demand from time to time at fair prices."

In *Harishankar Bagla's case*, AIR 1954 SC 465, Clause 3 of the Cotton Textiles (Control of Movement) Order, 1948 issued by the Central Government under Sections 3 and 4 of the Essential Supplies (Temporary Powers) Act, 1946, was challenged on the ground that Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 amounts to delegation of legislative power outside the permissible limits. In overruling the contention their Lordships of the Supreme Court observed:

"..... the preamble and the body of the sections sufficiently formulate the legislative policy and the ambit and character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy."

The above principles apply equally to Maximum Prices Orders of 1965 as the Maximum Prices for rice and paddy have been fixed after taking into account several factors which the legislature cannot be expected to exhaustively lay down. The plea therefore that the Maximum Prices Orders are vitiated by uncontrolled and excessive delegated legislative power cannot be accepted.

53. The contention that Maximum Prices Orders of 1965 violate the guarantee under Articles 19 (1) (f) and 19 (1) (g) of the Constitution cannot stand. The object of fixing the price under Section 3 (2) (c) of Act is to maintain the supplies of essential commodities at a fair price to the general public. It is obvious that the Maximum Prices Orders of 1965 have been made to ensure the availability of rice and paddy to the public at reasonable prices and it is necessary in the interests of general public. It will be seen that the fixation of maximum prices in the orders of 1965 is by the State Government itself and not by any officer of the State Government. The Levy Order was issued by the State Government before the addition of Section 3 (3B) in the Act by the Amending Act 25 of 1966. It was therefore contended on behalf of the respondents that there is no specification of the price in the Levy Order as required by Section 3 (3B) of the Act. In my view there is sufficient

specification of the price payable in the latter portion of Clause 7 of the Levy Order, if it otherwise satisfies the requirements of law. When the maximum price in respect of foodgrains, edible oilseeds or edible oils has been fixed under Section 3 (2) (c) of the Act, there is nothing in the wording of Section 3 (3B) of the Act which prevents the State Government from prohibiting payment of compensation beyond the maximum price fixed, provided the maximum price is fixed with reference to the actual cost of production and a reasonable margin of profit to the cultivator. The object of Section 3 of the Act is to secure essential commodities at fair prices to the consumer and the object of the Levy Order and the Requisition Order is to secure even distribution of rice or paddy to the general public at fair prices. If the fixation of maximum price under Section 3 (2) (c) of the Act, is fair both to the producer and to the consumer, it is difficult to accept the contention that it does not represent the just equivalent for the paddy or rice acquired or requisitioned. Whatever a producer or cultivator is able to get towards the price of rice or paddy over and above the maximum price, taking advantage of the scarcity of the foodgrains in the State can be only something more than the just equivalent for the article acquired. One of the methods to fix the fair price at which an article may be made available to the general public is to control the rate of profit at which a producer, wholesale dealer or a retail dealer will be entitled to sell the commodity. Without controlling the profit or the margin of profit it will not be possible to fix the price under Section 3 (2) (c) of the Act, for carrying out the object and purpose of the Act.

54. If it is found that the Maximum Prices Orders of 1965 are legally valid the further submission on behalf of the respondents was that the maximum prices fixed in 1965 are quite inadequate even for covering the cost of production, in view of the increase in the wages to be paid for the labourers, the cost of fertilisers etc. If the cultivators are compelled to give paddy either through the Levy Order or the Requisition Order, without getting adequate compensation it will be in violation of the terms of Section 3 (3B). Even if the contention of the learned Advocate-General that Section 3 (3) will apply, the position is the same. It was also pointed out on behalf of the respondents when the Government has specified the compensation payable for the paddy requisitioned during the latter part of the year 1967 on the basis of the maximum price fixed in 1965 the burden is upon the State to prove that even today the said price represents a fair price or a just equivalent from the

point of view of the cultivator and in support of that contention reliance was made on the following observations in AIR 1965 SC 190.

"Assuming that in appropriate cases, fixation of a date anterior to the publication of the notification under Section 4 (1) for ascertainment of market value of the land to be acquired, may not always be regarded as a violation of the constitutional guarantee, in the absence of evidence that compensation assessed on the basis of market value on such anterior date, awards to the expropriated owner a just monetary value of his property at the date on which his interest is extinguished, the provisions of the Act arbitrarily fixing compensation based on the market value at a date many years before the notification under Section 4 (1) was issued, cannot be regarded as valid. It is a matter of common knowledge that since the termination of hostilities in the last World War there has been an upward tendency in land values resulting in appreciation in some areas many times the original value of land in the area since April 1947 was solely attributable to a scheme of land acquisition of lignite bearing lands."

The above observations which no doubt place the burden upon the State are made in the context of the case before their Lordships and cannot apply to this case. No question of any violation of Constitutional guarantee arises here in view of the principles for determining the compensation laid down by Sections 3 (3) and 3 (3B) of the Act. The Courts can take judicial notice of the facts that there has been a steady increase in the price of all commodities including essential commodities from 1965. That there has been an increase in the wages to be paid to the labourers and in the prices of fertilisers cannot be brushed aside. But even then the initial burden is on the respondents to show that the payment of compensation on the basis of the maximum prices fixed in 1965 is inadequate. Materials supplied in the cases before us are absolutely insufficient to come to that conclusion. The inadequacy of the compensation resulting from imposing the prices fixed in the Maximum Prices Orders in the Levy Order and in the Requisitioning Order is not an infringement of Article 31 (2) of the Constitution. They may be violative of Section 3 (3) or Section 3 (3B) of the Act. The latter portion of Clause 7 of the Levy Order itself provides for the fixation of maximum price from time to time. We cannot shut our eyes to the variation of prices of all the articles including essential Commodities in the market due to several accounts (economic?) factors. There cannot therefore be any permanent fixation of price under

Sec. 3 (2) (c) of the Act in respect of any essential commodity. If it is established that the maximum prices fixed in 1965 are not adequate to represent the just equivalent of paddy acquired from the second crop of 1967, it affects only the adequacy of compensation. The law which prescribes the principles for determining and fixing the compensation is Section 3 (3B) of the Act. That law does not offend Article 31 (2) of the Constitution. The Levy Order and the Requisition Order if at all can only be violative of Section 3 (3B) of the Act. In this view, no question of declaring the latter part of Clause 7 of the Levy Order contravening Article 31 (2) of the Constitution arises. Therefore the striking down of the latter part of Clause 7 of the Levy Order as violative of Article 31 (2) of the Constitution cannot stand.

55. BALAKRISHNA ERADI, J.:— I have had the advantage of perusing the judgments prepared by my learned brothers Madhavan Nair and Krishnamoorthy Iyer, J.J., and I fully concur with the views expressed by them. I agree that the appeal — W. A. 30 of 1968 filed by the State should be allowed upholding the validity of the impugned orders, viz. the Kerala Rice and Paddy (Procurement by Levy) Order, 1966, the Kerala Paddy and Rice (Declaration and Requisitioning of Stocks) Order, 1966, the Kerala Paddy (Maximum Prices) Order, 1965 and the Kerala Rice (Maximum Prices) Order, 1965 and that the other appeals should be dismissed.

RGD

Order accordingly.

AIR 1969 KERALA 68 (V 56 C 14)

T. C. RAGHAVAN, J.

T. J. Kurian, Petitioner v. The State of Kerala and others, Respondents.

Criminal Revn. Petn. No. 436 of 1967,
D/- 27-3-1968.

Criminal P. C. (1898), S. 209 (1) — Applicability — Provision does not enable a Magistrate to discharge accused regarding some of the offences and try them for others — He can either discharge the accused or try them or send them for trial before a Magistrate of competent jurisdiction. AIR 1966 SC 911, Rel. on. (Para 2)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 911 (V 53)=
1966 Cri LJ 700, Thakur Ram v.
State of Bihar 2

S. Narayanan Potti, for Petitioner;
State Prosecutor, for Respondent No. 1.

ORDER:— The petitioner and some others were charged under Sections 409,

477A, 419, 420, 467, 468, 471 and 109 of the Penal Code and also under cl. 14 of the Kerala Foodgrains Distribution Control Order read with Secs. 3 and 7 of the Essential Commodities Act. The Sub-Magistrate enquired into the case as P. E. C. No. 11 of 1967 and expressed the opinion that there was nothing on record to show that the petitioner or any of the other accused persons committed offences falling under Sections 468, 467 and 471 of the Penal Code. He observed further that on perusal of the records the offences disclosed fell only under Sections 409, 477A, 419, 420 and 109 of the Penal Code and under clause 14 of the Kerala Foodgrains Distribution Control Order read with Sections 3 and 7 of the Essential Commodities Act. Consequently, he did not commit the accused persons for trial before the Court of Session. And he also felt that the offences mentioned in Sections 409, 477A, 419, 420 and 109 of the Penal Code and clause 14 of the Kerala Foodgrains Distribution Control Order read with Sections 3 and 7 of the Essential Commodities Act were not triable by him and that the case should be recommended for transfer to a Court of competent jurisdiction for trial. The case therefore came before the Additional First Class Magistrate by transfer; and the Additional First Class Magistrate has decided to treat the case as a Preliminary Enquiry Case as he was of opinion that it was too early to say that there was no evidence that none of the accused persons committed offences under Sections 468, 467 and 471. The revision petition is directed against that order of the Additional First Class Magistrate.

2. The counsel of the petitioner argues that regarding the offences under Sections 468, 467 and 471 of the Penal Code there was an implied discharge by the Sub-Magistrate and therefore, the Additional First Class Magistrate could not have treated the entire case on all the sections as a Preliminary Enquiry Case with a view to see whether the case was to be committed to the Sessions Court. The counsel also brings to my notice the decision of the Supreme Court in Thakur Ram v. State of Bihar, AIR 1966 SC 911.

3. Section 209 (1) of the Code of Criminal Procedure lays down what a Magistrate should do in a preliminary enquiry. The sub-section says that if the Magistrate finds that there are not sufficient grounds for committing the accused person for trial, he shall record his reasons and discharge the accused person, unless it appears to him that such person should be tried before himself or before some other magistrate, in which case he shall proceed accordingly. This provision is clear that the magistrate may either discharge the accused person or

try him or send him for trial before another magistrate of competent jurisdiction. The sub-section does not provide that the magistrate may discharge the accused person regarding some of the offences and then try him for the other offences or send him for trial for the other offences before a competent magistrate. This also appears to be the reasoning adopted by the Supreme Court in the decision already cited. The Supreme Court observes:

"These provisions would thus indicate that an express order of discharge is contemplated only in a case where a Magistrate comes to the conclusion that the act alleged against the accused does not amount to any offence at all and, therefore, no question of trying him either himself or by any other Court arises."

Evidently, the discharge under Section 209 is an express discharge, recording the magistrate's reasons for the discharge, and there is no question of an implied discharge or a partial discharge: either the magistrate discharges, or he tries, or he sends the case to another magistrate. The discharge can arise only if the magistrate comes to the conclusion that the acts alleged against the accused person do not amount to any offence at all. If, on the other hand, his conclusion is that the acts alleged amount to some offence, then the course open to him is to try the accused person himself if the acts amount to offences triable by himself or send him before another competent magistrate if the acts alleged against the accused person amount to offences triable by such competent magistrate. The question of dropping some of the offences or deciding what are the offences committed can arise only when the trial starts: and in a case which goes to another competent magistrate, that question can arise only before him.

4. Thus, the order of the Additional First Class Magistrate is right. The said order is confirmed; and the revision petition is dismissed.

GGM/D.V.C.

Petition dismissed.

AIR 1969 KERALA 69 (V 56 C 15)

P. T. RAMAN NAYAR AND K. K.
MATHEW, JJ.

Smt. Kadija Bai, Cochin-2, Petitioner v.
The Wealth Tax Officer, A. Ward, Matancherry, Respondent.

O. P. No. 81 of 1966, D/- 23-2-1968.

Constitution of India, Arts. 14, 39 (b) and (c), 246, Sch. 7, Entry 86 — Wealth Tax Act (1957), S. 3, Sch. (as amended by Finance Act 10 of 1965) Part I, Para A, Cl. (c), read with Rr. 1 and 2 of Para B — Imposition of additional wealth-tax

on capital assets — Classification based on population of different areas is rational — Not violative of Art. 14.

Imposition of additional wealth-tax under Cl. (3) of para A read with Rules 1 and 2 of para B of Part I of the Schedule to the Act is not discriminatory and does not violate Art. 14.

By and large, the differentiation made by the statute in respect of the levy of additional wealth-tax on the basis of the population of the area concerned seems to be based on a rational classification having regard to the objects of the Act.

(Para 8)

The Act imposes a wealth-tax at the same rates on all assets irrespective of where the assets are held. It is only in respect of the additional wealth-tax, imposed only in respect of lands and buildings, that it makes a difference between one area and another. The immoveable property of the same market value fetches a higher income in an urban area than in a rural area. Therefore, in relation to its market value, the capital value of an asset situate in an urban area is higher than the capital value of an asset situate in a rural area. And, since the tax is really on the capital value, although it is the market value that the Act adopts for arriving at the capital value, this provides ample justification for the total exemption in respect of immoveable property in a rural area, having population of less than one lakh.

(Para 7)

Higher limit of exemption for a bigger urban area is also justifiable because, as one progresses from a smaller to a bigger urban area, owing to several factors, the market value of an asset increases out of proportion to its productivity, in other words, out of proportion to its capital value. Thus while investment in immoveable properties in rural area would fetch smaller return than in urban area, in between different urban areas, the same investment would fetch larger return from smaller urban area as compared to bigger urban area.

(Para 7)

Total exemptions under Cl. (c) are calculated to make the taxable value approximate more nearly to the capital value. They apply a correction in order to bridge the disparity between capital value and market value. It is not as if properties in rural areas escape taxation altogether as if they had no capital value at all. Their market value is taken into account in assessing wealth-tax, and the correction is applied at the stage of levying additional wealth-tax.

(Para 7)

The scheme of the Act, a scheme justified not merely by the legislative Entry but also by clauses (b) and (c) of Article 39 of the Constitution, is to tax excessive wealth on a progressive scale. Having regard to such factors as the cost and

standard of living, and the much higher price that has to be paid for a property of the same physical character in a bigger city than in a smaller one, the property worth same price in a smaller city than in a bigger city has to be considered as excessive wealth and hence the classification under clause (c) cannot be said as discriminatory. (Para 9)

M. A. Hameed, T. C. Karunakaran and P. K. Shamsuddin, for Petitioner; C. T. Peter, for Respondent.

RAMAN NAYAR, J.:—The petitioner, an owner of non-agricultural land and buildings in Mattancherry, Cochin, protests against the levy of what has been called additional wealth-tax, to the extent of Rs. 1800/- and odd, made on her under clause (c) of paragraph A read with rules 1 and 2 of Paragraph B of Part I of the Schedule to the Wealth Tax Act, 1957 — for short, the Act. She attacks the levy as discriminatory and therefore violative of Article 14 of the Constitution, and she seeks to have it quashed by this application brought under Article 226 of the Constitution.

2. The legislative entry authorising the imposition of the tax is Entry 86 of the Union List, "Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies." And the law that actually imposes the tax is the charging section of the Act, namely, Section 3 which says that a tax called wealth-tax shall be charged in accordance with the provisions of the Act in respect of the net wealth of every individual, Hindu undivided family, and company at the rates specified in the Schedule to the Act. Net wealth, according to Section 2 (m) of the Act, is the amount by which the aggregate value of the assets of a person exceeds the aggregate value of his debts, and, by Section 2 (e) agricultural land and certain other assets are excluded from the scope of the word, "assets". Section 7 says that, subject to any rules made in that behalf, the value of any asset other than cash, shall for the purposes of the Act, be the price which, in the opinion of the Wealth-tax Officer, it would fetch if sold in the open market on the valuation date.

Clauses (a) and (b) of paragraph A of Part I of the Schedule provide for the rates of assessment (with progressively higher rates for the higher slabs) in respect of the net wealth of individuals and Hindu undivided families respectively while cl. (c), which is the provision with which we are here directly concerned, provides for the levy of an additional tax on the value of land (excluding, of course, agricultural land) and buildings (other than business premises) situate in what might be called urban areas. Rule

2 of paragraph B divides urban areas into four categories, A, B, C, and D, in accordance with their population. All cities and towns the population of which, including the population of the contiguous municipalities and cantonments, according to the census held in the year 1961 exceeds sixteen lakhs fall in Category A; those in which the population exceeds eight lakhs but does not exceed sixteen lakhs fall in Category B; those in which the population exceeds four lakhs but does not exceed eight lakhs fall in Category C; and those in which the population exceeds one lakh but does not exceed four lakhs fall in Category D. Clause (c) of Paragraph A prescribes the rates at which the additional Wealth-tax is to be assessed on the value of lands and buildings situate in urban areas, the taxable value of the assets being determined in accordance with Rule 1 of paragraph B.

Put briefly, the taxable value of assets in an area in Category A is the value in excess of Rs. 5 lakhs; in Category B is excess of Rs. 4 lakhs; in Category C is excess of Rs. 3 lakhs; and in Category I in excess of Rs. 2 lakhs. Provision is made in respect of persons owning properties in more than one category. If all, the exemption allowed will not be higher than the exemption allowable in respect of the highest category in which such person owns property; and if the property in that category escapes taxation because its value is within the exemption, then the value of that property will be added on to the value of the property held in the next lower category and so on until the taxable limit is reached. The result is that, while there is no additional wealth-tax at all in respect of properties in what we might, for the present purposes, call rural areas (which might include towns with a population of one lakh and below) the tax on property of the same value is progressively lower as we go from a smaller to a bigger urban area, smaller and bigger in point of population, not of extent.

Thus, as the petitioner has shown by way of illustration, while properties of the value of say Rs. 10 lakhs would suffer no additional wealth-tax if situate in a rural area, they would suffer a tax of Rs. 7,000/- if situate in an area in Category D, but only Rs. 5,000/- if situate in an area in Category C, Rs. 4000/- if situate in an area in Category B and Rs. 3,000/- if situate in an area in Category A. According to the petitioner, this difference is clearly discriminatory and can have no rational bearing on the object of the statute. Even if there were any acceptable reason, which there is none, to justify a difference merely on the basis of population, then if that reason justifies the total exemption of rural areas, it should operate to enhance-

not to diminish the tax as one proceeds from a less populated to a more populated urban area. Among urban areas the tax should be lightest, not the heaviest, in an area like Cochin falling in Category D, and it should be the heaviest, not the lightest, in an area like, say, Bombay or Calcutta, falling in Category A. So runs the petitioner's argument.

3. The Revenue seeks to justify the seeming differences on the ground that, owing to pressure of population and shortage of accommodation, the value of immovable property and the return therefrom are artificially high in urban areas that unaccounted money therefore seek investment in urban areas, in turn artificially pushing up the price of properties in such areas, and that it is necessary to curb investment in immovable property in urban areas diverting it as far as possible into the industrial field so as to encourage the growth of industrial enterprises in the country. Reference has been made to the speech made by the Finance Minister when introducing the bill in Parliament. He then explained the object of the legislation in these words:

"Honourable Members would recall that earlier in my speech I had referred to the need for curbing excessive investment in urban property which has been rising rapidly in value due to a variety of reasons. Without such a curb, investment in more productive directions cannot be encouraged. There has also been a demand that there should be some ceiling on vast accumulations of urban property. I have considered this problem from various angles and have come to the conclusion that the best way of dealing with it through a fiscal measure is by way of an additional wealth-tax on such properties. The tax will apply to urban property in towns with a population of one lakh or more. In view of differences in urban property values in towns of different sizes, I have decided to provide for different exemption limits according as the population of the town is between 1 lakh and 4 lakhs, 4 lakhs and 8 lakhs, 8 lakhs and 16 lakhs and over 16 lakhs. The exemption would vary from Rs. 2 lakhs in the smallest of these ranges to Rs. 5 lakhs in the highest of these ranges. Honourable Members will see that the classification of towns that I have adopted for this purpose is the same as is already available for purposes of granting compensatory and other allowances to Central Government employees. Urban properties in excess of these exemption limit will, under my proposal, bear an additional wealth-tax at progressive rates rising from one per cent to four per cent on successive slabs of the total market value of such property. It is not possible for me now to

estimate precisely the revenue from this source, but as at present I would put down the additional revenue expected Rs. 1.5 crores in 1965-66. I would like to emphasise, however, that the purpose of this levy is as much to raise revenue as also to achieve wider social purposes. It may be that as a result of this measure, property owners may transfer properties to corporate bodies which are not now liable to the wealth-tax or property owning companies may come up. If this tendency develops, Government will deal with it at the appropriate time."

4. All this might explain why property in what we have called rural areas should be exempt from the additional tax. But it can scarcely explain the seemingly contrary trend of a higher tax in respect of property in a smaller urban area than in respect of property of the same market value in a bigger urban area. The evil sought to be mitigated, one should have thought, would progressively increase with an increase of population.

5. The real explanation for the seeming discrimination is, we think, to be found elsewhere. Perhaps there is a hint of it in this rather cryptic passage in the Finance Minister's speech.

"In view of differences in urban property values in towns of different sizes, I have decided to provide for different exemption limits according as the population of the town is between 1 lakh and 4 lakhs, 4 lakhs and 8 lakhs, 8 lakhs and 16 lakhs and over 16 lakhs. The exemption would vary from Rs. 2 lakhs in the smallest of these ranges to Rs. 5 lakhs in the highest of these ranges. Honourable Members will see that the classification of towns that I have adopted for this purpose is the same as is already available for purposes of granting compensatory and other allowances to Central Government employees."

6. As we have seen, the legislative entry speaks of taxes on the capital value, not the market value, of the assets of individuals and companies. And we think that the fallacy behind the petitioner's contention lies in the assumption that capital value and market value are one and the same thing. The two are no doubt closely related, so closely related as to be twins so that it is often difficult to tell the one from the other. But they are by no means the same. They are so nearly alike that one of the modes commonly employed for assessing the capital value of an asset is to assess its market value if that is determinable. That is the mode adopted by the Act and that is accurate enough for most purposes. Another mode frequently employed for assessing both capital value and market value is to capitalise the income the as-

set is capable of earning at a number of years' purchase.

To a large extent, both the capital value and the market value of an asset depend on what we might call its productivity. But capital value is more closely dependent on productivity than market value which is more largely influenced by other factors; and therein lies the difference which is relevant for our purposes. The very dictionary meaning of the word, "capital", namely, "accumulated wealth used in producing more" indicates the extent of the dependency of the capital value of an asset on its productivity. But, so far as market value is concerned, other factors such as capital cost, supply and demand, in other words, property hunger, or unsatisfied demand, enter in a larger degree. And, generally speaking, while these factors work in one direction when we proceed from a rural to an urban area they work in the opposite direction when we proceed from a smaller to a bigger urban area. There might, of course, be individual cases which are exceptions, — the petitioner would have it that Cochin is one of the exceptions, but, even if that were material, she has adduced no evidence in support of her assertion — but we cannot take note of that.

7. The Act imposes a wealth-tax at the same rates on all assets irrespective of where the assets are held. It is only in respect of the additional wealth-tax, imposed only in respect of lands and buildings, that it makes a difference between one area and another. Now, it is notorious that immovable property of the same market value fetches a higher income in an urban than in a rural area. Therefore, in relation to its market value, the capital value of an asset situate in an urban area is higher than the capital value of an asset situate in a rural area. And, since the tax is really on the capital value, although it is the market value that the Act adopts for arriving at the capital value, this provides ample justification for the total exemption in respect of immovable property in a rural area. But, as we progress from a smaller to a bigger urban area, owing to several factors, property hunger and sentiment not the least, generally speaking, the market value of an asset increases out of proportion to its productivity, in other words, out of proportion to its capital value.

Thus, generally speaking, it would be correct to say that if a man buys immovable property for Rs. 10 lakhs in a rural area he would get a smaller return for his investment than if he had bought property for the like sum in an urban area. At the same time he would get a larger return on such an investment in

a smaller urban area than in a bigger urban area. This, we think, justifies the higher limit of exemption for a bigger urban area. Put briefly, the exemptions, including the total exemption in respect of properties situate in rural areas, are calculated to make the taxable value approximate more nearly to the capital value. They apply a correction in order to bridge the disparity between capital value and market value. It is not as if properties in rural areas escape taxation altogether as if they had no capital value at all. Their market value is taken into account in assessing wealth-tax, and the correction is applied at the stage of levying additional wealth-tax.

8. The factors of which we have taken note depend largely on the degree of urbanisation of an area and this, in turn, depends largely on the population of the area. As we have said, there might be exceptions, and it is obvious that there is a certain degree of arbitrariness in the fixation of all limits. But, by and large, the differentiation made by the statute in respect of the levy of additional wealth-tax on the basis of the population of the area concerned seems to us to be based on a rational classification having regard to the objects of the Act.

9. Another way of looking at the higher limits of exemption for the bigger cities would be this. The scheme of the Act, a scheme justified not merely by the legislative entry but also by clauses (b) and (c) of Article 39 of the Constitution, is to tax excessive wealth on a progressive scale. Having regard to such factors as the cost and standard of living, and the much higher price that has to be paid for a property of the same physical character in a bigger city than in a smaller one, can it not reasonably be said that, while Rs. 5 lakhs worth of immovable property in Calcutta or Bombay cannot be regarded as excessive wealth, Rs. 5 lakhs worth of property in Tiruchirappalli or Cochin can well be regarded as excessive wealth?

10. It is needless to say that the burden lies on the petitioner to demonstrate a hostile discrimination; and the burden is heavier in the case of a taxing statute. That burden the petitioner has failed to discharge.

11. We dismiss the petition but make no order as to costs.

BNP/D.V.C.

Petition dismissed.

AIR 1969 KERALA 73 (V 56 C 16)

M. U. ISAAC, J.

Easwari Pillai Kaliyamma Pillai and another, Appellants v. Easwara Pillai Krishna Pillai and others, Respondents.

Second Appeal No. 1268 of 1964, D-15-2-1968, from order of Dist. J., Trivandrum, in A. S. No. 293 of 1963.

Transfer of Property Act (1882), S. 91 — Besides the mortgagor — Redemption of sub-mortgage — Mortgagor entitled to redeem sub-mortgage — Expression "property mortgaged" — Meaning. AIR 1953 Trav-Co. 271 & (1896) ILR 20 Bom 549, Dissented from.

On the language of S. 91 it is clear that a mortgagor is a person entitled to redeem a sub-mortgage. There is a privity between the mortgagor and sub-mortgagee. Privity of estate is not the term employed in the section and what is required thereunder to enable a person to redeem the mortgage is not privity of estate but any interest in the mortgaged property or in the right to redeem the same. Release of a sub-mortgage in favour of the original mortgagor does not extinguish the sub-mortgage, but it operates only as an assignment of the sub-mortgage in favour of the mortgagor. The expression "property mortgaged" in Section 91 (a) of the Act does not mean the mortgage right but the mortgaged property. This is because the Section deals with redemption of "the mortgaged property"; and clause (a) provides that a person who has any interest in the property mortgaged or in the right to redeem it, may redeem "the mortgaged property". So the redemption is of the mortgaged property, and the person who may do so is one who has an interest in the said property or an interest in the right to redeem it. (1896) ILR 20 Bom 549 & AIR 1953 Trav-Co 271, Diss. from (Paras 3 & 4)

Cases Referred: Chronological Paras (1953) AIR 1953 Trav-Co 271 (V. 40), Gouri v. Lekshmi 3, 4 (1896) ILR 20 Bom 549, Nagaya v. Baji Babaji Moholkar 3

P. Sukumaran Nair and C. S. Rajan, for Appellants; G. Viswanatha Iyer and V. Vyasan Potti, for Respondents.

JUDGMENT:— This Second Appeal is by the plaintiffs, the first appellant being the wife of the second appellant. The suit was instituted to redeem 28 cents of paddy field in Survey No. 598/1A of Kun-nathukal Village, held under a mortgage, Ext. P-1 dated 16-9-1108, executed by one Sankara Pillai Eswara Pillai in favour of the first defendant. Defendants 2 and 4 are the children of the first defendant. Though the mortgagor has purported to

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execute Ext. P-1 as if he was the owner of the property, admittedly he had only a mortgage right therein from one Madappan who was its original owner. The plaintiffs seek to redeem the plaint schedule property on the ground that the rights of Madappan as well as those of Sankara Pillai Eswara Pillai have devolved in them. The second defendant alone contested the suit. He contended that the rights of Sankara Pillai Eswara Pillai had not devolved in the plaintiffs, and that he had also no knowledge of the devolution of Madappan's rights in favour of the plaintiffs. The parties did not adduce any oral evidence.

The plaintiffs produced a number of documents, which were marked by consent. The trial Court held on the basis of these documents that the rights of Madappan as well as Eswara Pillai had devolved in the plaintiffs; and it passed a decree for redemption. The second defendant filed an appeal to the District Court, Trivandrum. One Thankappan got impleaded in that appeal as additional second appellant, claiming himself to be the person in whom the rights of the second defendant had devolved. He seems to have advanced other contentions also before the lower appellate court, but they were rightly not considered by that Court. The learned District Judge, however, held that the documents produced by the plaintiffs did not establish that Sankara Pillai Eswara Pillai's right had devolved in the plaintiffs, and that they were not, therefore, entitled to redeem. He did not however consider the question whether the rights of Madappan had devolved in the plaintiffs, and if so, whether the plaintiffs were entitled to succeed. The plaintiffs have filed this Second Appeal.

2. The learned Counsel for the appellants contended before me that the documents would show that Sankara Pillai Eswara Pillai's rights have been acquired by the first plaintiff. The only document which he relied on for this purpose is Ext. P-4 D/- 3-9-1954. It is a deed of partition executed by the first plaintiff and others; and it is said item No. 7 in C schedule takes in the plaint schedule property. Ext. P-4 cannot, and does not show, that Eswara Pillai's rights have devolved in any one of the plaintiffs. It proceeds on the assumption that the first plaintiff's tarwad has got the rights of Eswara Pillai in the said property. The plaintiffs have not produced any documents to show that the rights of Eswara Pillai had devolved in them. As the evidence stands, no objection can be taken to the finding of the learned District Judge. On the question whether the rights of Madappan had devolved in the plaintiffs, the learned Counsel for the appellants referred me to three documents, Exts. P-6,

P-5 and P-2. Ext. P-6 is dated 6-3-1121; and it is a sale deed executed by one Parvathy Parappi and others in favour of one Levi Nadar. It shows that the executants were the members of Madappan's tarwad, that Madappan was their karnavan. This is also clear from the recitals of a sale deed. Ext. P-5 dated 30-9-1119, which they executed in favour of the same Levi Nadar. Ext. P-5 dated 7-10-1959 is a sale deed executed by Levi Nadar in favour of one Eswara Pillai Kumara Pillai, who is said to be the first plaintiff's brother. Ext. P-2 dated 8-3-1950 is another sale deed executed by the said Kumara Pillai in favour of the first plaintiff. Exts. P-6, P-5 and P-2 take in a property bearing survey No. 598/IA in Kunnathukkal Village. The plaint schedule property also bears the same survey number. The plaintiffs' learned Counsel submits that the plaint schedule property is part of the property included in the aforesaid documents as Survey No. 598/1A.

There are certain indications in the documents in support of that submission. But in the absence of oral evidence, it is not possible to find that the first plaintiff has become the owner of the plaint schedule property under the said documents. Ext. P-5 also states that the property bearing Survey No. 598/1A is in the possession of the first plaintiff as per partition deed Ext. P-4 dated 3-9-1954. This statement would indicate that the rights of Sankara Pillai Eswara Pillai have also devolved in the plaintiffs. In the absence of evidence to establish the plaintiffs' right to redeem the suit mortgage, the suit should have been dismissed. But the trial Court decreed the suit, holding that the plaintiffs had established their rights. The lower appellate Court, though it reversed the decree of the trial Court, did not consider the question whether Madappan's rights had devolved in the plaintiffs, and they are entitled to redeem on that ground. This is a question on which the plaintiffs were entitled to have a decision from the lower appellate court. The decision of that Court had, therefore, to be set aside on that ground. The manner in which the trial Court has disposed of the suit is also very unsatisfactory. I, therefore, set aside the judgments and decrees of the Courts below, and remit the case to the trial Court for disposing the suit afresh after taking evidence on the above questions, namely whether the rights of Sankara Pillai Eswara Pillai and those of Madappan in the plaint schedule property have devolved in the plaintiffs.

3. A question was mooted before me whether the plaintiffs, if they have obtained only the rights of Madappan and not the rights of Eswara Pillai, are entitl-

ed to redeem Ext. P-1. In other words, the question is whether a mortgagor or a person claiming under him can redeem a sub-mortgage, without seeking to redeem the mortgage, or even impleading the mortgagee. The matter appears to be covered by Section 91 of the Transfer of Property Act. Clause (a) of this Section provides that "any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge against the property mortgaged or in or upon the right to redeem the same" may redeem a mortgage. On the language of the section, there can be no doubt that a mortgagor is a person entitled to redeem a sub-mortgage. The learned Counsel for the respondents contended that the expression "property mortgaged" means the mortgage right, and not the mortgaged property, and that a mortgagor was not, therefore, entitled to redeem a sub-mortgage.

It was also submitted that a mortgagor has no privity of contract with a sub-mortgagee, and that such a person is not entitled to redeem the other. Reliance was placed in support of the above contention on a decision of the Bombay High Court in Nagaya v. Baji Babaji Moholkar, (1898) ILR 20 Bom 549. This was a case where a mortgagor sought to redeem the mortgage, impleading the sub-mortgagor also. The mortgagee died during the pendency of the suit; and the question arose whether the suit could be continued against the sub-mortgagor without impleading the legal representatives of the mortgagee. The Court held that the suit had abated, and it was not maintainable against the sub-mortgagor, as he was not an assignee of the mortgagee. The question which arose for decision in that case was different from the one which arises in the present case, and hence the above decision does not help the learned Counsel.

Mulla in his book on Transfer of Property Act, 5th Edition, referring to the above decision points out that the observation contained in the above decision to the effect that there is no privity between the mortgagor and the sub-mortgagor, is not correct, for there is privity of estate as both of them have rights in the same property. Privity of estate is not a term employed in Section 91, and what is required under the section to enable a person to redeem a mortgage is not privity of estate, but any interest in the mortgaged property or in the right to redeem the same.

The learned Counsel for the respondents referred me to another decision of the Travancore-Cochin High Court in Gouri v. Lekshmi, AIR 1953 Trav-271. That case arose out of a suit for redemption of a sub-mortgage by the mortgagee. The defendant had purchas-

ed the equity of redemption from the mortgagor, and he had also got a release of the sub-mortgage, in his favour. It was contended by the defendant that the suit was not maintainable as the sub-mortgage has ceased to exist, consequent on the release obtained by him. This contention was repelled by the High Court, holding that the said release operated only as an assignment of the sub-mortgage right in favour of the defendant, and that he was liable to be redeemed, even though the equity of redemption had vested in him. It was also pointed out that the defendant, who stood in the position of the mortgagor, would be entitled to redeem the original mortgage, but it does not provide any defence to the suit for redemption of the sub-mortgage. I respectfully accept the above decision; but it does not help the learned Counsel.

Reliance was placed by him on the following passage appearing in the said decision:

"The sub-mortgagee has no privity of estate or privity of contract with the original mortgagor, who is now represented by the defendant. So far as the sub-mortgage is concerned the privity of estate and privity of contract are between the mortgagee and the sub-mortgagee and as such the sub-mortgage can be put an end to by redemption or by release, only by the original mortgagee and his representative-in-interest."

This statement is only an obiter, it does not appear to be fully correct. I have already referred to the observation contained in Mullah's book on Transfer of Property Act, wherein the learned author points out that it is not correct to say that there is no privity of estate between the mortgagor and the sub-mortgagee. I agree with the learned Judge in saying that the release of a sub-mortgage in favour of the original mortgagor does not extinguish the sub-mortgage, but it operates only as an assignment of the sub-mortgage in favour of the mortgagor. This question does not arise in the instant case; and the passage quoted above does not, therefore, support the contention of the learned Counsel.

4. The contention that the expression "property mortgaged" in Section 91 (a) of the Act means the mortgage right and not the mortgaged property cannot stand scrutiny on a careful reading of the said provision. This section deals with redemption of "the mortgaged property"; and clause (a) provides that a person who has any interest in the property mortgaged or in the right to redeem it, may redeem "the mortgaged property". So the redemption is of the mortgaged property, and the person who may do so is

one who has an interest in the said property or an interest in the right to redeem it. Section 92 of the Transfer of Property Act provides, among other things, that a person who redeems a mortgaged property shall have the same rights as the mortgagee whose mortgage so redeemed may have against the mortgagor.

In other words, he stands subrogated to the rights of the sub-mortgagee. The redemption of the sub-mortgage by the mortgagor does not extinguish the sub-mortgage; it operates only as an assignment of the sub-mortgage in favour of the mortgagor. The same will be the position if the mortgagor got a surrender or release of the sub-mortgage, as was held in AIR 1953 Trav-Co 271. The mortgagee's rights will not in any way be impaired by the mortgagor being allowed to redeem the sub-mortgage without impleading the mortgagee.

5. In the circumstances of this case, I consider that the proper order as to costs would be to direct the parties to bear their own costs in this Court and in the lower appellate Court and I order accordingly. Costs in the trial Court will abide the result of the suit.

GGM/D.V.C.

Order accordingly.

AIR 1969 KERALA 75 (V 56 C 17)

T. S. KRISHNAMOORTHY IYER, J.

T. K. Sreedharan, Petitioner v. P. S. Job, Respondent.

C. R. P. No. 938 of 1967, D/- 22-3-1968 against order of Munsiff's Court, Kottayam in L A. No. 991 in O. S. No. 12 of 1967.

Civil P. C. (1908), O. 6 R. 17, O. 7 R. 10, O. 23 R. 1 — Amendment if allowed, suit falling out of jurisdiction of Court — Court should allow amendment and then return plaint for presentation to proper Court. AIR 1928 Mad 400 & AIR 1957 Andh Pra 10 & (1959) 1 Mad LJ 307 & AIR 1953 Nag 273, Dissented from.

While considering whether an amendment should be allowed or not, the Court ought not to go on the merits of the case. If, after allowing the amendment, the Court comes to the conclusion that the Court has no jurisdiction, the Court could return the plaint to the plaintiff to be presented in the proper Court. AIR 1959 Raj 146 & AIR 1949 Mad 208 & AIR 1953 Hyd 212, Rel on AIR 1928 Mad 400 & AIR 1957 Andh Pra 10 & (1959) 1 Mad LJ 307 & AIR 1953 Nag 273, Dissented from. (Para 5)

It will be possible to invoke the provision of Order 7 Rule 10 (1) only after the amendment of the plaint, the effect

of which alone will be to deprive the jurisdiction of the Court to try the suit. No question of applicability of Order 7 Rule 10 (1) can arise before that stage. It is also not possible to apply the provisions of Order 23 for this purpose. When a Court has jurisdiction to entertain the suit it is only that Court that is competent to deal with the application for amending the plaint in that suit. If as a result of an order allowing the amendment the pecuniary jurisdiction is ousted, it must return the plaint for presentation to the proper Court. The fact that the amendment relates back to the presentation of the plaint cannot affect the question at all. The amended plaint will be considered to have been wrongly presented in the Court not having jurisdiction to entertain the same in which case that Court will have to pass an order under Order 7 Rule 10 (1).

(Para 5)

Cases Referred: Chronological Paras (1959) (1959) 1 Mad LJ 307, Nagatha Mohamed Nainar v. Vadavalli Ammal

(1959) AIR 1959 Raj 146 (V 46)= ILR (1959) 9 Raj 26, Kundan Mal v. Thikana Siryari

(1957) AIR 1957 Andh Pra 16 (V 44)= 1956 Andh WR 354, E. R. R. M. H. S. Committee v. P. Atchayya

(1954) 1954 Ker LT 513, Sankaran Kesavan v. Sankaran Bharathan (1953) AIR 1953 Hyd 212 (V 40)= ILR (1953) Hyd 366, Govardhan Bang v. Government of the Union of India

(1953) AIR 1953 Nag 273 (V 40)= ILR (1953) Nag 792, Lalji v. Narottam

(1949) AIR 1949 Mad 208 (V 36)= 1948-2 Mad LJ 417, Bhavani v. Mangamma

(1928) AIR 1928 Mad 400 (V 15)= 54 Mad LJ 145, Singara Mudaliar v. Govindaswami Chetty

P. H. Sankaranarayana Iyer and A. K. Srikrishnan, for Petitioner; Joseph Augustine, M. C. Mathew and A. K. Avirah, for Respondent.

ORDER:—The plaintiff is the revision petitioner and the revision petition is directed against the order of the Court below refusing his application for amending the plaint. The suit is instituted by the plaintiff for recovery of Rs. 3893.00 being the balance and interest thereon due from the defendant on account of pattuvaravu transactions. In the application for amending the plaint the plaintiff stated that the balance due from the defendant is Rs. 4721.55 and the sum of Rs. 3065.54 mentioned in the plaint as the balance due is a mistake and that he should be allowed to amend the plaint so

as to claim the sum of Rs. 4721.55 and interest thereon at the rate of 12% per annum from 19-1-1966.

2. The application for amendment was dismissed by the Court below as it took the view that it does not satisfy the requirements of law the amendment if allowed will change the character of the suit and the Court has no jurisdiction to deal with the application, as the result of allowing the amendment will be to deprive the Court of its jurisdiction to try the suit.

3. The first ground is based upon the decision in Sankaran Kesavan v. Sankaran Bharathan, 1954 Ker LT 513 where it was observed that;

"An application for amendment of pleading must state precisely the specific words, clauses or sentences to be added if the prayer is for addition and the precise place in the original pleading where those are to be inserted; if the amendment sought is for deletion of any part of the original pleading the details thereof must also be given with precision."

The complaint is that the application for amendment does not satisfy the above principle. On a perusal of the application for amendment it is seen that the prayer is to correct the amount claimed in the plaint and also to claim interest thereon. This is specifically stated in the petition. This is quite sufficient and the view taken by the Munsif cannot be accepted.

4. The finding of the Munsif that the amendment if allowed will alter the character of the suit cannot be supported. The plaint is based on pattuvaravu transactions between the parties and it will continue to be so even if the amendment is allowed. The second ground mentioned by the Munsif has to be overruled. The last ground mentioned by the Court below presents some difficulty. In the case before me the original claim and the additional claim sought to be introduced by the amendment are within the jurisdiction of the trial Court. But the two claims taken together will fall outside its jurisdiction. The jurisdiction of the Court to try a suit is determined by the plaint. Normally therefore the Court competent to entertain the suit is entitled to deal with the application for amendment of the plaint. But the question to be considered is whether when the Court as a result of allowing the application for amendment is deprived of its jurisdiction to deal with the amendment plaintiff has power to deal with the application for such an amendment. In Singara Mudaliar v. Govindaswami Chetty, AIR 1928 Mad 400, a learned single Judge of the Madras High Court observed;

"I conceive that no Court will permit a plaint to be so amended as to oust its own jurisdiction to try the suit". The above principle was invoked by the learned Counsel for the respondent. In Bhavani v. Mangamma, AIR 1949 Mad 208, the view was taken by the Madras High Court that where the claim was originally with the jurisdiction of the Court but falls outside it as a result of the amendment, the Court should, if the application for amendment is allowed, return the plaint for presentation to the proper Court. The decision in AIR 1928 Mad 400 was followed by another single Judge of the Madras High Court in Nagutha Mohamed Nainar v. Vedavalli Ammal, 1959-1 Mad LJ 307. The decision in AIR 1928 Mad 400 has also been followed in E. R. R. M. H. S. Committee v. P. Atchayya, AIR 1957 Andh Pra 10.

5. In Lalji v. Narottam, AIR 1953 Nag 273, the legal position was stated thus:—

"When the Court is faced with the question of allowing an amendment which taken together with the original claim exceeds its pecuniary jurisdiction, it is in effect trying a suit beyond its pecuniary jurisdiction. By adding the new relief which the plaintiff claims, the Court in effect amends the plaint as presented because it is also well settled that all amendments relate back to the presentation of the plaint. This clears the difficulty because the Court is thereby rendered incompetent to entertain the claim for amendment at all. In such a situation, because the plaintiff cannot ask for the return of the plaint, nor can the Court cause the amendment, the logical procedure to follow would be to return the plaint together with the application for amendment for the consideration of that Court which has jurisdiction to consider the original claim and the claim sought by the amendment not taken separately but together."

In Kundan Mal v. Thikana Siryari, AIR 1959 Raj 146, a Single Judge of the Rajasthan High Court disagreed with the decision in AIR 1928 Mad 400 and observed:

"It is true that if the suit as framed were beyond the jurisdiction of the lower Courts, they would have had no jurisdiction to make any amendment. However, from the plaint as it stands, it cannot be said that the lower Court had no jurisdiction in the suit when it was filed. The Civil Courts would have been, therefore, perfectly justified in exercising their powers of amendment, even though the consequence of the amendment would be that the suit might become beyond the jurisdiction of the Civil Courts. If as a result of amendment, the suit becomes one not cognisable by Civil Court they would have to return the plaint for presentation to proper Court."

The same principle was stated in Govardhan Bang v. Govt of the Union of India, AIR 1953 Hyd 212, thus:—

"While considering whether an amendment should be allowed or not, the Court ought not to go on the merits of the case. If, after allowing the amendment, the Court comes to the conclusion that the Court has no jurisdiction, the Court could return the plaint to the plaintiff to be presented in the proper Court."

I accept the principle of law stated in AIR 1953 Hyd 212 and AIR 1959 Raj 146. It is not possible to accept the dictum in AIR 1953 Nag 273. Order 7 Rule 10 (1) C. P. C. enables the return of a plaint only for presentation to the proper Court in which the suit should have been instituted. It will be possible to invoke the provision of Order 7 Rule 10 (1) C. P. C. only after the amendment of the plaint, the effect of which alone will be to deprive the jurisdiction of the Court to try the suit. No question of applicability of Order 7 Rule 10 (1) C. P. C. can arise before that stage. It is also not possible to apply the provisions of Order XXIII C. P. C. for this purpose. When a Court has jurisdiction to entertain the suit it is only that Court that is competent to deal with the application for amending the plaint in that suit. If as a result of an order allowing the amendment the pecuniary jurisdiction is ousted it must return the plaint for presentation to the proper Court. The fact that the amendment relates back to the presentation of the plaint cannot affect the question at all. The amended plaint will be considered to have been wrongly presented in the Court not having jurisdiction to entertain the same in which case that Court will have to pass an order under Order 7 Rule 10 (1) C. P. C. When the original plaint and the application for amendment are returned for the reason that the effect of the amendment if allowed will be to deprive the jurisdiction of the Court to entertain the suit, the Court will not be acting under the provision of Order 7 Rule 10 (1) C. P. C. Further if the Court in which they are presented refuses the prayer for amendment then it is open to that Court again to direct the return of the plaint for presentation in the first Court. I do not think such a situation is contemplated. The question of ouster of jurisdiction will come in only after an order allowing the amendment is passed and not before that. Under such circumstances the Court below has got jurisdiction to deal with the application. In these circumstances, I set aside the order of the Court below and allow the revision petition. But I make no order as to costs.

CWM/D.V.C.

Revision allowed.

AIR 1969 KERALA 78 (V 56 C 18)

P. T. RAMAN NAYAR, J.

Devassi, Appellant v. Anthoni, Respondent.

Second Appeal No. 589 of 1964, D/- 21-2-1968 from judgment of Dist. Court, Trichur, in A. S. No. 143 of 1963.

Civil P. C. (1908), O. 23, R. 1, Ss. 2 (2), 96, O. 1, R. 10 and O. 9, R. 8 — Suit for accounts of a dissolved partnership — Defendant denying partnership and accounting relationship between himself and plaintiff — Suit withdrawn by plaintiff under O. 23, R. 1 (1) — Dismissal of suit as withdrawn held was not a decree as defined by S. 2 (2) — It stood on same footing as dismissal under O. 9, R. 8 — There being no decree no appeal lay under S. 96 — There being no finding of Court that there was accounting relationship between parties there could be no question of transposition of parties.

(Paras 1, 3)

Cases Referred: Chronological Paras (1966) AIR 1966 All 318 (V 53) = 1965 All WR (HC) 725, Raisa Sultan Begam v. Abdul Qadir (1963) AIR 1963 All 368 (V 50) = 1962 All LJ 577, Hulas Rai v. K. B. Bass and Co. Ltd. (1961) ILR (1961) 11 Raj 1173 = 1961 Raj LW 473, Jal Kishan v. Bajrangal (1957) AIR 1957 Cal 57 (V 44) = 97 Cal LJ 193, Saraswati Bala v. Surabala Dassi (1949) AIR 1949 Mad 772 (V 36) = 1949-1 Mad LJ 515, Hasan Badsha v. Razia Begum (1942) AIR 1942 Bom 35 (V 29) = ILR (1942) Bom 35, Devsey Khetay v. Hirji Khairaj (1930) AIR 1930 Lah 725 (V 17) = ILR 11 Lah 359, Arura Mal v. Makhan Mal (1928) AIR 1928 Mad 416 (V 15) = ILR 51 Mad 664, Kulandal v. Ramaswami Pandia (1928) AIR 1928 All 582 (V 13) = 24 All LJ 694, Debi Chand v. Prabhulal

K. Kuttikrishna Menon and A. P. Chandrasekharan, for Appellant; K. Chandrasekharan, T. Chandrasekharan Menon and Thampan Thomas, for Respondent.

JUDGMENT:— None of the conditions in sub-section (1) of Section 100 of the Code is here satisfied. Indeed, the dismissal of the appellant defendant's appeal to the court below can be supported on the short ground that that appeal did not lie. This is a case where the plaintiff withdrew his suit under sub-rule (1) of Rule 1 of Order XXIII — he was competent to do that and required nobody's

permission since he was the sole plaintiff, the defendant, as we shall presently see, being in no sense a plaintiff — and the so-called dismissal of the suit as withdrawn by the trial Court was not really a dismissal but a mere recording of the fact of withdrawal. It determined none of the matters in controversy in the suit — there was no claim by the defendant to be determined — and is not a decree as defined by Section 2 (2) of the Code. It stands on the same footing as a dismissal under Rule 8 of Order IX which, because the word, "dismissal" implying a determination on the merits is used by the Rule, is expressly excluded from the definition in Section 2 (2) by clause (b) of the exclusions therein. It is the provision in sub-rule (3) of Rule 1 of Order XXIII (like that in Rule 9 of Order IX) and not any principle of res judicata that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter. It follows that there being no decree no appeal lay under Section 96 of the Code. Reference may be made in this connection to Kulandai v. Ramaswami, AIR 1928 Mad 416 at p. 418, Saraswati Bala v. Surabala Dassi, AIR 1957 Cal 57 and Raisa Sultan Begam v. Abdul Qadir, AIR 1966 All 318 at p. 320.

2. The suit was for an account of a dissolved partnership. By his written statement the defendant denied the partnership alleged in the plaint, and denied that there was any accounting relationship between himself and the plaintiff. Nor was there any finding by the Court that there was any such relationship. Hence, there is here no question of regarding the defendant and the plaintiff as occupying the position of both plaintiff and defendant on the principle underlying the decisions in Debi Chand v. Parbhulal, AIR 1926 All 582, Arura Mal v. Makhan Mal, AIR 1930 Lah 725 and Devsey Khetay v. Hirji Khairaj, AIR 1942 Bom 35 any more than a defendant in a suit for partition who has claimed sole and exclusive title to the property can be regarded as a plaintiff unless and until the Court has found that the property is liable to partition. See in this connection Hasan Badsha v. Razia Begum, AIR 1949 Mad 772 and Hulas Rai v. K. B. Bass & Co. Ltd., AIR 1963 All 368.

3. It is said that there was a previously instituted suit between the same parties in which the partnership averred by the plaintiff and denied by the defendant in the present suit has been found and that the defendant has suffered that finding to become final so that it will operate as res judicata in the present suit and rule out his defence that there was no such partnership. Further, that pending disposal of that earlier suit, the present

suit had been stayed under Section 10 of the Code. That might well be so, but, so long as the plea of res judicata was not taken in the present suit and a finding obtained that the parties stood in an accounting relationship — it was not for the Court to take such a plea and give such a finding of its own accord — and so long as the written statement of the defendant stood as it was and denied the partnership and was not amended so as to admit the partnership and ask for an account, there was no change in the scope and nature of the suit and no question of treating the defendant as occupying the role of a plaintiff as well, or, vice versa, so as to permit of the transposition which the defendant sought, or so as to preclude the plaintiff from withdrawing the suit at his own sweet will and pleasure.

So long as the defendant's plea was that there was no partnership and so long as there was no finding that there was a partnership, how could the defendant be transposed to prosecute a suit which, on his own plea, had to be dismissed? A stay of a suit under Section 10 of the Code does not amount to a consolidation of that suit with the previously instituted suit which might, after all, be pending in another Court, so as to make the decree therein a decree in the stayed suit. It is for the parties to take the plea of res judicata, after the disposal of the earlier suit has resulted in the stay being dissolved and obtain an adjudication thereon. *Jai Kishan v. Bajranglal, ILR (1961) 11 Raj 1173* relied upon by the appellant, itself recognises this distinction between a stay and an actual consolidation.

4. No application to amend his written statement was made by the defendant to the trial Court and that being so his application for transposition made on the plaintiff informing the Court of his withdrawal was rightly dismissed even if the suit could be regarded as still pending so as to give that Court jurisdiction to entertain such an application. And, since no appeal lay, there was obviously no question of the lower Appellate Court allowing the application for amendment made to it.

5. I dismiss this second appeal with costs.

6. Leave granted.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 KERALA 79 (V 56 C 19)

K. SADASIVAN, J.

Food Inspector, Corporation Health Officer, Calicut, Appellant v. Vijayasingh Padamshi, Respondent.

Criminal Appeal No. 323 of 1967, D/30-1-1968, against order of Dist. Magistrate, Kozhikode in C. C. No. 194 of 1966.

Prevention of Food Adulteration Act (1954), Ss. 16 (1) (a) (i), 7 (i) — Storing "simpliciter" is not an offence — Storing for sale is punishable — AIR 1967 Cal 110, Diss. from AIR 1959 Ker 190 & AIR 1960 AP 366 & AIR 1962 All 82 & AIR 1964 All 199, Followed. (Para 5)

Cases Referred: Chronological Paras (1967) AIR 1967 Cal 110 (V 54)= 1967 Cri LJ 329, Shipping & Clearing (Agents) v. Calcutta Corpora- tion

(1967) AIR 1967 Punj 132 (V 54)= 1967 Cri LJ 513, Rameshwari Dass v. State

(1964) AIR 1964 All 199 (V 51)= 1964 (1) Cri LJ 502, Municipal Board, Faizabad v. Lal Chand

(1962) AIR 1962 All 82 (V 49)= 1962 (1) Cri LJ 120, Narain Das v. State

(1960) AIR 1960 Andh Pra 366 (V 47)= 1960 Cri LJ 886, In re, Govind Rao

(1959) AIR 1959 Ker 190 (V 46)= 1958 Ker LJ 1150, Food Inspector, Kozhikode v. Punshi Desai

P. K. Shamsuddin, for Appellant; T. L. Viswanatha Iyer, for Respondent, also Heard State Prosecutor.

JUDGMENT:— The Food Inspector, Calicut Corporation has come up in appeal against the order of acquittal entered by the District Magistrate, Kozhikode in C. C. No. 194 of 1966 on the file of his Court. Prosecution was launched under Section 16 (1) (a) (i) of the Prevention of Food Adulteration Act against the accused. The first accused is the Managing Partner and the second accused the firm engaged in the sale of articles of food. On 12-8-1966 at about 12-20 noon, P. W. 1 the Food Inspector visited the godown of the firm where he found 30 bags of toor dhall kept, presumably for sale. He seized the article under Section 10 (4) of the Act and took samples from two of the bags and sampled them as provided by the Act. On analysis by the Public Analyst it was found that the article was infested with insects and completely damaged, and for that reason adulterated and unfit for human consumption.

2. The defence put forward was that the said 30 bags of toor dal was not intended for sale. The accused-firm is only

the commission agent for their principal at Bombay for the disposal of the above toor dal which was received in Calicut on 15-3-1965. After some time, it became unfit for human consumption. Therefore, the accused firm contacted their principal at Bombay for sending back the article to them. The said 30 bags therefore, were kept inside for being returned to Bombay at the earliest available opportunity. Evidence was adduced by the accused in support of the fact that the article in question was intended to be sent back and the principal at Bombay had duly been informed of the position. Learned District Magistrate accepted this plea and has acquitted the accused.

3. The question therefore that arises for consideration is whether storing simpliciter is itself an offence. The position is covered by authorities starting from Food Inspector, Kozhikode v. Punsi Desal, 1958 Ker LJ 1150=(AIR 1959 Ker 190) where a Division Bench of this Court has held that:

"The general words 'store' and 'distribute' found in Section 7 should be read as qualified by the particular words 'for sale' and 'sell' preceding them. Therefore, it is only storage for sale that is prohibited under the section."

The learned Judges have in coming to the above conclusion compared the wording of Section 16 (1) and Section 7 of the present Act, with corresponding provisions of the various State Acts which preceded the present Act in which also similar words occur. Section 5 (1) (b) of the Madras Act runs:

"Every person who manufactures, stores or offers for sale or hawks about or sells any food shall be punished." Words 'for sale', 'offers', 'manufactures' and 'stores' appearing in the above section were judicially interpreted so as to attach the said qualifying words; in other words, as if the section read, 'manufactures for sale; stores for sale, or offers for sale'.

"The intention was to make storage of adulterated food an offence irrespective of whether it was for sale or not, and that is why in the prohibition found in Section 7 of the Central Act the qualifying words, 'for sale' appear immediately after the word, 'manufacture' and before the words 'or store, sell or distribute' so as to make it clear that they qualify only manufacture and not sale or distribution. And it was because storage simpliciter was prohibited that the presumption embodied in Section 5 (2) of the Madras Act which we might straightway observe is little more than what a Court would normally presume under Section 114 of the Evidence Act, was dropped as being no longer necessary. Had the ingredient,

'for sale', been an element of the offence this presumption, so useful for establishing that element, would have been enlarged rather than dropped."

On this reasoning the learned Judges held that mere storing of adulterated article of food is not an offence. The above ruling of the Kerala High Court gets support from In re Govinda Rao, AIR 1960 Andhra Pra 366; Narain Das v. State, AIR 1962 All 82; Municipal Board, Faizabad v. Lal Chand, AIR 1964 All 199 and Rameshwari Dass v. State, AIR 1967 Punj 132. In the last mentioned case namely, Rameshwari Dass v. State, AIR 1967 Punj 132 it was held further that:

"The scheme of the Act being the safeguard against the manufacturers and sellers deceiving the public by passing off adulterated food or misbranded article of food to unwary and innocent purchaser the prohibition against storage of such food must be for sale and not storage simpliciter. Adulteration implies an element of deceit. It does not intend to prohibit a householder from adulterating any food for consumption or even for distribution otherwise than by way of sale. Any other construction of the word 'store' in Section 7 would mean that misbranded container of food contained in a private house would render the owner or occupier of the house liable to the punitive actions prescribed by the Act. A reference to clauses (iii) and (iv) of Section 7 also indicates that the opening words of the section are intended to apply to articles manufactured or stored for sale or actually sold or distributed by way of sale."

Section 16 of the Act which prescribes the penalties, also uses the same phrasology".

4. A recent Division Bench ruling of the Calcutta High Court rendered in Shipping & Clearing (Agents) v. Calcutta Corporation, AIR 1967 Cal 110 has taken the contrary view. The learned Judges would observe:

"Storage of an adulterated article of food is by itself an offence. It is not necessary that such storing ought to be for sale before the offence could be said to have been committed. Therefore, the procedural powers of the Food Inspector to enter and inspect a place under Section 10 (2) of the Act cannot be taken to qualify and limit the operation of Section 7 which creates the offence and Section 16 which is charging section by importing into the latter two sections the expression 'for sale' after the word 'store'. There is good reason to insist that in the case of 'manufacture' to be an offence such manufacture has to be 'for sale' because other kinds of manufacture, viz., for scientific experiments etc., are exempt. Absence of the words 'for sale' after the word 'store' in Sections 7 and 16

of the Act has been deliberate and intentional and the intention is that the storing will be an offence by itself whether it is for sale or not. The language of Section 7 and Section 16 in its plain reading and connotation supports this interpretation. (Paras 15 and 12)

Limiting the scope of the provisions by adding the words 'for sale' after the word 'store' will be unjustified legislation on the part of the Court especially that the provisions are unambiguous and unqualified and requires no attempt to give it life and meaning. Further, rule of construction that prohibits such an interpretation is that a word should not be given a meaning which makes its use tautological in its context. Thus, if Section 7 is to be read as 'store for sale' then, that result is achieved already by word 'sell' used in that very section. Selling includes the whole process of selling including the storing, buying, handling and selling ultimately at the counter." (See Headnote of AIR 1967 Cal 110—Ed.)

5. AIR 1959 Ker 190=1958 Ker LJ 1150; AIR 1960 Andh Pra 366; AIR 1962 All 82 and AIR 1964 All 199 referred to by me above, have been dissented from, by the learned Judges. But on a careful consideration of the two views, I am satisfied that the view expressed by this Court in AIR 1959 Ker 190 and followed by the Andhra Pradesh, Allahabad and Punjab decisions is preferable and is more in consonance with the spirit of the Act. If the view held by the Calcutta High Court is accepted, the position would be that even the storing of waste food materials will be actionable, which I do not think is a state of things, intended by the Act. I would, therefore, accept the majority view in preference to the other. The result will be that the accused cannot be held liable for the 30 bags of toor dhall found in their godown which was not intended for sale. Exts. D-1 to D-8 are letters and Exts. D-9 and D-10 account-books duly proved by the clerk of the accused-firm, and they show that out of the 53 bags of toor dhall received by the accused on 15-3-1965, 19 bags were sold in the course of 1965 itself, and there remained 34 bags which subsequently became insect-infested and unfit for human consumption. These 34 bags were refilled into 30 bags and kept in the godown to be sent back to their vendors at Bombay. Correspondence was going on between the accused and their vendors with a view to effect the return of the said bags to them. The learned Magistrate has, on a perusal of the correspondence, come to the conclusion that the contention put forward is factually true and correct. On a reappraisal of the position, I do not see any reason to take a different view. The order of acquittal has hence only to be confirmed.

6. In the result, the order of acquittal entered by the learned District Magistrate is confirmed and this appeal is dismissed.
BDB/D.V.C.

Appeal dismissed.

**AIR 1969 KERALA 81 (V 56 C 20)
FULL BENCH**

P. T. RAMAN NAYAR, Ag. C. J., K. K. MATHEW AND V. BALAKRISHNA ERADI, JJ.

V. Punnen Thomas, Petitioner v. State of Kerala, Respondent.

O. P. No. 1051 of 1965, D/- 1-4-1968.
Constitution of India, Arts. 226, 14
— Government, not bound by law to call tenders, debarring certain person from submitting tenders — No infringement of his civil rights — Government can refuse to deal with any person without giving reason or for any reason it thinks fit — Principle of *audi alteram partem* is not attracted.

Per Majority (K. K. Mathew, J. — Contra) — Where the Government, not bound by any law to call tenders before entering into contract, puts a person in black list and debars him from submitting tenders, after coming to its own conclusion that he has previously committed irregularities resulting in loss to Government, there is no infringement of any of his civil rights. The Government has right to refuse to deal with any person without giving reasons or for any reason that it thinks fit. Therefore, he cannot seek to set aside such refusal under Article 226 on grounds of violation of either Article 14 or rules of natural justice, thereby. Case law discussed. (Para 7)

Although every citizen has a fundamental right to carry on a trade or business, he has no right fundamental or otherwise to insist upon the Government to enter in business with him. The Government, like any private individual, has got the right to enter or not into a contract with a particular person. In case there is a law regulating the conduct of business by the Government, such a law might imply a right in others to insist on their transactions with the Government being dealt with in accordance with that law, and consequently, a right to complain against a breach of the law. But when a person is excluded or rejected from entering in business with the Government in accordance with the law, there is no question of an invasion of his civil rights, and the rules of natural justice or Article 14 cannot, therefore, be invoked. (Paras 5, 6, 7)

A mere refusal to afford a man the prospect of doing profitable business with the Government i. e., of entering into ad-

vantageous relationship with the Government entails no civil consequence, however serious a blow that might be to the person concerned. (Para 7)

Even assuming that the reason given for debarring the person casts a stigma on him, the principles of natural justice are not attracted. The question whether an impugned act involves a stigma or not is relevant only for the purpose of determining whether the act sounds only in the region of contract or involves a punishment attracting the rules of natural justice or statutory provisions such as Article 311 embodying such rules. (Para 9)

When the refusal by the Government to enter into contract with a person does not infringe any of his civil rights, the mere fact that the refusal is based on the opinion of the Government which involves the character or conduct of the person, does not attract the principle of *audi alteram partem* (no man should be condemned unheard). It is not necessary for the Government to hear him before forming the opinion. (Para 6)

It is but proper that even a purely administrative order, involving not the least element of adjudication, should be reasonable and judicious. But that is not to say that the reasons must be reached by the judicial process, and it is wrong to assume that only the judicial process can face the clear light of the day and that all other means of reaching conclusion are necessarily benighted. Moreover, when the Government is not bound to give any reason at all, for refusing to enter into contract with a person and when the refusal does not infringe any civil rights of the person the fact that the refusal is based on some reason cannot place him in better position to challenge the refusal. (Para 10)

- Cases Referred: Chronological Paras
 (1968) AIR 1968 SC 445 (V 55)=
 -1968-1 SCWR 419, Kantilal Babu-
 Lal v. H. C. Patel 15
 (1967) AIR 1967 SC 1269 (V 54)=
 (1967) 2 SCR 625, State of Orissa
 v. Binapani Dei 7, 18
 (1967) 1967 Ker LT 1041=ILR
 (1968) 1 Ker 649, Kochunni Nayar
 v. Dist. Collector 8, 18
 (1964) 1964-1 SCJ 42=(1962) Supp
 3 SCR 508, State of Assam v.
 Tulshi Singh 6, 20
 (1963) 1963-2 All ER 66=(1963)
 2 WLR 935, Ridge v. Baldwin 7
 (1959) AIR 1959 SC 490 (V 46)=
 (1959) Supp (1) SCR 787, C. K.
 Achuthan v. State of Kerala 4, 14
 (1958) AIR 1958 Ker 333 (V 45)=
 1958 Ker LT 334, Bhaskaran v.
 State of Kerala 5, 14
 (1958) AIR 1958 Mad 572 (V 45)=
 ILR (1959) Mad 5. Kannappa v.
 Dist. Forest Officer, Vellore 5, 19, 20
- (1955) AIR 1955 Mad 365 (V 42)=
 1955-1 Mad LJ 234, Vedachala
 Mudaliar v. Divisional Engineer,
 Highways Saidapet, Madras 5
 (1954) AIR 1954 SC 592 (V 41)=
 1955 SCR 305, K. N. Guruswamy
 v. State of Mysore 6
 (1953) AIR 1953 SC 303 (V 40)=
 1953 SCR 865, State of Assam v.
 Keshab Prasad Singh 6
 (1951) 341 U. S. 123=95 Law Ed
 817, Joint Anti Fascist Refugee
 Committee v. McGrath 15, 17, 21
 (1939) 310 U. S. 113=84 Law Ed
 1108, Perkins v. Lukens Steel Co. 6, 11
 (1897) 165 U. S. 578=41 Law Ed
 832, Allgeyar v. State of Louisiana 14
 S. Easwara Iyer, L. Gopalakrishnan
 Potti, C. S. Rajan, P. Sankaranikuttu
 Nair and E. Subramoni, for Petitioner;
 Govt. Pleader, for Respondent.

RAMAN NAYAR, Ag. C. J. (on behalf
 of himself and Eradi, J.)

The petitioner, V. Punnen Thomas, who describes himself as a Government Contractor, takes exception to the following order made by the respondent State Government:

"Sub:- Forest — Irregularities in
 Forest contract — tenderers blacklisted.

It has been revealed that Sri V. M. Mohammed Shafi, Karakad House, Erattupetta and Sri Punnen Thomas, Valanjathil, Kottayam have committed irregularities in connection with the tender for working down timber from Udumbanchola Block I, with the result that Government had to sustain loss to a considerable extent. Government therefore order that these two persons are blacklisted and debarred from taking any Government work for the next ten years.

The Chief Conservator of Forests is informed that Sri. Punnen Thomas will however be permitted to do the work as per orders contained in Government Memorandum No. 12319/F1/65 Agri. dated 7-4-1965.

Sd/-T. R. Sukumaran Nair,
 Joint Secretary.

To
 The Chief Conservator of Forests."
 2. The petitioner's grievance is that he was not heard before the order was made and he wants this Court to quash the order and restrain the respondent from giving effect to it. His case is that the order is violative of the principles of natural justice and of Articles 14, 16 (1) and 19 (1) of the Constitution.

3. As we understand it, the impugned order is in no sense an order against the petitioner — it was not communicated to him and how he came by it is not disclosed — and involves no civil consequences so far as he is concerned. It poses no threat to any legal right of his, fusing the word, "right" in its widest pos-

sible sense) fundamental or otherwise, whether the reason it gives, namely, that the petitioner had committed irregularities resulting in loss to the Government, be true or not. No doubt it means that he will not be given any Government work on contract for the next 10 years, but, as we shall presently show, he has no claim, as of right, to be given such work.

4. The impugned order, it seems to us, is no more than a direction by the Government to its subordinates not to give any contracts to the petitioner, and it is, we apprehend, the use of vivid expressions like, "blacklist", and, "debar" in such orders, savouring as they do of punishment and of deprivation of legal rights, and the reference to such orders as decisions suggestive of an element of adjudication which, in fact, there is not, that give rise to contentions like the present, in our view unfounded, invoking the principles of natural justice and the fundamental rights in Articles 14, 16 and 19 of the Constitution. Subject to any limitations that might be imposed by statute — and in this case no such limitation is pleaded — the law does not deny to the Government the freedom of contract (carrying with it the freedom not to enter into a contract) it vouchsafes to every person. And, subject to any such limitations, Government like any private party is free to treat with whom it pleases. It is free, if it so pleases, not to treat with any particular person for any or for no reason whatsoever.

This much we think is clear from the decision of the Supreme Court in C. K. Achuthan v. State of Kerala, AIR 1959 SC 490. There, their Lordships held that a refusal by the Government to do business with a particular person, whether or not such refusal amounted to a breach of contract, involved no breach of any fundamental right of the person concerned — Articles 14, 16 (1), 19 (1) (g) and 31 were the provisions of the Constitution pressed into service in that case — and furnished no ground for judicial interference under Article 32 or Article 226 of the Constitution. And their Lordships observed as follows :—

"3. The gist of the present matter is the breach, if any, of the contract said to have been given to the petitioner which has been cancelled either for good or for bad reasons. There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking, to fulfil contracts which they wish to be performed. When one person is chosen rather than another, the aggrieved party cannot claim the protection of Article 14,

because the choice of the person to fulfil a particular contract must be left to the Government. Similarly a contract which is held from Government stands on no different footing from a contract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases, even specific performance, but he cannot complain that there has been a deprivation of the right to practise any profession or to carry on any occupation, trade or business, such as is contemplated by Article 19 (1) (g). Nor has it been shown how Article 31 of the Constitution may be invoked to prevent cancellation of a contract in exercise of powers conferred by one of the terms of the contract itself.

9. The main contention of the petitioner before us was thus under Art. 16 (1) of the Constitution, and he claimed equal opportunity of employment under the State. To begin with, a contract for the supply of goods is not a contract of employment in the sense in which that word has been used in the Article. The petitioner was not to be employed as a servant to fetch milk on behalf of the institution, but was a contractor for supplying the Articles on payment of prices. He claimed to have been given a contract for supply of milk, and did not claim to be an employee of the State. Article 16 (1) of the Constitution, both in its terms and in the collocation of the words, indicates that it is confined to "employment" by the State, and has reference to employment in service rather than as contractors. Of course there may be cases in which the contract may include within itself an element of service. In the present case, however, such a consideration does not arise, and it is therefore not necessary for us to examine whether those cases are covered by the said Article. But it is clear that every person whose offer to perform a contract of supply is refused or whose contract for such supply is breached cannot be said to have been denied equal opportunity of employment, and it is to this matter that this case is confined.

10. Looking to the facts of the case, it is manifest that the petitioner was supplying, or, in other words, selling milk and other articles, of diet to the State for the use of hospitals and similar institutions. He was in no sense a servant, and no question of employment qua servant arose. In these circumstances, it is plain that Article 16 (1) of the Constitution is not attracted to the facts.

11. In our opinion, the petition under Article 32 of the Constitution is wholly misconceived. No fundamental right is involved. At best, it is a right to take the matter to the Civil Court, if so advis-

ed, and to claim damages for breach of contract, if any."

5. Reference may also be made to *Bhaskaran v. State of Kerala*, 1958 Ker LT 334=(AIR 1958 Ker 333), *Vedachala Mudaliar v. Divisional Engineer, Highways Saidapet Madras*, AIR 1955 Mad 365 and *Kannappa v. Dist. Forest Officer Vellore*, AIR 1958 Mad 572. The first, a decision of a division bench of this Court was a case of blacklisting like the present and of a consequent refusal to deal with the person blacklisted. It is directly in point, and, although with great respect, it seems to us that some of the observations there made regarding the scope of Article 14 and of the principles of natural justice in relation to a mere executive order might require reconsideration in view of subsequent pronouncements by this Court and the Supreme Court, the conclusion reached, namely, that no right fundamental or otherwise, of the petitioner therein was involved and that the refusal was not justiciable seems to us correct. The latter two emphasize that, although every citizen has a fundamental right to carry on a trade or business, he has no right fundamental or otherwise to insist upon the Government, any more than a private individual, doing business with him. The Government, like any private individual, has got the right to enter or not into a contract with a particular person. The last mentioned case no doubt went on to point out that a public auction would cease to be a public auction if persons were arbitrarily or capriciously excluded from participating therein. That might be a relevant consideration where there is an obligation to conduct a public auction or transact the business in a particular way. But here there is no such thing.

6. The position might be different if, as in the cases considered in *State of Assam v. Keshab Prasad Singh*, AIR 1953 SC 293, *K. N. Guruswamy v. State of Mysore*, AIR 1954 SC 592 and *State of Assam v. Tulsi Singh*, (1964) 1 SCJ 42 there were a law regulating the conduct of its business by the Government. (Even so as pointed out in *Perkins v. Lukens Steel Co.*, (1939) 310 US 113 the law might be something solely between the Government and its subordinates or agents, in no wise affecting third parties so as to give them a cause of action to complain against its breach). Such a law might imply a right in others to insist on their transactions with the Government being dealt with in accordance with the law, and, consequently, a right to complain against a breach of the law. For example, if such a law required that a sale by the Government should be by public auction, that might invest the members of the public with the corres-

ponding right of participating in the auction, and the exclusion of a person from the auction or the rejection of his bid otherwise than in accordance with the law, might be an invasion of his civil rights and therefore justiciable. But, even in cases where such exclusion or rejection in accordance with the provisions of the law involves an expression of opinion against the person concerned, as, for example, against his character or conduct, we are by no means certain that the principle of *audi alteram partem* is attracted and that he must be heard before the opinion is formed.

It is noteworthy that the interference in 1964-1 SCJ 42 was not on the ground of any violation of the principles of natural justice, but on the ground that the opinion had not been formed on any relevant material, or on its own appreciation of the materials by the authority concerned, and that, therefore, the rejection of the highest bid at the auction was in breach of the relevant statutory provisions. And it seems to us that the discussion as to the mode of preparation of the "special list" was for the purpose of showing that the list was not evidence rather than for making out a breach of the rules of natural justice.

7. In the present case, there is no question of the exercise of "legal authority to determine questions affecting the rights of subjects," or as it is sometimes put, "to adjudicate upon matters involving civil consequences to individuals". That is essential to bring a case within the horizons of natural justice wider though they be, once again after *Ridge v. Baldwin*, (1963) 2 All ER 66 and the decisions of the Supreme Court recognising this wider sweep, notably *State of Orissa v. Binapani Dei*, AIR 1967 SC 1269 which seems to go the farthest. In both the named cases, there was a finding against the person concerned on which an order of discharge from service was based, which order, if the finding were wrong, would amount to a breach of a statutory, not merely a contractual right to remain in office since the statute concerned required that something must be established against the man to warrant his discharge. But, here, there has been no determination of any question, and, as we have said more than once, no interference or threatened interference with the petitioner's civil rights. Surely, the term, "civil consequences" means something more than consequences which the person concerned does not like. There must be at least the possibility of an invasion of some civil right of his before it can be said that anything done in respect of him has civil consequences. A mere refusal to afford a man the prospect of doing profitable or unprofit-

able business with the Government, of entering into advantageous relationships with the Government as it has been put entails no civil consequences however serious a blow that might be to the person concerned. If a man's principal business is taking up Government contracts such a refusal might have the consequence of depriving him of that particular mode of earning a living. But so might a like refusal by a private party. It is not difficult to conceive of a company or other private party having a monopoly of a particular kind of business in a particular area, and the refusal of such a private party to do business with a particular person engaged in that particular line might have the effect of depriving that person of that particular means of earning a living. But no one would say that any principle of natural justice can be invoked in such a case. Why then should it be invoked when the party refusing to do business is the Government unless Article 14 be attracted? And how can Article 14 be attracted, or any complaint by a person provoke judicial interference, unless some legal right of his is affected?

8. Decisions such as Kochunni Nayar v. District Collector, 1967 Ker LT 1041 dealing with the exercise by an authority of a power conferred by statute, a power conditional on a factual determination and exercised in that particular case so as to involve the serious civil consequence of preventing a man from pursuing a legal remedy, can have little bearing on a matter like the present which is purely an exercise of executive discretion unregulated by law.

9. It is said that the impugned order casts a stigma on the petitioner. Assuming that it does, does that by itself attract the principle of natural justice? We think not. The question whether an impugned act involves a stigma or not is relevant only for the purpose of determining whether the act sounds only in the region of contract or involves a punishment attracting the rules of natural justice or statutory provisions such as Article 311 of the Constitution embodying such rules.

10. It is said that the reason given in the order for blacklisting the petitioner, namely, that he had committed irregularities in connection with some tender with resultant loss to the Government, is defamatory. It is difficult to understand how such a communication by the Government to one of its subordinates for the purpose of protecting its own interests can amount to defamation. But even if it does, it is quite obvious that the petitioner's remedy does not lie in Article 226 of the Constitution. Moreover, what the petitioner seeks to set aside is the de-

barment and not the reasons given therefor, and if the debarment cannot in any circumstances affect his civil rights, he can make no complaint against it on the ground that the reasons were not reached by the judicial process.

It is but proper that even a purely administrative order, involving not the least element of adjudication, should be reasonable and judicious. But that is not to say that the reasons must be reached by the judicial process, and it is wrong to assume that only the judicial process can face the clear light of day and that all other means of reaching a conclusion are necessarily benighted. Supposing the impugned order gave no reason at all, could the petitioner's complaint be entertained unless some civil right of his were threatened? Why should he be in a better position because the order gives reasons, reasons which, according to him, affect his reputation? Supposing a police officer were to give as a reason for arresting a person that the man was drunk and disorderly. Surely the statement that he was drunk and disorderly would affect his reputation, and, what is more, unlike as in the present case, the arrest would clearly involve civil consequences. But could the arrest be denounced as unlawful and could the police officer be exposed to action civil or criminal merely because he had reached the conclusion that the man was drunk and disorderly without observing the rule of *audi alteram partem*?

11. To accept the contention of the petitioner would so widen the scope of the principle of *audi alteram partem* and therefore the scope for judicial interference as to seriously hamper the administration. It would mean, for example, that before Government refuses to deal with a person because he is not solvent or declines to employ a person because he is medically unfit or otherwise unqualified, or abolishes a post with the result that somebody is thrown out of office, or instructs its subordinates or agents not to buy goods from a particular source because previous supplies by that source were unsatisfactory, it would have to give the person concerned a hearing.

In this connection reference may profitably be made to the decision in (1939) 310 U. S. 113 where the Supreme Court of the United States declined to interfere although the breach of a statute regulating the conduct of its business by the Government was alleged. The following observations of the Court are pertinent:

"Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

"Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. X X X X X X

"The case before us makes it fitting to remember that the interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

12. In our view this petition has to be dismissed.

MATHEW, J.:— I regret my inability to agree with my learned brethren.

The Petitioner Mr. Punnen Thomas seeks to quash a memorandum passed by Government of Kerala dated 12-4-1965 by the issue of an appropriate writ or order. The memorandum reads:

"It has been revealed that Shri. V. M. Mohammed Shafi, Karakad House, Erattupetta and Shri. Punnen Thomas, Valanjathil, Kottayam, have committed irregularities in connection with the tender for working down timber from Udumbanchola Block I, with the result that Government had to sustain loss to a considerable extent. Government therefore order that these two persons are blacklisted and debarred from taking any Government work for the next ten years.

The Chief Conservator of Forests is informed that Shri. Punnen Thomas will however be permitted to do the work as per orders contained in Government memorandum No. 12319/F1/65/Agri dated 7-4-1965."

The memorandum came to be passed under the following circumstances. The Divisional Forest Officer of Malayattoor issued a notice inviting tenders for working down timber from the coupes in Udumbanchola Blocks I and II, subject to the terms and conditions contained in the notice. The petitioner submitted a tender in pursuance of the notice for working down the timber in Block No. 1. There were other tenders for the same work. When the tenders were opened, it was found that the lowest tender was that of one Mohamed Shafi and the next higher tender that of the petitioner. As soon as the tenders were opened and the rates offered became known, Mohammed Shafi withdrew his tender in writing. Consequently, the rate offered by the petitioner became the lowest and on the recommendation of the Divisional Forest Officer, Government accepted the tender. The petitioner executed an agreement and carried out the work within the extended time allowed by Government. When the

petitioner approached the Forest Department with a view to take up fresh contract work he was told that the Government had passed Ext. P-1 memorandum putting him in black-list and debarring him from taking any Government work for the next ten years.

13. The petitioner submits that he has not committed any irregularity in connection with the tender, that the memorandum has been passed without notice and an opportunity of being heard, that he has got the liberty like any other citizen in this country to offer tenders for Government work and take the chance of their being accepted by Government if they happen to be the lowest ones, and that since the memorandum is attended with serious civil consequences to him, it should have been passed only after notice to him and an opportunity of being heard.

14. Government has right like any private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that Government must enter into a contractual relation with him. See 1958 Ker LT 334=(AIR 1958 Ker 333). In AIR 1959 SC 490 the Supreme Court observed:

"There is no discrimination, because it is perfectly open to the Government, even as it is to a private party, to choose a person to their liking to fulfil contracts which they wish to be performed." In that case, there was no question of the legality of putting a person's name in black-list. The only question was whether for breach of a contract by Government, the remedy of the petitioner there, was to approach the Supreme Court under Art. 32 of the Constitution. A citizen, I think, has the right "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto". (See Allgeyer v. State of Louisiana. (1897) 165 US 578, 589, 591).

15. A contractual relationship presupposes a consensus of two minds. If Government is not willing to enter into contract with a person, I do not think that Government can be forced to do so. It is one thing to say that Government, like any other private citizen, can enter into contract with any person it pleases, but a totally different thing to say that government can unreasonably put a person's name in a black-list and debar him from entering into any contractual relationship with the government for years

to come. In the former case, it might be said that Government is exercising its right like any other private citizen, but no democratic government should with impunity pass a proceeding which will have civil consequences to a citizen without notice and an opportunity of being heard. The reason why the proceeding for blacklisting the petitioner and debarring him from taking government work for ten years was passed, is that he committed irregularities in connection with the tender of the contract work. In the counter-affidavit on behalf of the State it is stated that the petitioner was found to be "dishonest and undependable" because of the irregularities and so his name was put in the black-list. The question whether he committed irregularities in connection with the tender is a question of fact. An ex parte adverse adjudication that the petitioner committed irregularities in connection with the tender for working down timber from Udmabandholia Block No. 1 by Government on the report of some petty officer without notice and an opportunity of being heard to the petitioner and putting his name in the black-list and debarring him from taking any government work for ten years by way of punishment, appear to me, to be against all notions of fairness in a democratic country.

"That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular Government, that justice has been done." (See Frankfurter, J., in Joint Anti Fascist Refugee Com. v. McGrath, (1951) 341 U.S. 123, 171, 172).

Apart from the material damage involved in the loss of the prospect of entering into advantageous relationship with Government for a period of ten years, a verdict that the petitioner has been guilty of irregularities in connection with the tender, coming as it does from Government has civil consequences, as it touches his reputation and standing in the business world.

See the valuable article of Kenneth Culp Davis under the title 'The Requirement of a Trial-Type Hearing' in Harvard Law Review Vol. 70 page 193 at p. 225. The following passages are particularly apposite in this connection:

"The plain fact is that the Courts often give legal protection to what they persist

in calling 'privileges'. In doing so they commonly rely upon one or more of three ideas or on a fourth method which involves the lack of an idea. The three ideas are: (1) that constitutional principles of substantive and procedural fairness apply even when only a privilege is at stake and even when the privilege itself is not directly entitled to legal protection; (2) that privileges as well as rights are entitled to legal protection; and (3) that when a privilege is combined with another interest the combination may be a right and accordingly entitled to legal protection. The remaining method is (4) to cast logic to the winds in discussing right and privilege or to provide legal protection to a privilege without mentioning the problem of privilege.

(1) the essence of the first idea is that the government is still the government even when it is dispensing bounties, gratuities, or privileges, that we want the government to be fair no matter what its activities may be, and that often the best way to assure governmental fairness is by relying upon judicial enforcement of the usual concepts of fairness. Therefore, the basic constitutional limitations having to do with fairness often apply even though the privileges as such are not entitled to legal protection.

But if a right is an interest which is legally protected, and if a Court gives legal protection to a privilege, does not the Court turn the privilege into a right? Even if the answer to this question is yes, the proposition still be perfectly sound that one who lacks a 'right' to a Government gratuity may nevertheless have a 'right' to fair treatment in the distribution of the gratuity. In tort law, the accident victim has no right to be helped by the passer-by who volunteers to help. Like the passer-by, the Government may refuse altogether to help applicants for gratuities, but it cannot provide the help improperly; it cannot grant or withhold on the basis of racial or religious discrimination. The federal Government could deny altogether the admission of Oklahoma to the union, but it could not admit Oklahoma improperly, that is, with a condition that its capital must be at a particular place. A State can deny altogether a permit to a foreign corporation to do local business, but it cannot grant the privilege improperly, that is, on condition that suits against the corporation shall not be removed to a federal Court."

"Similarly, one who has no 'right' to sell liquor, in the sense that the State may prohibit the sale of liquor altogether, may nevertheless have a right to fair treatment when State officers grant, deny, suspend, or revoke liquor licences. The State need not grant any such licen-

ces, but if it does so, it must do so fairly — without racial or religious discrimination, and without unfair procedure."

"The fundamental proposition, stated abstractly, is that some kinds of unfairness are deemed deserving of judicial relief even when they appear in a context of privileges or gratuities. This position appears frequently in judicial opinions."

"Even though one may have no right to a Government gratuity one may have a right to be free from damage to reputation or position that may result from withholding of a Government gratuity in some circumstances."

16. An analogy from a different field of the law seems helpful in the context. If Government were to terminate the services of a temporary Government servant for a reason which casts a stigma upon his reputation, it is well settled that he should be given an opportunity of being heard. A temporary Government servant has no right to continue in service. From whence then arises his right to notice and opportunity of being heard? Certainly not from the infringement of any right in connection with the service. The right of being heard arises from the stigma involved in the termination of the services for a reason which savours of punishment. It is no doubt true that Article 311 has been interpreted to require that the termination of the services even of a temporary servant by way of punishment should be preceded by an opportunity of being heard. But the reason for applying Article 311 to the case of a person holding a post with no right to it is that the termination for a reason which casts a stigma on his reputation is a punishment. I would add, the fact that one may not have a legal right to enter into contractual relation with Government does not mean that he can be adjudged ineligible to take up any Government work illegally. No man shall be condemned without being heard. In Kantilal Babulal v. H. C. Patel, (1968) 1 SCWR 419= (AIR 1968 SC 445) Hegde, J., on behalf of the Court said:

"Under our jurisprudence no one can be penalised without a proper enquiry. Penalising a person without an enquiry is abhorrent to our sense of justice. It is a violation of the principles of natural justice, which we value so much."

17. Reputation can be viewed both as an interest of personality and as an interest of substance, viz., as an asset.

"It may be granted that reputation in many respects differs from other forms of property and connotes certain ideas involved in the notion of 'person' or 'personality', for it is certainly a very special and strictly personal type

of asset: it has some analogies, no doubt, to the right of the individual to his life, his limbs, or his liberty, which are all only 'property' in a somewhat metaphorical sense. In so far, however, as individual honour, dignity, character, and reputation are recognised by the law as proper subjects of its protection and as being such that any injury thereto entitles the aggrieved party to the same forms of legal redresses as the invasion of property strictly so called, it is permissible to consider these rights as assets, though assets of a somewhat peculiar description." (Code of Actionable Defamation 275-276 by Spencer Bower.) Roscoe Pound says:

"On the one hand there is the claim of the individual to be secured in his dignity and honour as part of his personality in a world in which one must live in society among his fellow men. On the other hand there is the claim to be secured in his reputation as a part of his substance, in that in a world in which credit plays so large a part the confidence and esteem of one's fellow-men may be a valuable asset. ('Interest of Personality' — 28 Harvard Law Review pages 445, 447.)

At one stage of the argument it was said that as there was no publication of the memorandum to the outside world, it was not defamatory even if it contained imputations against the petitioner. But that was not persisted in, probably realising that in law publication to any person other than the person (subject, of course, to the well-known exception of husband and wife) against whom the imputation is made would be defamation. But it was submitted by the learned Advocate-General that communication by Government to one of its subordinates for the purpose of protecting its own interest would not amount to defamation. I understand the submission to mean that even though the imputation is defamatory, no action for defamation would lie, because the Government has absolute or qualified privilege. I am not in this case concerned with the question whether the Government would have a valid plea, in a suit for damages for defamation. The plea of privilege is really a plea of confession and avoidance. The plea has no relevance when the question is whether the Government can pass a proceeding casting a stigma upon the petitioner, without notice and an opportunity of being heard. Nor do I think that when a defamatory imputation is made by Government in a proceeding, the only remedy of the party affected is to sue for damages.

These questions were considered by the Supreme Court of America in the important case of (1951) 341 U.S. 123, already referred to. There the Attorney-

General of the United States claiming authority under the President's Executive Order No. 9835 included three organisations ostensibly of a charitable nature in a list of groups designated by him as communists. This was done without notice or hearing to the organisations concerned. This list was transmitted to the Loyalty Board and disseminated by the Board to Government departments. The organisations concerned sued the Attorney-General for declaratory and injunctive reliefs. The Government's motions to dismiss the actions were granted by the Lower Court on ground of want of cause of action and standing. In certiorari, by a majority of five Judges the Supreme Court reversed the decision, holding that notice and opportunity of being heard were necessary before designating the organisations as communists and putting them in the list. It is important to bear in mind that the actions were not for damages for defamation.

Justice Burton said that the effect of the designation by the Attorney-General as communist was "to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation" and so violated "complaining organisations' common law right to be free from defamation". Justice Black observed:

"Petitioners have standing to sue for the reason among others that they have a right to conduct their admittedly legitimate political, charitable and business operations free from unjustified Governmental defamation. Otherwise, executive officers could act lawlessly with impunity."

Frankfurter, J., said that although the injuries asserted in the cases do not fall into any familiar category,

"the novelty of the injuries described in these petitions does not alter the fact that they present the characteristics which have in the past led this Court to recognize justiciability. They are unlike claims which the Courts have hitherto found incompatible with the judicial process. No lack of finality can be urged. Designation works an immediate substantial harm to the reputations of petitioners".

He further said:

"Here, on the other hand, petitioners seek to challenge governmental action stigmatizing them individually".

Douglas J., observed:

"This is a government of laws not of men. The powers being used are the powers of Government over the reputations and fortunes of citizens. In situations far less severe or important than these a party is told the nature of the charge against him."

It is strange that if a plea of official privilege either absolute or qualified were available in the case, why it was not set up by Counsel or dealt with by the Judges? The list was communicated by the Attorney-General to the Loyalty Board and disseminated by the Board only to the Government departments and agencies and still it was held to be defamatory of the organisations concerned.

18. As the memorandum in question casts a stigma on the reputation of the petitioner, which is both an interest of personality and an interest of substance, and as it is attended with civil consequences to the petitioner, and as it operates as a punishment for an alleged irregularity, I think, the memorandum should have been proceeded by notice and an opportunity of being heard. If anybody were to say that Ext. P-1 is an administrative proceeding and so no notice or opportunity of being heard was required and that no interference under Article 226 is possible, I would answer him in the high and powerful words of Mr. Belloc, "you have mistaken the hour of the night: it is already morning". The language of the Supreme Court in AIR 1967 SC 1269, 1272 is plain:

"It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting and explaining the evidence."

In the case of 1967 Ker LT 1041 decided by this Court, M. S. Menon, C. J., after a survey of the recent English cases said that the ultimate question in the language of Australian Law Journal Vol. 41 page 129 is,

"Whether an exercise of the power would have a 'serious' effect on the applicant, and whether an exercise of the power was conditional on some factual determination or evaluation rather than being a completely open discretion based on policy."

That the exercise of the power here, has serious effect on the petitioner and is attended with civil consequences cannot be denied by anyone making a realistic approach to the situation, and I think the exercise of the power was also conditional on the determination of a question of fact, namely whether the petitioner committed any irregularity in connection with the tender, a question which cannot be decided by discretion based on policy.

19. It is said that the petitioner has no right to enter into contract with the Government, and therefore a proceeding

debarring him from entering into contractual relationship with the Government for a period of ten years involved no civil consequences. In other words it was submitted that opportunity to enter into advantageous relationship with Government is nothing but a privilege, and a denial of a privilege for any reason whatsoever, cannot be attended with civil consequences.

"Not only does the privilege concept often enter in the judicial motivations, but all agree that sometimes it should. For instance, if the President discharges a cabinet officer for singing the wrong tune on foreign policy, the officer clearly lacks a "right" to continue in his position, and therefore he is not entitled to a hearing even if he denies the facts the President sets forth in discharging him. Similarly, if a Governor states facts in denying a pardon to a convict, no informed lawyer would be likely even to argue that due process entitles the convict to cross-examine those from whom the Governor obtained his facts, for a pardon is too clearly an act of grace and in no sense a legal right". (See the article "The Requirement of a Trial-Type Hearing" by Kenneth Culp Davis.)

The concept of privilege, gratuity, or grace is useful; we probably would invent it if our legal system were without it. Like an individual, the Government may make generous gifts, perform compassionate acts of grace, and legally recognise as privileges such interests as deserve to be something less than legal rights. A donee ought not to be allowed to compel the Government to make a gift. Nor should a supplicant for an act of grace be permitted to coerce officers to make a favourable determination in the exercise of discretionary power. Even so, the Government is not and should not be as free as an individual in selecting the recipients for largess. Whatever its activity the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

"A 'privilege' is not something to be dealt with lightly. Much of modern life, it may be said, depends on the continued enjoyment of a 'privilege'." (See 'Summary of Colloquy on Administrative law' by Walter Gellhorn in "The Journal of the Society of Public Teachers of Law", June 1961, page 70 at 72).

I have already referred to the decision of the Supreme Court of America where it was held that a citizen has the undoubted privilege to earn his livelihood by pursuing any lawful avocation and for that purpose to enter into con-

tracts. In AIR 1958 Mad 572 it was held that exclusion of an individual from public auction would have the effect of preventing him from purchasing goods and doing business in a lawful trade and in discriminating against him in favour of other persons. Can a modern society happily allow a decision to be made which affects a person's privilege to follow a lawful avocation in terms that are unchallengeable? I think not.

20. In the decision of the Supreme Court in 1964-1 SCJ 42 the question that fell for consideration was whether a person can complain of exclusion from a public auction of a lease of a ferry. The statute under consideration there, provided that lease of the right to conduct the ferry must be by public auction and that the officer conducting the auction has liberty to reject any bid for reasons recorded by him in writing. On the ground that the name of the appellant before the Supreme Court was included in a 'special list', he was excluded from participating in the auction. The Supreme Court held that the Officer was wrong in relying upon the 'special list' for excluding him from participating in the auction as there was nothing in evidence to show how the 'special list' was prepared. The following observations of Venkataswamy Aiyar, J., throw some light upon the point in controversy.

"He (the officer) found his name in the 'special list' and straightway rejected his bid. Now, the question is whether on this material an order rejecting the highest bid could be made under Rule 19. It is not and cannot be argued that the 'special list' is a document falling within Section 35 of the Evidence Act. It is said to be a confidential document. It does not appear on what information it is prepared or from what sources the information is received. Nor is anything disclosed as to the procedure adopted by the Government officers in preparing the list. While such lists might serve a purpose in guiding Criminal Intelligence Department it will be unsafe to rely solely on them for deciding civil rights of persons. If the 'special list' is thus ruled out as not material on which an opinion could be formed, then there was nothing else on which the conducting officer could have rejected the offer of the highest bidder under Rule 19."

The implication of the ruling, as I understand it, is that a 'special list' prepared without following a fair procedure cannot be relied on for deciding civil rights. The Supreme Court said that the 'special list' should not have been relied upon by the officer for the reason that there was nothing to show that it was prepared in accordance with the rules of natural justice; and I presume that the Court would have held that the officer

would have been justified in relying upon it, had it been prepared after notice and an opportunity for hearing. By parity of reasoning, I would say that if any department were to rely solely upon Ext. P-1 and exclude the petitioner from taking up any government work, it would be a grievous wrong to him. It was said, there was statutory obligation on the officer to lease the ferry in public auction, and that that makes all the difference between that case and this. We are here considering the question whether the Government when it calls for tenders from all persons can exclude the petitioner arbitrarily by a proceeding behind his back. The principle governing a public auction must apply here also. The question whether there is statutory obligation to hold a public auction is irrelevant.

That is clear from the ruling in AIR 1958 Mad 572. That was a case where a Forest Officer excluded a person from participating in a public auction for sale of forest produce. There was no statutory obligation to hold a public auction. Nevertheless the learned Judges Rajamannar, C. J. and Ramachandra Iyer, J., held that the Officer had no right to exclude him from participating in the public auction, as that would affect the public revenue, and would be discriminatory. The following observations of Ramachandra Iyer, J., are apposite:

"It is clear that the matter can be looked at from two points of view: (1) exclusion of a member of the public from bidding at the public auction would undoubtedly be detrimental to the public revenue as it not merely prevents the particular individual from making his offer but also leaves the other bidders without a rival bidder, who by his participation in the auction would stimulate higher bids. The interests of public revenue therefore require that there should ordinarily be no such exclusion of bidders and (2) in regard to the individual excluded the exclusion would have the effect of preventing him from purchasing and doing a lawful trade in the goods and in discriminating against him in favour of other people. No person can have the fundamental or inherent right to bid at any public auction. But the essence of a public auction is that it should be open to the public and if unlimited power of exclusion of individuals from such an auction is recognised the auction would cease to be a public one. It would, however, be open to the authorities to impose reasonable conditions regarding the receipt and acceptance of bids and the qualifications of the bidders

..... While we agree with Balakrishna Iyer, J., that it is open to the Government to enter into contracts with whomsoever they

please and subject to whatever conditions they may impose we are unable to hold that that rule can be applied to the case of a public auction held by the Government. In such cases the interests of the public revenue and of the public require that there should be no exclusion of bidders."

By parity of reasoning, I would say that when Government calls for tenders for execution of a work, there can be no arbitrary exclusion of a person from submitting his tender which might possibly be the lowest one, as that would affect the public revenue in the same manner as the exclusion of a person from public auction would affect it, by excluding the possibility of a higher bid.

21. It is said that Ext. P-1 is not an order but only a communication to the department concerned. If the memorandum embodies a decision by Government and was intended to be acted upon by the department concerned, it would be highly technical to found a distinction upon the characterisation of that decision as a memorandum and deny the petitioner the relief which he would have got, had the Government labelled the decision as an order and communicated it to him. I think, the adverse civil consequence to the petitioner is the same whether Government called it tweedledee instead of tweedledum. It might be remembered that in (1951) 341 U.S. 123, the Attorney-General communicated the list to the Loyalty Board and the Board only disseminated the list to the various departments and agencies. There was no order communicated to the organisations concerned. Burton, J., said that,

"It is unrealistic to contend that because the respondent gave no orders directly to the petitioners to change their codes of conduct relief cannot be granted against what the respondents actually did."

I would, therefore, quash Ext. P-1 and allow the writ petition, but in the circumstances, without any order as to costs.

22. BY COURT. Petition dismissed.
No costs.
BNP/D.V.C. Petition dismissed.

**AIR 1969 KERALA 91 (V 56 C 21)
FULL BENCH**
M. MADHAVAN NAIR, T. S. KRISHNA-MOORTHY IYER AND K. SADASIVAN, JJ.

Assistant Educational Officer, Kuthuparamba, Appellant v. P. R. Mammo and others, Respondents.

Writ Appeals Nos. 206, 207 and 245 of 1966 and O. P. No. 1419 of 1967, D/- 17-6-1968.

Education — Kerala Education Act (6 of 1959), Ss. 11, 12 (2), 36 — Kerala Education Rules (1959), Rr. 67, 75 and 77 (as amended in 1965) — Disciplinary action against teachers — Rules constituting original authority in Officers (other than Manager of Schools) — Rules are void being repugnant to Sections 11 and 12 (2). 1968 Ker LT 537, Approved.

Rules 67, 75 and 77 of the Kerala Education Rules 1959, as amended in 1965, to the extent they constitute original authority in officers (other than the Manager of the schools) to take disciplinary action and to impose penalties on teachers (inclusive of headmasters) in aided schools are repugnant to the provisions of the Kerala Education Act and therefore they are to that extent void.

(Para 10)

Neither Section 11 nor Section 12 (2) of the Act empowers the Government to frame Rules superseding the Manager and authorising departmental officers to initiate disciplinary proceedings and/or to impose penalties. A power to prescribe general Rules and conditions for an Act or to give or refuse approval for a particular act of an authority cannot be construed to involve a power to oust or supersede the authority. Laying of conditions and giving of approvals relate only to the mode of doing a thing, and not to the constitution of authority to do the thing.

(Para 6)

Section 12 (2) of the Act does not confer a power of dismissal on anybody. It only restricts the exercise of the power conferred elsewhere. The power it concedes to "the officers" is not to impose a penalty on teachers, but only to approve or disapprove the action of Managers in that regard. Section 11 of the Act, read, as it ought to be, with Section 15 of the Interpretation and General Clauses Act, is the only provision in the Act that constitutes authority to dismiss and therefore to remove or reduce-in-rank, or to suspend teachers of aided schools; and that authority is the Manager and Manager only. When the rule-making authority purports to confer that power on other authorities, it overrides the Act itself, which is not permitted. Rules must subserve the Act and cannot run parallel to, much less, supersede it.

(Para 6)

Even if the expression "the conditions of service of teachers" in S. 12 (1) would normally include the constitution of authorities for appointment and dismissal of teachers, it cannot be held so when the appointments and dismissal of teachers have been particularly provided for elsewhere in the Act itself. For between general provisions and particular provisions the maxims generalia specialibus non derogant, and specialia generali-

bus derogant come to play. AIR 1966 SC 1081 & AIR 1955 SC 188, Foll.

(Para 7)

Cases Referred: Chronological Paras (1967) 1967 Ker LT 653=ILR (1967)

2 Ker 208, V. K. Vasudevan Namboodiri v. V. K. Sarojini Amma (1966) AIR 1966 SC 1081 (V 53)=

(1966) 2 SCR 982, State of Punjab v. Hari Kishan Sharma

(1961) AIR 1961 SC 838 (V 48)=

1961 (2) Cri LJ 1, Chief Inspector of Mines v. Karam Chand Thapar

(1955) AIR 1955 SC 188 (V 42)=

1955 SCR 1065, Ganpati Singhji v. State of Ajmer

(Para 8)

In W. A. No. 206 of 1966:

Govt. Pleader, for Appellant; K. Chandrasekharan, T. Chandrasekhara Menon and K. Vijayan, (for No. 1) and N. N. Sugunapalan, (for No. 2), for Respondents.

In W. A. No. 207 of 1966:

Government Pleader, for Appellants; K. Velayudhan Nair, K. J. Joseph and N. R. K. Nair, for Respondent.

In W. A. No. 245 of 1966:

Govt. Pleader, for Appellants; T. C. Karumakaran and P. K. Shamsuddin, for Respondent.

In O. P. No. 1419 of 1967:

S. A. Nagendran, for Petitioner; Govt. Pleader, for Respondents.

MADHAVAN NAIR, J.:— On the writ petitions, O. P. Nos. 1688 and 1903 of 1965, disposed of by a common judgment (reported in 1968 Ker LT 537), Mathew, J., has held Rule 67 (1) of the Kerala Education Rules, 1959, "in so far as it authorises the various educational authorities and the Government to suspend a teacher" of an aided school to be "repugnant to Section 12 (2)" of the Kerala Education Act, 1958; and that has been followed by the learned Judge in O. P. No. 1461 of 1966. The State challenges those decisions in Writ Appeals Nos. 206, 207 and 245 of 1966, and a Division Bench has referred them to a Full Bench. As the appeals awaited hearing, O. P. No. 1419 of 1967, in which a penalty of reduction-in-rank imposed by a Regional Deputy Director of Public Instruction on the headmaster of an aided school is challenged on ground of a like incompetency, has also been posted to be heard along with them. It is clarified at the bar that the particular rules relevant to the O. P. are Rules 75 and 77 of the Kerala Education Rules. Thus, the question in these cases is the validity of the empowerment of departmental authorities to suspend and punish teachers of aided schools under Rules 67, 75 and 77 of the Kerala Education Rules, 1959.

2. The abovementioned rules have been made by the Government of Kerala as amendments to the original rules is-

sued in 1959 and are published in the Kerala Gazette dated 2nd February, 1965. The main controversy is about the rules being consistent with Sections 11 and 12 of the Kerala Education Act, 1958. The learned Judge has observed that at the time the Act was passed, the Managers of aided schools had exclusive power of appointment, dismissal and suspension of teachers (inclusive of the headmaster) therein and that the policy of the Act is to affirm that pre-existing power of the Manager, subject to restrictions upon the exercise thereof mentioned in the Act. The learned Government Pleader, Sri Kuruvilla, urges that a consideration of conditions before the Act may not be of assistance in assessing the powers of Managers after the Act has come in force, as all the Managers are now statutory authorities "appointed under the Act" and therefore having powers and disabilities as provided in the Act only. We find force in that submission as the Explanation to Section 7 (1) of the Act provides:

"All the existing managers of aided schools shall be deemed to have been appointed under this Act."

If managers are authorities appointed under the Act, their powers and disabilities must be only as mentioned in the Act.

3. Sections 11 and 12 of the Act read thus:

"11. Appointment of teachers in aided schools:— Subject to the rules and conditions laid down by the Government, teachers of aided schools shall be appointed by the managers of such schools from among persons who possess the qualifications prescribed under Section 10.

12. Conditions of service of aided school teachers:— (1) The conditions of service of teachers in aided schools, including conditions relating to pay, pension, provident fund, insurance and age of retirement, shall be such as may be prescribed by the Government.

(2) No teacher of an aided school shall be dismissed, removed or reduced in rank by the manager without the previous sanction of the officer authorised by the Government in this behalf, or placed under suspension by the manager for a continuous period exceeding fifteen days without such previous sanction."

4. Obviously Section 11 concedes the power to appoint teachers to the Manager, to be exercised "subject to the rules and conditions laid down by the Government." The argument that, in laying down "rules and conditions" for the appointment, it is open to the Government to provide that the Manager can appoint only if the departmental authorities do not appoint one to fill the vacancy, does not commend to us. A

like contention advanced before the Supreme Court has been repelled in the State of Punjab v. Hari Kishan Sharma, AIR 1966 SC 1081. Gajendragadkar, C. J., speaking for the Constitution Bench, observed thus:—

"That takes us to Section 5 which must be read:—

'5. (1) The licensing authority shall not grant a licence under this Act unless it is satisfied that—

(a) the rules made under this Act have been complied with; and

(b) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of the persons attending exhibitions therein.

(2) Subject to the foregoing provisions of this section and to the control of the Government, the licensing authority may grant licences under this Act to such persons as it thinks fit, on such terms and conditions as it may determine.

(3) Any person aggrieved by the decision of the licensing authority refusing to grant a licence under this Act may, within such time as may be prescribed, appeal to the Government or to such officer as the Government may specify in this behalf and the Government or the officer, as the case may be, may make such order in the case as it or he thinks fit'.

The question which we have to decide in the present appeal lies within a very narrow compass. What appellant No. 1 has done is to require the licensing authority to forward to it all applications received for grant of licences, and it has assumed power and authority to deal with the said applications on the merits for itself in the first instance. Is appellant No. 1 justified in assuming jurisdiction which has been conferred on the licensing authority by Section 5 (1) and (2) of the Act? It is plain that Section 5 (1) and (2) have conferred jurisdiction on the licensing authority to deal with applications for licences and either grant them or reject them. In other words, the scheme of the statute is that when an application for licence is made, it has to be considered by the licensing authority and dealt with under Section 5 (1) and (2) of the Act. Section 5 (3) provides for an appeal to appellant No. 1 where the licensing authority has refused to grant a licence; and this provision clearly shows that appellant No. 1 is constituted into an appellate authority in cases where an application for licence is rejected by the licensing authority. The course adopted by appellant No. 1 in requiring all applications for licences to be forwarded to it for disposal, has really converted the appellate authority into the original authority itself, because Section 5 (3) clearly allows an appeal to be pre-

ferred by a person who is aggrieved by the rejection of his application for a licence by the licensing authority.

It is, however, urged by Mr. Bishan Narain for the appellants that Section 5 (2) confers very wide powers of control upon appellant No. 1 and this power can take within its sweep the direction issued by appellant No. 1 that all applications for licences should be forwarded to it for disposal. It is true that Section 5 (2) provides that the licensing authority may grant licences subject to the provisions of S. 5 (1) and subject to the control of the Government, and it may be conceded that the control of the Government subject to which the licensing authority has to function while exercising its power under Section 5 (1) and (2), is very wide; but however wide this control may be, it cannot justify appellant No. 1 to completely oust the licensing authority and itself usurp his functions. The legislature contemplates a licensing authority as distinct from the Government. It no doubt recognises that the licensing authority has to act under the control of the Government; but it is the licensing authority which has to act and not the Government itself. The result of the instructions issued by appellant No. 1 is to change the statutory provision of Section 5 (2) and obliterate the licensing authority from the Statute-book altogether. That, in our opinion, is not justified by the provision as to the control of Government prescribed by Section 5 (2).

..... To hold that the control of the Government contemplated by Section 5 (2) would justify their taking away the entire jurisdiction and authority from the licensing authority, is to permit the Government by means of its executive power to change the statutory provision in a substantial manner; and that position clearly is not sustainable.

..... The basic fact in the scheme of the Act is that it is the licensing authority which is solely given the power to deal with such applications in the first instance, and this basic position cannot be changed by Government by issuing any executive orders, or by making rules under Section 9 of the Act."

Section 11 of the Kerala Education Act specifies the authority to make appointment of teachers to be the Manager of the school, and the authority to lay down the rules and conditions of such appointment to be the Government. That Section does not empower the Government to oust the Manager and specify the authority to make the appointments to be some other or itself. We hold that under Section 11 of the Act the Manager alone has the power to appoint teachers (inclusive of headmasters) in an aided school.

5. Section 15 of the Interpretation and General Clauses Act 1125, as amended by the Kerala Acts III of 1957 and XXIII of 1958, which admittedly applies to the Kerala Education Act, reads thus:

"Where, by any Act, a power to make any appointment is conferred, then unless a different intention appears, the authority having for the time being power to make the appointment shall also have the power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power."

As has been observed by the Supreme Court in Chief Inspector of Mines v. Karam Chand Thapar, AIR 1961 SC 838 at p. 843 "whatever the General Clauses Act says, whether as regards the meaning of words or as regards legal principles, has to be read into every statute to which it applies." It then follows that Section 11 of the Kerala Education Act has to be read along with Section 15 of the Interpretation and General Clauses Act and that therefore the power of dismissal of teachers is also conceded to the Managers and no others. It does not require a long discussion to hold that the powers of appointment and dismissal vested in an authority will include the power to initiate disciplinary action and to impose lesser punishments than dismissal, as also the power of suspension pending enquiry into conduct. *Cui licet quod majus non debet quod minus est non licere* (He who has authority to do the more important act is not debarred from doing that of less importance).

6. It is contended vehemently by the learned Government Pleader that the power of dismissal is not vested by the Act in the Manager alone, as sub-section (2) of Section 12 of the Act (quoted above) prescribes his authority to dismiss, remove or reduce in rank or suspend beyond 15 days to be subject to "the previous sanction of the officer authorised by the Government in this behalf". That sub-section does not confer a power of dismissal on anybody; it only restricts the exercise of the power conferred elsewhere. The power it concedes to "the officers" is not to impose a penalty on teachers, but only to approve or disapprove the action of Managers in that regard. Section 11 of the Act, read, as it ought to be, with Section 15 of the Interpretation and General Clauses Act, is the only provision in the Act that constitutes authority to dismiss and therefore to remove or reduce in rank, or to suspend teachers of aided schools; and that authority is the Manager and Manager only. When the rule-making authority purports to confer that power on other authorities, it overrides the Act itself, which is not permitted. Rules must

subserve the Act and cannot run parallel to, much less, supersede it.

Ganpati Singhji v. State of Ajmer, AIR 1955 SC 188 seems pertinent here. The Chief Commissioner of Ajmer was empowered by the Ajmer Laws Regulation, 1877, "to make rules about the maintenance of watch and ward, and the establishment of a proper system of conservancy and sanitation at fairs and other large public assemblies." The Commissioner made a rule prohibiting the holding of a fair except under a permit issued by the District Magistrate, who was enjoined by the rule to "satisfy himself, before issuing any permit, that the applicant is in a position to establish a proper system of conservancy, sanitation and watch and ward at the fair", and empowered to "revoke any such permit without assigning any reasons or giving any previous notice". When Ganapati Singhji, the appellant, applied for a permit the District Magistrate replied:

"It has been decided that as a matter of policy permits to hold fairs will be issued only to local bodies and not to private individuals. It is, therefore, regretted that you cannot be permitted to hold the fair and you are therefore requested to please abandon the idea."

Five learned Judges of a Full Court observed:

"In our opinion, the rules travel beyond the Regulation in at least two respects. The Regulation empowers the Chief Commissioner to make rules for the establishment of a system of conservancy and sanitation. He can only do this by bringing a system into existence and incorporating it in his rules so that all concerned can know what the system is and make arrangements to comply with it. What he has done is to leave it to the District Magistrate to see that persons desiring to hold a fair are in a position 'to establish a proper system of conservancy, etc.' But who, according to this, is to determine what a proper system is: obviously the District Magistrate. Therefore, in effect, the rules empower the District Magistrate to make his own system and see that it is observed. But the Regulation confers this power on the Chief Commissioner and not on the District Magistrate, therefore, the action of the Chief Commissioner in delegating this authority to the District Magistrate is 'ultra vires'.

Further, under the fourth sub-rule of Rule 1 the District Magistrate is empowered to revoke a permit granted 'without assigning any reasons or giving any previous notice'. This absolute and arbitrary power uncontrolled by any discretion is also 'ultra vires'. The Regulation assumes the right of persons to hold fairs, and all it requires is that

those who do so should have due regard for the requirements of conservancy and sanitation; and in order that they may know just what these requirements are the Chief Commissioner (not some lesser authority) is given the power to draw up a set of rules stating what is necessary. If they are in a position to observe these rules, they are, so far as the Regulation is concerned, entitled to hold their fair, for there is no other law restricting that right. Therefore, the Chief Commissioner cannot by Rule invest the District Magistrate with the right arbitrarily to prohibit that which the law and the Constitution, not only allow, but guarantee.

As these sub-rules of Rule 1 are 'ultra vires', the District Magistrate's order, which in effect prohibits the holding of the fair, is also bad; for, without the aid of these rules or of some other law validly empowering him to impose the ban, he has no power in himself to do it." The other two learned Judges of the Full Court also concurred with the above, observing:

"The rules themselves under which the permit has been asked for and with reference to which the District Magistrate declined to grant the permit are not within the ambit of the rule-making power. These rules purport to have been framed in exercise of the powers conferred by Sections 40 and 41 of the Ajmer Laws Regulation, 1877. Section 40 authorises the framing of the rules:

'for the maintenance of watch and ward and the establishment of a proper system of conservancy and sanitation at fairs, and other large public assemblies'.

But the actual rules as framed establish a system of 'ad hoc' control by the District Magistrate through the issue of a permit and by the vesting of other powers in him under the rules. These cannot be said to be rules which in themselves constitute a system of conservancy, sanitation and watch and ward. Thus the result that is brought about is not within the intention of the section which authorises the making of the rules.

A system of 'ad hoc' control of responsible officers may, possibly be one method of regulating the sanitary and other arrangements at such large gatherings. But if it is intended to constitute a system of 'ad hoc' control with reasonable safeguards, the power to make rules in that behalf must be granted to the rule-making authority by the legislative organ in appropriate language."

In the light of the above dicta, we are clearly of opinion that neither Section 11 nor Section 12 (2) of the Kerala Education Act empowers the Government to frame rules superseding the Manager and authorising departmental officers to initiate disciplinary proceedings and/or to

impose penalties. A power to prescribe general rules and conditions for an act or to give or refuse approval for a particular act of an authority cannot be construed to involve a power to oust or supersede the authority. Laying of conditions and giving of approvals relate only to the mode of doing a thing, and not to the constitution of authority to do the thing.

7. Much reliance was had by the learned Government Pleader and Shri Easwara Iyer on the provisions of Section 12 (1) (quoted above) which authorises the Government to prescribe "the conditions of service of teachers in aided schools." Even if the expression "the conditions of service of teachers" would normally include the constitution of authorities for appointment and dismissal of teachers, it cannot be held so when the latter matters have been particularly provided for elsewhere in the Act itself. For between general provisions and particular provisions the maxims generalia specialibus non derogant, and specialia generalibus derogant come to play. The contention has therefore to be repelled.

8. Shri Easwara Iyer contended that under the scheme of the Act and the Rules, the Managers are only agents of the Government, who pays salaries to and is therefore the real master of the teachers of the aided schools. The short answer to this contention is, in the language of the Supreme Court (Vide: paragraph 13 of the first cited precedent (AIR 1966 SC 1081)) that as the Legislature has named the Manager, and specified the Manager to act under rules and conditions laid down by the Government, it is the Manager who has to act and not the Government itself. The fact that Section 9 directs the Government to "pay the salary of all teachers in aided schools" does not mean that the Government can overlook the mandates of Sections 11 and 12 of the Act.

9. The learned Government Pleader pointed out that instances may arise where a Manager is not available or refuses to take disciplinary action against a headmaster as the two offices might combine in the same person or the Manager may be in collusion with the misconducting headmaster. But, provisions are in the Act and the Rules empowering the Government and its officers to revise the orders of Managers and also to take over management of a school wherein the Manager "has neglected to perform any of the duties imposed by or under this Act or the Rules made thereunder."

10. We hold Rules 67, 75 and 77 of the Kerala Education -Rules 1959, as

amended in 1965, to the extent they constitute original authority in officers (other than the Manager of the schools) to take disciplinary action and to impose penalties on teachers (inclusive of headmasters) in aided schools, repugnant to the provisions of the Kerala Education Act and therefore to that extent void.

In the result, we dismiss W. A. Nos. 206, 207 and 245 of 1966. We allow O. P. 1419 of 1967 and quash the impugned order Ext. P-5, leaving the authorities free to transmit the enquiry reports, Exts. P-2 and P-3, to the Manager of the concerned school for appropriate action thereon.

11. Before leaving this case, we would like to point out to the Government an anomaly in the matter of appointment of teachers by Managers. In V. K. Vasudevan Namboodiri v. V. K. Sarojini Amma, 1967 Ker LT 653, a Bench of this Court has held the Government not liable to pay salary to a teacher whose appointment has not been approved by it; and in C. R. P. No. 807 of 1964, Vaidalingam, J., has held that the appointment of a teacher under the Kerala Education Rules being "subject to provisions of the Kerala Education Act" under which the liability to pay salary is that of the Government, the Manager cannot be called to pay his salary. Rule 7 of Chapter XIV (A) of the Kerala Education Rules directs "as soon as a teacher is appointed in a school, the Manager shall immediately issue an appointment order to the teacher in Form No. 27 which runs thus:

"Shri (name and address of teacher) is appointed as a permanent / probationary / acting / temporary teacher under this management on a pay of Rs. per mensem in the scale of Rs. and is posted as (designation) in the (name of School) from to in the vacancy of who has"

As the teacher is given a posting as soon as the appointment is made in the above Form, he has necessarily to work from the specified date; and, in the normal course, the disapproval, if any, of his appointment would be communicated to him only several months thereafter, when he has to go without a pie of remuneration for the work done. This is an anomalous position which involves injustice. It is upto the Government to take note of this fact and provide a limit of time for the Educational Officers to decide on their approval of the appointment and direct that the Manager's appointment of the teacher shall not take effect within that time, and also that if the refusal or approval is not intimated

use and occupation and subsequent damages, was filed on 13-8-1958.

3. At the time the suit was filed, the C. P. and Berar Letting of Houses and Rent Control Order, 1949 was in force. The Madhya Pradesh Accommodation Control Act, 1955 was applied to this region with effect from 1-1-1959. At the time the suit was filed, it was necessary to obtain the permission of the Rent Controller to determine the tenancy, as required by Clause 13 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949. But the present suit was filed without obtaining any such permission.

4. The tenant's defence was that the sale in favour of the plaintiffs was void, as one of the vendors was a minor and the permission of the District Judge had not been obtained. Therefore, according to him, the plaintiffs did not become his landlords and, therefore, they could not sue either for eviction or for claiming arrears of rent.

5. The learned Judge of the trial court dismissed the suit mainly on the ground that no permission of the Rent Controller had been obtained and, therefore, the suit itself was not tenable. On the other hand, the learned appellate Judge expressed the opinion that Section 8 of the Hindu Minority and Guardianship Act, 1956 was attracted, and for want of permission of the District Judge for the said sale, title did not vest in the plaintiffs and consequently, they could not become landlords of the defendant. In that view the trial Court's decree, dismissing the suit, was upheld.

6. In the present appeal it is urged by the learned counsel for the appellants that S. 8 of the Hindu Minority and Guardianship Act, 1956 is not at all attracted with reference to the joint interest of a minor in the joint family property. Therefore, no permission of the District Judge was necessary, as the property was not the exclusive property of the minor. So far as this contention is concerned, I am in agreement with the suggestion of the learned counsel for the appellants. Section 8 of the Act does not apply to the joint interest of a minor in a family property which the manager is competent to dispose of under the general provisions of the Hindu Law, namely, for the benefit of the minor or for family need etc. Thus, there can be no doubt that the learned Appellate Judge was wrong in holding that the plaintiffs did not become the landlords for want of permission of the District Judge under S. 8 of the said Act.

7. Further, the view expressed by the learned Judges of the Courts below that the M. P. Accommodation Control Act, 1955, was inapplicable to the present case,

is also clearly erroneous, in view of the pronouncement of a Full Bench of this Court in *Shyamal v. Umacharan*, 1960 MPLJ 1002 : (AIR 1961 Madh Pra 49) (FB). The M. P. Accommodation Control Act, 1955 was applied to this region with effect from 1-1-1959 and consequently the suit filed without the permission of the Rent Controller could not be considered to be defective. Even before that, it was open to the landlord to file a suit or to determine the tenancy of the tenant without the permission of the Rent Controller. Such determination was not rendered void or suit did not become untenable even under the law in force at that time. But at the most, the landlord rendered himself liable for a prosecution for contravention of Clause 13 of the C. P. and Berar Letting of Houses and Rent Control Order, 1949. That has been the view of the Court expressed in a series of cases. I find it unnecessary to refer to them.

8. However, during the pendency of the suit, the M. P. Accommodation Control Act, 1955 came into force and consequently any provisions of the Transfer of Property Act, which would come into conflict with the provisions of the new Act, would not be operative. Only such provisions of the Transfer of Property Act as do not come into conflict with the provisions of the new Act, would continue to remain in force. Section 4 (f) of the new Act provided for a ground for eviction that the tenant has renounced his character as such or denied the title of the landlord and the latter has not waived his right. Section 111 (g) of the Transfer of Property Act provides that a lease of immoveable property determines—

"by forfeiture; that is to say,—(1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself". Therefore, to the extent that the second Clause of section 111 (g) of the Transfer of Property Act comes into conflict with section 4(f) of the Act, it will stand abrogated and it is only section 4 (f) of the Act, which will be available to the appellants after 1-1-1959, and no decree could be passed by the Courts below unless one of the grounds under section 4 of the M. P. Accommodation Control Act, 1955, was made out.

9. This brings us to the question whether a case under section 4 (f) of the Act was at all made out and consequently whether the appellants were entitled to evict the respondent on that ground. In this connection, it is to be noted that by virtue of section 116 of the Indian

Evidence Act, a tenant is estopped from denying the title of his landlord at the time the lease is given. That only provides for a restricted kind of estoppel. There may be other kinds of estoppel which might operate and which have been applied by the Indian Courts on principles of equity, justice and good conscience. This is clear from the pronouncement of their Lordships of the Privy Council in Kumar Krishna Prosad v. Baraboni Coal Concern, Ltd., AIR 1937 PC 251. It may be pertinent to reproduce the observations of their Lordships to the following effect:

"The section does not deal or profess to deal with all kinds of estoppel or occasions of estoppel which may arise between landlord and tenant. It deals with one cardinal and simple estoppel and states it first as applicable between landlord and tenant and then as between licencier and licensee, a distinction which corresponds to that between the parties to an action for rent and the parties to an action for use and occupation. Whether during the currency of a term the tenant by attornment to A, who claims to have the reversion, or the landlord by acceptance of rent from B, who claims to be entitled to the term is estopped from disputing the claim which he has once admitted are important questions, but they are instances of cases which are outside section 116 altogether; and it may well be that as in English law the estoppel in such cases proceeds upon somewhat different grounds and is not wholly identical in character and in completeness with the case covered by the section. The section postulates that there is a tenancy still continuing, that it had its beginning at a given date from a given landlord. It provides that neither a tenant nor anyone claiming through a tenant shall be heard to deny that that particular landlord had at that date a title to the property. In the ordinary case of a lease intended as a present demise — which is the case before the Board on this appeal — the section applies against the lessee, any assignee of the term and any sub-lessee or licensee. What all such persons are precluded from denying is that the lessor had a title at the date of the lease and there is no exception even for the case where the lease itself discloses the defect of title. The principle does not apply to disentitle a tenant to dispute the derivative title of one who claims to have since become entitled to the reversion though in such cases there may be other grounds of estoppel, e.g. by attornment, acceptance of rent, etc. In this sense it is true enough that the principle only applies to the title of the landlord who let the tenant in as distinct from any other person claiming to be reversioner. Nor does

the principle apply to prevent a tenant from pleading that the title of the original lessor has since come to an end."

10. Therefore, what a tenant cannot be permitted to do is to deny the title of the original lessor. Similarly, he cannot be permitted to deny the derivative title of a reversioner if he has attorned to him. However, if he has not attorned to him or if he has not paid any rent to him, he can certainly deny the derivative title of a reversioner. To this extent their Lordships of the Privy Council have laid down that a tenant can deny the title within these permissible limits. Similarly, he can also contend as against the original lessor that he has ceased to be his landlord because of some subsequent transfer. These, in my opinion, are the permissible limits where the estoppel will not be applied as against the tenant. The question is whether a tenant denying the title of the landlord within the permissible limits, as indicated by their Lordships of the Privy Council should be made to suffer by a forfeiture of his tenancy. There can be no doubt that if a tenant denies the title of his landlord outside the permissible limits, he should forfeit his tenancy, as he cannot be permitted to deny his landlord's title unless he has delivered back possession to the landlord openly. But can it be said that he should suffer the penalty of forfeiture even though his denial is within the permissible limits where the principle of estoppel cannot be applied against him?

11. In this connection, a Division Bench of the Calcutta High Court in Abdulla v. Md. Muslim, AIR 1926 Cal 1205 laid down that the denial of the right of an assignee from the original lessor by the tenant would not work a forfeiture of the tenancy. Of course, the learned Judges did not refer to the previous decisions, but evidently the reasoning of the said Division Bench would, in my opinion, be in consonance with the ratio decidendi of the observations of their Lordships of the Privy Council in AIR 1937 PC 251 (supra). I fail to see as to why a tenant who denies the title of the assignee or the reversioner within the permissible limits should be made to suffer the penalty of forfeiture. I quite conceive the situation where the tenant denies the title beyond the permissible limits.

12. In this connection, I may further refer to another Division Bench case of the Allahabad High Court in Prag Narain v. Kadir Bakhsh, (1913) ILR 35 All 145, where the Division Bench was concerned with the question as to the denial of the landlord's title on the part of the tenant. The learned Judges laid down that the denial of his landlord's title by a tenant,

In order to work a forfeiture under section 111 (g) of the Transfer of Property Act, must be an unequivocal and unambiguous denial; mere non-payment of rent or even the mortgaging of the premises as belonging to the tenant does not necessarily constitute such a denial. According to the learned Judges, the second requirement of the Section is that the landlord should exercise his option in unequivocal terms electing to forfeit the tenancy. In the present case what the respondents did was to cast a doubt on the title of the appellants in view of the fact that one of the vendors of the appellants was a minor and the respondents felt that permission of the District Judge for effecting the sale was necessary. As such, the respondents never claimed that the title vested in them or they had in unequivocal terms denied the title of the landlord. But what they did say was that the transfer in favour of the landlord may be defective for want of permission from the District Judge under the Hindu Minority and Guardianship Act, 1956.

13. As such, it is clear that even if it were to be assumed that the appellants might be entitled to forfeit the tenancy on account of the denial of title, the same was not unequivocal, as laid down by the said Division Bench of the Allahabad High Court.

14. However, the learned counsel for the appellants invited our attention to the observations of Chaturvedi J. in *Ramdas v. Shree Ram*, AIR 1953 All 797. The learned Judge, however, did not accept the view of the Division Bench of the Calcutta High Court in AIR 1926 Cal 1205 (*supra*) for the reason that no authorities had been cited in support of the proposition. Therefore, in the opinion of the learned Judge, this was the only case laying down that proposition. The learned Judge further felt that the two English decisions, namely, *Jones v. Mills*, (1861) 142 ER 664 and *Doe v. Long*, (1841) 173 ER 1047 were contrary to the view expressed by the Division Bench of the Allahabad High Court. No doubt these two English cases lay down the proposition that there can be forfeiture of tenancy if the tenant denies the derivative title of a reversioner. To that extent I am certainly in agreement with the view of Chaturvedi J. But these cases also do not lay down that if the tenant denies the derivative title within the permissible limits, even then his tenancy will be liable to be forfeited. Therefore, with due respect to the learned Judge, I am unable to read the observations in the two English cases in that light. Therefore, I would prefer the view of the Division Bench of the Calcutta High Court in AIR 1926 Cal 1205 (*supra*), which is in consonance with the view as expressed in

the Privy Council case of AIR 1937 PC 251 (*supra*) to the effect that to a limited extent only a tenant can challenge the derivative title of a reversioner or an assignee. To that extent which is permissible, the principle of forfeiture of the tenancy cannot be applied on account of such denial. If it were to be applied as was the view expressed by Chaturvedi J., I feel that it would be enlarging the scope of section 111 (g) of the Transfer of Property Act unwarrantably. It is to be noted that it is a penal provision and its operation ought to be restricted to the restricted wording of the Section and not beyond it. For this reason, with due respect to the learned Judge, I would prefer to follow the view of the Division Bench of the Calcutta High Court in AIR 1926 Cal 1205 (*supra*). Therefore, if there could be no forfeiture of the respondents' tenancy, even the ground under S. 4 (f) of the M. P. Accommodation Control Act, 1955 was not made out; and consequently the appellants were not entitled to a decree in their favour under that Section. In view of the opinion expressed by me above, it is unnecessary to consider the other questions with reference to the validity of the notice of forfeiture or whether the question that a notice for forfeiture was necessary or whether the quit notice under section 106 of the Transfer of Property Act was necessary. But there can be no doubt that the tenancy under the circumstances was not liable to be forfeited under section 4 (f) of the M. P. Accommodation Control Act, 1955. No other ground having been alleged and proved against the plaintiffs, the suit in my opinion was rightly dismissed. Therefore, I uphold that decree, though on different grounds.

15. As a result, this appeal fails and is accordingly dismissed. But in view of the fact that the matter was not very clear and the new Act came into force during the pendency of the suit, I direct that there shall be no order as to the costs throughout. The decree of the Courts below in the matter of costs, will stand modified to that extent.

Leave for filing Letters Patent Appeal is refused.
BDB/D.V.C.

Appeal dismissed.

**AIR 1969 MADHYA PRADESH 35
(V 56 C 12)**

**T. C. SHRIVASTAVA
AND G. P. SINGH, JJ.**

Piarelal Khuman, Appellant v. Bhagwati Prasad Kanhayalal, and others, Respondents.

Letters Patent Appeal No. 9 of 1965, D/- 2-4-1968, from judgment of Shiv Dayal J., in M. A. No. 125 of 1962, D/- 22-4-1963.

(A) Civil P. C. (1908), Ss. 11 and 47—
Res judicata — Applicability to execution proceedings — Principle applies to execution proceedings — Finding given at one stage cannot be challenged at any later stage of the same proceedings.

(Para 12)

(B) Civil P. C. (1908), Ss. 10, 11 and 47
— Null and void decree — Effect of.

Where there is inherent lack of jurisdiction from the initial stage, subsequent proceedings taken by such a Court are void and the decisions of such a Court do not operate as res judicata;

Where the Court has jurisdiction, a wrong decision by the Court on a point of law or fact is binding on the parties;

The doctrine of res judicata operates in respect of a decision of an executing Court in other proceedings as well as in the subsequent stages of the same proceedings;

The principle of constructive res judicata also applies to execution proceedings and a judgment-debtor, who might and ought to have raised a defence at the appropriate stage, fails to do so, is precluded from urging such a defence at any subsequent stage of the proceedings; and

Where the Court has power to decide the question of jurisdiction arising from the interpretation or the applicability of a statute, even an erroneous decision is binding on the parties. AIR 1954 SC 340 and AIR 1943 Bom 288 and AIR 1958 Madh Pra 100 and AIR 1952 Nag 275 and (1901) ILR 25 Bom 337 (PC) and AIR 1953 SC 65 and AIR 1962 Pat 72 (FB) and AIR 1958 Andh Pra 1 (FB) and AIR 1938 Pat 427 and AIR 1966 SC 1061, Ref. (Para 16)

(C) T. P. Act (1882), S. 60 — Lessor of mortgagor can redeem if enforcement is sought against leasehold rights. AIR 1947 Nag 210, Expl. (Para 18)

(D) Civil P. C. (1908), S. 47 — Question of jurisdiction — Power of Civil Court and of Tribunal with limited jurisdiction — Distinction — Question whether S. 28 of M. P. Abolition of Proprietary Rights, Estates, Mahals and Alienated Lands Act applies — Executing Court, held, had jurisdiction to decide.

There exists a distinction between Tribunals of limited jurisdiction and a civil Court. A Tribunal cannot give itself jurisdiction by deciding jurisdictional facts wrongly unless power has been given to it to decide such jurisdictional facts. There are no such limitations on the power of a Civil Court and it must decide itself all matters which arise before it, including questions about jurisdiction. Where the decree-holder and the judgment-debtors hold different views

about the implications of Section 28 of the Abolition Act and if the matter has been raised by them before proceeding further with the execution, the matter falls squarely within the ambit of Section 47, Civil Procedure Code, and the question of executability of the decree cannot be left undecided. (Para 21)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 608 (V 54)=	
(1967) 2 SCR 77, Janak Raj v. Gurdial Singh	23
(1966) AIR 1966 SC 1061 (V 53)=	
1966 Cri LJ 805, State of West Bengal v. Hemant Kumar	15
(1962) AIR 1962 Pat 72 (V 49)=	
ILR 40 Pat 817 (FB), Baijnath Prasad Sah v. Ramphal Sahni	15, 24
(1960) Letters Patent Appeal No. 80 of 1958, D/- 30-7-1960=	
ILR (1963), Madh Pra 69, Kishan Chand Sharma v. Mst. Rani Bahu	6
(1958) AIR 1958 Andh Pra 1 (V 45)=ILR (1957) Andh Pra 326 (FB), Venkata Seshayya v. Virayya	15
(1958) AIR 1958 Madh Pra 100 (V 45)=1957 Jab LJ 859, Surajbai v. Sadashiv Jugal Kishore	14
(1958) AIR 1958 SC 87 (V 43)=	
1955-2 SCR 938, Merla Ramanna v. Nallapparaju	28
(1954) AIR 1954 SC 340 (V 41) =	
1955 SCR 117, Kiran Singh v. Chaman Paswan	14
(1953) AIR 1953 SC 65 (V 40) =	
1953 SCR 377, Mohanlal v. Benoy Krishna	15, 24
(1952) AIR 1952 Nag 275 (V 39)=	
ILR (1952) Nag 534, Laxmichand Nanhal Kalal v. Mt. Sunderabai	14
(1947) AIR 1947 Nag 210 (V 34)=	
ILR (1947) Nag 740, Pawankumar v. Jagdeo	18
(1943) AIR 1943 Bom 288 (V 30)=	
ILR (1943) Bom 400, Karashiddayya Shiddayya v. Shree Gajanan Urban Co-operative Bank Ltd.	14
(1938) AIR 1938 Pat 427 (V 25)=	
5 BR 18, Mahadeo Prasad v. Bhagwat Narain Singh	15
(1936) AIR 1936 PC 46 (V 23) =	
63 Ind App 53, Bindeswari Charan Singh v. Bogeswari Charan Singh	20
(1901) ILR 25 Bom 337 = 27 Ind App 216 (PC), Malkarjun v. Narhari	15, 22
(1888) ILR 10 All 166=15 Ind App 12 (PC), Zain-Ul-Abdin Khan v. Muhammad Asghar Ali Khan	23

R. S. Dabir and J. N. Nagrath for Appellant; Y. S. Dharmadhikari, for Respondent No. 1.

SHRIVASTAVA, J.: This judgment governs the disposal of twelve Letters Patent Appeals Nos. 8, 9, 11, 12, 13, 14, 15, 17, 19, 20, 21 and 22 of 1963 which have all been filed against the order of Sheodayal, J. allowing the several appeals filed by the respondents.

2. In order to appreciate the points raised in support of the appeals, it is necessary to state the facts in some detail. Chaturbhuj and Sewaram executed two simple mortgage deeds on 4-9-1924 and 30-6-1927 in favour of Pyarelal, Ramlal and Motilal mortgaging their proprietary rights in village Jerwans along with the homefarm (sir and khudkasht) lands. In the second mortgage bond, they had agreed to the condition that they would not lease out the homefarm lands. In spite of this agreement, they leased out the khudkasht lands to several persons. The mortgagors and mortgagees have been succeeded by their legal representatives but it is not necessary to give details. We shall refer to the mortgagees as creditors, the mortgagors as principal judgment debtors and the lessees as lessee-judgment-debtors.

3. The creditors instituted Civil Suit No. 5-A of 1943 in the Court of Additional District Judge, Sagar, on the basis of the two mortgage deeds impleading the debtors and the lessees of khudkasht lands. On 9-4-1946, a preliminary decree was passed for sale of the properties including the khudkasht lands; but it was stated in the decree that the lessees had no right to redeem and were discharged. One of the lessees went up in appeal on the ground that the lands could be validly leased out by the proprietors in the course of village management but this contention was negatived on account of the express covenant to the contrary in the second mortgage deed. Another contention that the lands were protected under section 43 of the M. P. Abolition of Proprietary Rights Act (hereinafter referred to as "the Abolition Act") was also rejected.

4. On 25-1-1950, a final decree was passed for sale of the village and the lands. On 21-4-1950, the mortgagees applied for execution and steps were taken to sell the lands. In the meantime, the Abolition Act had come in force on 31-3-1951. The debtors and the creditors applied for settling the debt under section 19 of the Abolition Act. The Claims Officer reduced the debt from Rs. 48,891-00 to Rs. 39,615-00 and declared that the balance of the debt remaining after adjusting Rs. 6954-00 paid as compensation to the creditors shall be recoverable from the sale of the lands in the hands of the lessees.

5. On 4-12-1952, the decree-holders applied for continuing the execution sale only against the lands held by the lessees for the reduced amount of the debt. Objections to the execution were filed by some of the judgment-debtors under Section 47, Civil Procedure Code, that the executions could not be proceeded with according to the provisions of the Abolition Act. These objections were by the principal debtors Sunderlal and Sewaram (Misc. Judicial Case No. 26 of 1953), lessee judgment-debtor Kishanchandra Sharma (Misc. Judicial Case No. 35 of 1953) and other lessee judgment-debtors, Udaisingh, Ramdin, Goralal, Rewa, Randhire, Parma and Pyarelal (Misc. Judicial Case No. 38 of 1953). All these objections were rejected by the executing Court. The execution was proceeded with and the lands were sold to several auction purchasers. The sales were confirmed.

6. Appeals were filed in the High Court by the judgment-debtors, Sunderlal and Sewaram (Misc. Appeal No. 49 of 1954), Kishanchandra Sharma (Misc. Appeal No. 59 of 1954), and Pyarelal (M. A. No. 127 of 1954) against the order of the executing Court rejecting their objections. Other judgment-debtors did not appeal. All these appeals were decided by Tare J. who held (i) that the sir lands could not be sold; and (ii) that the execution could proceed so far as the sale of Khudkasht lands in the hands of the lessees were concerned. Against the decision of the learned single Judge, only Kishanchandra Sharma went up in Letters Patent Appeal: Kishan Chand Sharma v. Mst. Rani Bahu, LPA No. 80 of 1958, D/- 30-7-1960 (Madh Pra) which was allowed. It was held that it was necessary for the creditors to obtain a fresh preliminary decree under section 28 of the Abolition Act, and they could not proceed with the execution of the earlier final decree.

7. This led to several applications by the judgment-debtors for restitution of the properties sold in execution of the decree. These applications were based on the contention that the execution was a nullity and the auction sales were hence void. The applicants also claimed mesne profits. The executing Court allowed restitution of the lands but rejected the prayer for mesne profits. The auction-purchasers came up in appeal in the High Court and the several appeals were allowed by Sheodayal J. holding that the auction-purchasers were entitled to retain the lands and there could be no restitution. Against these decisions, the present Letters Patent Appeals have been filed by the judgment-debtors. The details about the appeals are as below:

L.P.A.
No.

Appellant

17/63	Sunderlal and Sewaram—principal judgment-debtors	For restitution of the lands.
19/63	Kishorilal — lessee-judgment-debtor	"
9/63	Pyarelal — principal judgment-debtor	For restitution of the lands.
15/63	Pyarelal — principal judgment-debtor	For mesne profits.
8/63	Kunj Bihari — lessee-judgment-debtor	For restitution of the lands.
11/63	Kunj Bihari — lessee-judgment-debtor	For mesne profits.
22/63	Kailash — lessee-judgment-debtor	For restitution of the lands.
12/63	Kailash and Smt. Gajrani—lessee-judgment-debtors	For mesne profits.
20/63	Mahendra Kumar Sharma — lessee-judgment-debtor	For restitution of the lands.
14/63	Mahendra Kumar Sharma — lessee-judgment-debtor	For mesne profits.
21/63	Kashiprasad — lessee-judgment-debtor	For restitution of the lands.
13-63	Kashiprasad — lessee-judgment-debtor	For mesne profits.

8. At this stage, it would be convenient to refer to the provisions of the Abolition Act which are relevant to the controversy between the parties. Section 17 defines "secured debt" as a debt secured by the mortgage of the proprietary rights divested under S. 3. Sec. 19 gives the right to the proprietor and the creditor to apply to the Claims Officer for determination of the debt. Section 20 provides for stay of proceedings for recovery of such debt pending determination by the Claims Officer. Under sections 24 and 27, the Claims Officer passes an order declaring the amount due and the property remaining encumbered for the debt.

9. Then follows Section 28, which provides for recovery of the amount as follows:

"Any creditor in whose favour an order under Section 27 has been passed may within one year apply to the Civil Court for passing a preliminary decree for sale of the encumbered property and the Civil Court shall accordingly pass a preliminary decree for sale fixing such time for payment as it may deem fit". The only other section to which reference is necessary is section 33 which states:

"The jurisdiction of the Civil Court shall, except as otherwise provided in this Act, be barred in respect of—

(a)
(b)

(c) the recovery of any secured debt or claim determined under Section 24 except in the manner provided for in Section 28".

10. In the instant case, the debt was determined by the Claims Officer and he had further declared that the lands

remaining encumbered for the determined amount were the lands held by the lessee-judgment-debtors.

11. The learned single Judge did not consider it necessary to enter into the merits of the case as he was of the view that the applications for restitution were barred by the rule of res judicata and also by limitation. The question of res judicata arose because it was held by the executing Court that the execution proceedings could continue and it was not open to the judgment-debtors to raise the point again. It was held that the proceedings which continued till the decision of the Letters Patent Appeal were binding on the judgment-debtors; but the auction-purchasers could not be prejudiced because the view of the executing Court was not upheld in appeal. One reason for holding that the auction-purchasers were not bound by the decision in Letters Patent Appeal was that the auction-purchasers were not made parties to the appeal. On the question of limitation, the learned Judge held that Article 181 of the Limitation Act applied and the applications were barred by time as they were filed more than three years from the date on which the judgment-debtors lost possession.

12. On the question of res judicata, the learned counsel for the appellants did not dispute the position that the doctrine of res judicata applies to execution proceedings also and a finding given at one stage of the proceedings cannot be challenged at any later stage of the same proceedings. It was, however, contended that Section 30 of the Abolition Act created an absolute bar to the execution of the decree and all proceedings of

the execution Court including the auction sales were, therefore, void. As the finding of executing Court was without jurisdiction, it did not operate as res judicata. It was further contended that those judgment-debtors, who did not file any objection before the executing Court, were not bound by the decision and the doctrine of constructive res judicata could not be applied to their case. The learned counsel pressed the contention of want of jurisdiction to the extreme contending that all decisions including the one in the Letters Patent Appeal in which the order of the executing Court was set aside were without jurisdiction and bind no one. They wanted the point to be decided afresh urging that the decision of that Letters Patent Appeal be treated as a precedent only.

13. The crucial point which has to be decided in the case is whether the executing Court was competent to decide the question of jurisdiction to proceed with the execution. If there was lack of inherent jurisdiction to do so, all further proceedings would be void. However, if it could decide the matter, a wrong decision by the Court would not matter. The parties would still be bound by it until it was set aside by the superior Courts. In that event, the auction sales will be with jurisdiction in spite of the contrary decision in the Letters Patent Appeal and cannot be set aside. Before we take up this point for decision on the facts of the case it will be helpful to refer to the several decisions cited at the Bar in support of the rival contentions.

14. The following cases were cited on behalf of the appellants:

(i) In Kiran Singh v. Chaman Paswan, AIR 1954 SC 340, this is what was said about the effect of a judgment suffering from want of jurisdiction:

"... It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings..."

(ii) In Karashiddayya Shiddayya v. Shree Gajanan Urban Co-operative Bank Ltd., AIR 1943 Bom 400, it was held that once a decree has been found to be a nullity, all proceedings taken in execution of it are also null and void. In that case, the award of the Registrar, Co-operative Societies was held to be without jurisdiction and the sale held in execution of such an award was held to be void.

(iii) In Surajbai v. Sadashiv Jugal Kishore, AIR 1958 Madh Pra 100, it was held that the decision of civil Courts

deciding the question of validity of an adoption was not binding as the matter was excluded from the jurisdiction of civil Courts under Section 99 of the Jagirdar Manual of the former Holkar State. Any decision by the civil Court could not operate as res judicata as it was not a decision of a court of competent jurisdiction.

(iv) In Laxmichand Nanhalal v. Mt. Sunderabai, AIR 1952 Nag 275, the difference between want of jurisdiction and a wrong decision given when Court has jurisdiction was explained. It was observed that the question whether the Court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction. It was stated that if the Court has no jurisdiction, all its orders are nullities. In that case, decision of the executing Court on the application of a stranger under Section 144, Civil Procedure Code, was held to be without jurisdiction as no notice was given to the decree-holder who was affected by the order.

15. The following decisions were relied on on behalf of the respondents:

(i) In Malkarjun v. Narhari, ILR 25 Bom 337 (PC), notice was served on a wrong representative of the deceased judgment debtor and in spite of the statement of the legal representative that there were preferential heirs, the executing Court held that he could represent the estate and execution was proceeded with. Their Lordships observed:

"... In doing so, the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting the matters right and if that course is not taken the decision, however wrong, cannot be disturbed...". Ultimately, the sale held was not disturbed.

(ii) Mohanlal v. Benoy Kishna, AIR 1953 SC 65. In this case, the following observations in para 25 are pertinent:

"There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata'. A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court even though erroneous is binding on the parties."

The view taken by the Patna High Court in Mahadeo Prasad v. Bhagwat Narain Singh, AIR 1938 Pat 427 that the principle of constructive res judicata is applicable to execution proceedings was cited with approval. In this case, the

question of the validity of execution proceedings was objected to by the judgment-debtor on the ground of want of sanction of the Collector under a special Act. The objection was not expressly decided but the execution was proceeded with. It was held that as the point was raised, and although it was not decided, it was res judicata by reason of Explanation 4 to Section 11.

(iii) *S. Venkataseshayya v. Virayya*, AIR 1958 Andh Pra 1 (FB). In this case, service inam lands were sold in execution without an objection by the judgment-debtor; although sale of such lands was prohibited under a special law. It was held that the judgment-debtor was precluded from challenging the auction sale as it was a defence which he might and ought to have raised in execution proceedings. We may refer to the following observations particularly.

".... The principle that where a statute confers on a Tribunal jurisdiction subject to a condition, it cannot clutch at jurisdiction by deciding wrongly the existence of that condition, has no application to the decision of a court in regard to questions that legitimately arise for decision in the course of a suit maintainable therein. If so much is conceded, I do not see any reason why the principle of constructive res judicata cannot be invoked in regard to the decision of a Court in such a suit. Explanation IV to Section 11 does not impose any such limitation...."

(iv) *Baijnath Prasad Sah v. Ramphal Sahni*, AIR 1962 Pat 72 (FB). In this case, lands which could not be sold in execution on account of provisions in a special Act were sold. The judgment-debtor did not raise any objection to the sale. It was held that the executing Court impliedly decided the point against him and he was debarred from challenging the validity of the sale. This is what was said:

".... Though a transaction is void if a certain provision of law applies, it is for the Court to decide whether that provision is applicable. Once a competent Court has given a decision, holding expressly or by implication, that that provision of law is inapplicable and the transaction is not void, that decision operates as res judicata between the parties. So also if an order of the Court is deemed to have decided the question, the order is binding upon the parties." After referring to the several decisions relevant to the question, Sahai J. observed:

".... It is immaterial whether the sale of the lands in question is void or voidable because we have to consider, at present, the consequences of the

judgment-debtor not having raised the objection before the sale when he might and ought to have raised it. In accordance with the views which I have expressed, I hold that the judgment-debtor is barred by the principle of constructive res judicata from raising the objection on the ground of non-saleability of the kasht lands."

Three other Judges concurred with the decision of Sahai J. in this case.

(v) *State of West Bengal v. Hemant Kumar*, AIR 1966 SC 1061. Though this decision is given in the context of criminal proceedings, it shows what the law is in the case of an erroneous decision of a Court. This is what was said in para 20 of the judgment:

".... The position that emerges therefore is that though the effect of the order of the High Court dated April 4, 1952, was to leave the proceedings against the accused pending before the Chief Presidency Magistrate, so as to attract the ban enacted by Section 12 of the Act, still by the decision of the High Court dated December 19, 1956 which is binding as between the parties, the Special Court had been held to have jurisdiction over the case, Section 12 being held not to be in the way. There is thus no escape from the position that effect has to be given to this state of affairs and that the respondent can derive no advantage by canvassing before us the correct result of the order of the High Court, dated April 4, 1952 unhampered by the subsequent decisions which are binding on him. We, therefore, reach the conclusion that the Special Court must be deemed to have jurisdiction over the case and that the learned Judges whose judgment is now under appeal were in error in reversing the order of the Special Judge."

It may be observed that the jurisdiction to try the case was with the Chief Presidency Magistrate according to the correct interpretation of the provision of law, but it was held that the erroneous interpretation of the High Court upholding the jurisdiction of the Special Judge was binding on the parties and the Special Judge could, therefore, proceed with the case.

16. The following propositions emerge from these decisions:

(a) that where there is inherent lack of jurisdiction from the initial stage, subsequent proceedings taken by such a Court are void and the decisions of such a Court do not operate as res judicata;

(b) that where the Court has jurisdiction, a wrong decision by the Court on a point of law or fact is binding on the parties;

(c) that the doctrine of res judicata operates in respect of a decision of an

executing Court in other proceedings as well as in the subsequent stages of the same proceedings;

(d) that the principle of constructive res judicata also applies to execution proceedings and a judgment-debtor, who might and ought to have raised a defence at the appropriate stage, fails to do so, is precluded from urging such a defence at any subsequent stage of the proceedings; and

(e) that where the Court has power to decide the question of jurisdiction arising from the interpretation or the applicability of a statute, even an erroneous decision is binding on the parties.

17. With this background of the law as laid down in the decisions referred to above, let us turn to the facts of the instant case. It is not disputed by the appellants that the decree passed in Civil Suit No. 5-A of 1943 was with jurisdiction. The execution proceedings started in 1950 for sale of the lessee-judgment-debtors' lands were also valid and with jurisdiction. We may, however, refer to the unusual decision of the trial Court in Civil Suit No. 5-A of 1943 holding that the lands held by the subsequent lessees of khudkasht lands were liable to be sold in enforcing the mortgage and yet the lessees were not entitled to redeem. They were hence 'discharged'.

18. A lessee of a mortgagor has normally a right to redeem the mortgage, if it is sought to be enforced against the leasehold rights. The contrary view in Pawankumar v. Jagdeo, AIR 1947 Nag 210 was taken in view of the special Revenue Law. It was held that a lessee of Khudkasht lands who gets the lease in the ordinary course of village management by the proprietor, is not entitled to redeem as he is not affected by the mortgage. In the instant case, the trial Court concluded that the lessees were not in the ordinary course of village management but were contrary to the express terms in the mortgage-deed. The lessees, who were affected by the mortgage and whose lands have to be sold in execution of the decree, were undoubtedly entitled to redeem the mortgage. However, that decision has now become final. The names of all the lessee-judgment-debtors were repeated in the preliminary and final decree and thus they are parties to the decree in spite of the orders of discharge. The order must be treated only as debarring them from redeeming the mortgage but their liability in respect of their lands continued. They were thus judgment-debtors under the decree. That apart, any question between a discharged defendant and the decree-holder relating to the execution, discharge and satisfaction of the decree is one which must be decided under Section 47, Civil Procedure Code. This position was not

disputed on behalf of the lessee judgment-debtors.

19. The execution proceedings were valid till the order of the Claims Officer determined the debt under Ss. 24 and 27 of the Abolition Act. After such determination, the creditor was required to enforce his claim according to the provisions of Section 28 of the Act and the jurisdiction of the civil Court to recover the debt in any other manner was barred under Section 33. At that stage, a question arose whether a fresh preliminary decree was necessary under S. 28; or whether the execution could proceed for recovery of the reduced amount by sale of the properties still remaining encumbered without any such decree. Some of the judgment-debtors applied to the executing Court to determine this point and the question is whether the executing Court had jurisdiction to decide this point.

20. Questions regarding the executability of a decree are matters which the executing Court must itself decide under Section 47, Civil Procedure Code. In Bindeswari Charan Singh v. Bageshwari Charan Singh, AIR 1936 PC 46, the Judicial Committee observed that "truly the third sub-section of Section 12-A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court".

Likewise, in the instant case also, the applicability of Section 28 of the Abolition Act was a matter to be decided by the executing Court.

21. In this connection, there exists a distinction between Tribunals of limited jurisdiction and a civil Court. A Tribunal cannot give itself jurisdiction by deciding jurisdictional facts wrongly unless power has been given to it to decide such jurisdictional facts. There are no such limitations on the power of a Civil Court and it must decide itself all matters which arise before it, including questions about jurisdiction. The decree-holder and the judgment-debtors held different views about the implications of Section 28 of the Abolition Act and as the matter was raised by them before the executing Court, it became incumbent upon it to decide the question before proceeding further with the execution. The matter fell squarely within the ambit of Section 47, Civil Procedure Code, and the question of executability of the decree could not be left undecided. We hold that the executing Court had jurisdiction to decide the question of the executability of the decree under Section 47, Civil Procedure Code.

22. The executing Court took the view that in cases where a preliminary decree and a final decree had already been passed, it was not necessary to pass a second preliminary decree again and the Court could give effect to the order of the Claims Officer by executing for the reduced amount against the properties remaining encumbered. That the question was not free from doubt is borne out by the fact that when the matter was taken up in appeal, a Single Judge of this Court upheld the decision. It is true that the correct law has later been laid down by the Division Bench in the Letters Patent Appeal; but that does not affect the validity of the execution so long as the order of the executing Court was not set aside. As there was no inherent lack of jurisdiction, an erroneous decision of the executing Court does not become inoperative as the Court had the right to decide wrong as well as right —Malkarjun's case, (1901) ILR 25 Bom 337 (PC) (supra). Accordingly we are of opinion that the sale held in execution at the time when the decision of the executing Court to proceed stood was valid and could not be set aside even if the order has been found to be wrong later.

23. So far as those judgment-debtors who raised an objection before the executing Court are concerned, they were bound by the wrong decision of the executing Court. Only three out of them went up in first appeal but they all lost the appeal. Thereafter only one of them, K. C. Sharma filed a Letters Patent Appeal. The other judgment-debtors were thus bound by the decision in the first appeal. As regards K. C. Sharma, it must be held that the order in the Letters Patent Appeal replaces the order of the executing Court. Even then, he is not entitled to challenge the execution sale. He did not apply for stay of the execution proceedings which were valid so long as the order of the executing Court was holding the field. As held in Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan (1888) ILR 10 All 166 (PC), the title of the stranger auction-purchaser is not affected by the reversal of the decree after the confirmation of sale. Similarly it has been held in Janak Raj v. Gurdial Singh, AIR 1967 SC 608 that the sale held in the execution of an ex parte decree is not affected when the decree is subsequently set aside. The same reasoning would apply to protect the auction-purchasers in the present case where the decision of the executing Court that the decree could be executed was reversed.

24. Turning now to the case of those judgment-debtors who did not object to the proceedings in execution, the contention is that they are not bound by the deci-

sion of the executing Court. It is clear from the cases cited earlier that the rule of constructive res judicata applies to execution proceedings also and a plea on which the judgment-debtors could have objected to the execution cannot later be raised if there is omission to raise it at the proper occasion. We may only refer to Mohanlal Goenka's case, AIR 1953 SC 65 (supra) in which an objection was raised but was not decided by the executing Court and yet it was held that it was res judicata by reason of Explanation 4 to Section 11, Civil Procedure Code. In the case of Baijnath Prasad Sah, AIR 1962 Pat 72 (supra), no objection was raised by the judgment-debtor but it was held that as the Court proceeded with execution, the point was impliedly decided and the judgment-debtor could not raise it later.

25. We find from the record of the proceedings in the executing Court that the case was never adjourned sine die but the date for the following hearing was always fixed. Notices of the proceedings were issued to all the judgment-debtors including the lessee-judgment-debtors. The judgment-debtors will thus be deemed to have knowledge of the dates in the proceedings. They should, therefore, have filed objections to the proceedings on the grounds now taken. As they failed to do so, they are debarred from raising the objections at least against the auction-purchasers who purchased the lands bona fide.

26. Shri Y. S. Dharmadhikari arguing for some of the auction-purchasers raised a new point. He said that the definition of "secured debt" in S. 17 of the Abolition Act confines that expression to debts secured by a mortgage of the proprietary rights divested under Section 3 and as homefarm lands were not divested, the debts secured on these lands were not secured debts. The contention is correct. However, we are unable to accept the further contention that that Chapter of the Abolition Act did not apply to such debts at all. Section 24 provides that the Claims Officer shall record the lands which remain still encumbered. These would certainly be lands which were not divested and remained with the proprietor. It is obvious that the mortgages covering properties vesting in the State and other properties not so vesting are to be governed by the provisions in the Chapter. The provisions in Section 28 thus apply to the properties remaining encumbered which have not vested in the State. The homefarm lands fall in this category.

27. To sum up, we hold that the auction sales held in execution are binding on all the judgment-debtors and cannot be set aside.

28. The learned Single Judge has also come to the conclusion that the applications were barred by time. The appellants contended that although the applications were filed under Section 144, Civil Procedure Code, that section did not apply in terms and therefore they should be treated as being under S. 151, Civil Procedure Code, for which there is no limitation for such an application. There is no substance in this contention in view of the decision in Merla Ramanna v. Nallaparaju, AIR 1956 SC 87. In that case, it has been held that an application by a party to the suit to recover possession of properties which had been taken delivery of under a void execution sale falls under Section 47 and would be governed by Article 181 of the Limitation Act. It would be in time if filed within 3 years of dispossession. Thus, there is no scope for holding that the application is one under Section 151, Civil Procedure Code. In view of the pronouncement of the law by the Supreme Court in this case, it is clear that Article 181 applies and the application should have been filed within three years from the date of dispossession. It was admitted by the appellants that in all cases possession was lost in 1954 except the case of Mahendra Kumar Sharma who lost possession in 1958. These applications were filed in 1961 and thus they were long time barred. In the case of Mahendra Kumar Sharma, the respondents challenged the date of delivery of possession but we need not go into that question. Even if that application is in time, no relief can be given to him as the auction sale binds him in any case.

29. The learned Single Judge has also held that the auction-purchasers were necessary parties to the Letters Patent Appeal and are not bound by it as they were not impleaded. Several decisions have been cited in support of this conclusion. We do not consider it necessary to decide this question in view of what we have held about the binding nature of the auction sale.

30. The appellants are not entitled to get back possession of the lands from the auction-purchasers. The claim for recovery of mesne profits must, therefore, necessarily fail.

31. In the result, all the appeals are dismissed with costs. Counsel's fee in this Court as per the prescribed schedule of rates, if certified.

GGM/D.V.C.

Appeals dismissed.

AIR 1969 MADHYA PRADESH 43

(V 56 C 13)

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

Bhilai Hindi Primary School Teachers Association, Bhilai and another, Petitioners v. General Manager, Hindustan Steel Ltd, Bhilai Steel Project, Bhilai and others, Respondents.

Misc. Petn. No. 261 of 1966, D/- 18-7-1968.

(A) Constitution of India, Art. 14 — Discrimination — Difference between scales of pay of those teaching in Hindi Primary Schools and those teaching in English Primary Schools — Though both may be said to be doing the same work difference in scales of pay cannot be said to be violative of Art. 14 : AIR 1962 SC 1139 and AIR 1963 SC 913, Rel. on. (Para 3)

(B) Constitution of India, Art. 16 — Teachers in Hindi Primary Schools and English Primary Schools — Qualifications, method of recruitment and avenues of promotion different in respect of Hindi and English School teachers — Held Hindi and English teachers formed two distinct and separate classes and hence disparity in chances of promotion between the two could not be said to be contrary to Art. 16 : AIR 1960 SC 384 and AIR 1963 SC 913, Rel. on. (Para 4)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 913 (V 50)=	
(1963) Supp 2 SCR 169, State of Punjab v. Joginder Singh	3, 4
(1962) AIR 1962 SC 1139 (V 49)=	
(1962) 44 ITR 532, Kishori v. Union of India	3
(1960) AIR 1960 SC 384 (V 47)=	
(1960) 2 SCR 311, All India Station Masters' and Asst. Station Masters' Association, Delhi v. General Manager, Central Railways	4

Y. S. Dharmadhikari, for Petitioners;
H. L. Khaskalam, for Respondents.

DIXIT C. J.: This application under Article 226 of the Constitution is by the Union of Primary School Teachers in Hindi employed in Schools run by the Bhilai Steel Project and by a teacher in Hindi in one of the Schools.

2. The petitioners' grievance is that in the Primary Schools run by the Bhilai Steel Project the scales of pay of teachers and headmasters of Hindi Primary Schools are lower than the scales of pay of teachers and head masters employed in the English Primary Schools. Their contention is that this difference is violative of Article 14 of the Constitution and they pray that a direction be issued to the respondents commanding

them to give to the teachers and headmasters of Hindi Primary Schools the same scales of pay as are given to the teachers and headmasters in English Primary Schools.

3. Having heard learned counsel for the parties we have reached the conclusion that this application must be dismissed. It is not necessary to enter into an examination of the relative competence, ability and work of Hindi teachers and English teachers. Even if it be assumed that the teachers employed in the Primary Schools run by the Bhilai Steel Project are State employees and that the teachers and headmasters employed in Hindi Primary Schools do the same work as is done by the teachers and headmasters in English Primary Schools and are in no way inferior to those teaching English, still the difference in the scales of pay of those teaching Hindi and those teaching English cannot be held to be offending Article 14 of the Constitution. This is clear from the decisions of the Supreme Court in *Kishori v. Union of India*, (AIR 1962 SC 1139) and *State of Punjab v. Joginder Singh*, AIR 1963 SC 913. In both these cases it has been pointed out that the State can constitute two services consisting of employees doing the same work but with different scales of pay or subject to different conditions of service and that the constitution of such services is not violative of Article 14 and further that the proposition that equal work must receive equal pay or that if there is equality in pay and work there have to be equal conditions of service is untenable. The matter is, therefore, concluded by the aforesaid decisions of the Supreme Court and the petitioners' contention that teachers and headmasters in Hindi Primary Schools must be given the same scales of pay as are given to teachers and headmasters in English Primary Schools cannot be accepted.

4. Shri Dharmadhikari, learned counsel for the petitioners also urged that there was disparity in the chances of promotion between Hindi teachers and English teachers and that this disparity was contrary to Article 16 of the Constitution. The contention cannot be entertained as it has not been raised in the petition. The petitioners have made no attempt to show how and in what manner there is disparity in the matter of promotion as between Hindi teachers and English teachers. It must also be pointed out that if the qualifications prescribed for Hindi teachers and English teachers are different, if the methods of recruitment of these teachers are different and these teachers have separate avenues of promotion, then Hindi and English teachers form two distinct and separate classes. That being so, "as between

them, there can be no scope for predicated equality or inequality of opportunity in matters of promotion." As pointed out by the Supreme Court in *All India Station Masters' and Asst. Station Masters' Association, Delhi v. General Manager, Central Railway*, AIR 1960 SC 384 and AIR 1963 SC 913, "if there are two distinct services, there can be no question of inter se seniority between members of the two services, nor of any comparison between the two in the matter of promotion for founding an argument based upon Article 14 or Article 16."

5. For these reasons, this petition is dismissed with costs of the respondents Nos. 1 and 2. Counsel's fee is fixed at Rs. 150/- The outstanding amount of the security deposit after deduction of costs shall be refunded to the petitioners.

RSK/D.V.C.

Petition dismissed.

AIR 1969 MADHYA PRADESH 44 (V 56 C 14)

(INDORE BENCH).

P. V. DIXIT C. J. AND S. B. SEN, J.

Poonamchand Bansidhar, Applicant v. Ramprasad Gopilal Sarda and another. Opposite Party.

Civil Revn. No. 463 of 1966, D/- 29-4-1968, decided by Division Bench on order of Reference made by G. P. Singh, J. D/- 30-1-1968.

(A) Civil P. C. (1908), Ss. 9, 115 and 21 — Court trying suit of small cause nature on regular side — Objection to jurisdiction of Court to try suit of small cause nature not taken in lower Courts — Held that the decree passed was without jurisdiction and a nullity and that the objection to jurisdiction could be taken for the first time in revision: Civil Revn. No. 178 of 1965 D/- 29-9-1965 (Madh Pra), Rel. on; Civil Revn. No. 208 of 1966, D/- 10-4-1967, (Madh Pra), Overruled. (Para 3)

(B) Civil P. C. (1908), S. 115 and O. 46 R. 7 — Court acting without jurisdiction in trying suit of small cause nature on regular side — Revision — No reference made under O. 46 R. 7 — High Court will set aside decree and order its presentation to proper Court and not examine case on merits. (Para 4)

Cases Referred: Chronological Paras (1968) Civil Revn No. 462 of 1967, D/- 23-4-1968 = 1968 Jab LJ 566. Jagannath v. Hari Singh (1967) Civil Revn. No. 208 of 1966, D/- 10-4-1967 (Madh Pra), Govardhan v. Nathu

(1965) Civil Revn No. 178 of 1965,
D/- 29-9-1965, (Madh Pra),
Mukund v. Firm Kashilal

S. D. Sanghi, for Applicant; H. K.
Maheshwari, for Opposite Party No. 1.

DIXIT, C. J.: This revision petition has come up before us on a reference made by Singh J. before whom it first came up for hearing. The questions which the learned Single Judge has referred to us for decision are:

"1. Whether, on the facts and in the circumstances of this case, the defendant can be permitted to raise the question of jurisdiction for the first time in revision?

2. Is the decree passed by the Court of first instance entirely without jurisdiction?

3. What is the course open for the High Court? Should this Court set aside the decrees passed by the Courts below and order return of the plaint or should it examine the merits of the case and pass any other suitable order?"

The learned Single Judge thought it necessary to make this reference because of a conflict in the decisions of this Court in Mukund v. Firm Kashilal, Civil Revn. No. 178 of 1965, D/- 29-9-1965 (Madh Pra) and Govardhan v. Nathu, Civil Revn. No. 208 of 1966, D/- 10-4-1967 (Madh Pra). In Mukund's case, Civil Revn. No. 178 of 1965 D/- 29-9-1965 (Madh Pra) (supra), one of us (Sen J.) expressed the view that "If there exists a Court who has power to hear the suit under Small Cause Courts Act and if the suit is instituted in a Civil Court that Court will have no jurisdiction to hear the suit of a small cause nature." In the case of Govardhan Civil Revn. No. 208 of 1966, D/- 10-4-1967 (Madh Pra) (supra), Krishnan J. has held that there is no inherent lack of jurisdiction if a court, which is otherwise competent, tries a suit in breach of section 16 of the Provincial Small Cause Courts Act, 1887; and that if the point of jurisdiction is not raised by the defendant in the court below, he cannot be permitted to raise the objection for the first time in revision.

2. The material facts are that the non-applicant No. 1 Ramprasad instituted a suit in the Court of the Civil Judge, Second Class, Mhow, for recovery of Rs. 700/- from the petitioner and the other non-applicant. The suit was tried on the regular side and decreed. That decree was confirmed in appeal by the second Additional District Judge, Indore. At the time of the institution of the suit, there existed a Court of Small Causes having jurisdiction to try the suit as a small cause suit, namely, the Court of the Second Additional District Judge, Indore. The suit was tried as an

ordinary suit by the Civil Judge, Second Class, Mhow, without any objection being raised by the petitioner as to the jurisdiction of that Court to try the suit. This revision petition is directed against the decision in appeal of the Additional District Judge, Indore.

3. This reference was heard along with the reference made by Nevaskar J. in Jagannath v. Harisingh, Civil Revn. No. 462 of 1967 (Madh Pra), where also the question referred to the Division Bench was whether a regular court has jurisdiction to try a suit which is of small cause nature and is cognizable by a Small Cause Court exercising jurisdiction within the same local limits. The opinion expressed in C. R. No. 462 of 1967 fully answers the first two questions referred by the learned Single Judge in this case. According to that opinion, the court of the Civil Judge, Second Class, Mhow, had no jurisdiction to try the plaintiff-non-applicant Ramprasad's suit, which was a suit of small cause nature and which was cognizable by the Court of the Second Additional District Judge, Indore, exercising small cause powers and jurisdiction within the same local limits; the decree passed by the Civil Judge, Second Class, Mhow, was, therefore, without jurisdiction and a nullity. The defendant applicant was entitled to raise objection as regards jurisdiction for the first time in this revision even if he had raised no such objection in the Court of the Civil Judge, Second Class, Mhow. The view expressed by the learned Single Judge in the order of reference is not different.

4. In regard to the third question, when the decree passed by the Civil Judge, Second Class, Mhow, is without jurisdiction and a nullity, this Court has to set aside that decree while exercising the revisional powers under section 115, C. P. C. and make an order for the return of the plaint for being presented to the proper court. O. 7 R. 10 C. P. C. directs that "The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted." When, therefore, at the time the plaint was filed in the Court of the Civil Judge, Second Class, Mhow there was a Court of Small Causes competent to try the suit, then there must be an order for the return of the plaint for being presented to the Court in which the suit should have been instituted. The High Court cannot, while exercising its powers under section 115 C. P. C., dispose of the case on its merits. It must be noted that this being a revision petition under section 115 C. P. C. and not a reference under O. 46 Rule 7 C. P. C. the High Court cannot exercise the powers conferred on it under Order 46 Rule 7. In-

deed, in the present case the District Court could not have made a reference under Order 46 Rule 7 C. P. C. when no question of jurisdiction was raised in and decided by the Court of the Civil Judge, Second Class, Mhow.

5. The reference is answered accordingly.

6. SEN. J.: I agree.

VGW/D.V.C. Answer accordingly.

**AIR 1963 MADHYA PRADESH 46
(V 56 C 15)**

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

Sagar Motor Transport Karmchari Union, Sagar, Petitioner v. Amar Kamgar Passenger Transport Co. Co-operative Society, Sagar, M. P. and another. Respondents.

Misc. Petn. No. 376 of 1966, D/- 14-8-1968.

Co-operative Societies — M. P. Co-operative Societies Act (17 of 1961), sections 55 (2), 93 — Dispute between Co-operative Society and its employees — Registrar, under S. 55 (2) alone can adjudicate — Reference to Labour Court under Section 10 (1) of Industrial Disputes Act (1947) is illegal — (Constitution of India, Art. 254(2)) — (Industrial Disputes Act (1947), S. 10(1)).

The language of the provision contained in section 55 (2) is clear enough to show that under the Act, which is a special enactment dealing with the special subject of co-operative societies, a dispute with regard to termination of services of an employee of a co-operative society can be decided only by the Registrar or any officer appointed by him, not below the rank of Assistant Registrar. (Para 4)

As "industrial and labour disputes" is one of the matters enumerated in the Concurrent List and the M. P. Co-operative Societies Act, received the assent of the President, section 55 (2) of the Act must prevail in the State over the provisions of the Industrial Disputes Act, 1947, in regard to disputes between a co-operative society, and its employees regarding terms of employment, working conditions and disciplinary action. This is clear from Article 254 (2) of the Constitution. AIR 1958 Cal 373 & AIR 1959 Punj 34. Distinguished.

(Paras 4, 5)

The omission of any reference in section 93 to the Industrial Disputes Act, 1947, cannot be read as a positive direction that the Industrial Disputes Act, 1947, would apply to a society registered under the Act, even though that Act does

not regulate adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. On the other hand, the provision in Section 93 of the Act that the M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act only emphasizes the fact that a dispute falling under Section 55 (2) of the Act can be decided only by the authorities pointed out therein even though the dispute may be capable of adjudication under the M. P. Industrial Relations Act, 1960, as an industrial dispute. Consequently, a reference regarding these matters to the Labour Court under S. 10 (1) of the Industrial Disputes Act (1947) is illegal. (Para 7)

Cases Referred: Chronological Paras (1959) AIR 1959 Punj 34 (V 46) — ILR (1959) Punj 169, Jullunder T.

C. Society v. Punjab State 6 (1958) AIR 1958 Cal 373 (V 45) — 6

62 Cal WN 405, Co-operative Milk Societies Union Ltd. v. W. B. State 6

Gulab Gupta, for Petitioner; K. K. Adhikari, for Respondent No. 1.

DIXIT C. J.: By this application under Articles 226 and 227 of the Constitution, the petitioner seeks a writ of certiorari for quashing a determination of the Presiding Officer of the Labour Court, Jabalpur, holding that the references of two disputes made to the Labour Court by the State Government under Section 10 (1) of the Industrial Disputes Act, 1947, are illegal and without jurisdiction.

2. The matter arises thus. Two persons, Ramdas and Abdul Latif, were in the employment of the non-applicant No. 1, the Amar Kamgar Passenger Transport Company Co-operative Society, Sagar, registered as a Co-operative Society under the M. P. Co-operative Societies Act, 1960, (hereinafter called the Act). The services of these two employees were terminated by the respondent-Society. The two employees and the petitioner, a union of employees engaged in motor transport industry at Sagar, feeling aggrieved by the action of the respondent-Society in terminating the services of Ramdas and Abdul Latif, raised a dispute. Ultimately in June 1965 the Government referred the dispute to the Labour Court for adjudication. The dispute referred for adjudication in the case of Abdul Latif was—

"Whether there exists a case for reinstatement of Shri Abdul Latif son of Abdul Rahim Driver with back wages? If not, the relief to which he is entitled?" A similar dispute was referred to the Labour Court for adjudication in the case of Ramdas.

3. Before the Presiding Officer of the Labour Court, the respondent-Society raised the preliminary objection that the Government had no power to refer the dispute under Section 10 of the Industrial Disputes Act, 1947, inasmuch as the disputes about the termination of services of Abdul Latif and Ramdas and their reinstatement were one which under Section 55 (2) of the Act the Registrar of Co-operative Societies or any officer appointed by him, not below the rank of Assistant Registrar, could alone decide. This objection was upheld by the Presiding Officer who accordingly refused to adjudicate upon the disputes referred to him.

4. Having heard learned counsel for the parties, we have formed the opinion that this application must be dismissed. The M. P. Co-operative Societies Act, 1960, was enacted in 1960. It received the assent of the President on 28th April, 1961. The assent was first published in the Madhya Pradesh Gazette on 12th May 1961. That Act came into force on 15th May 1962. The M. P. Co-operative Societies Act, 1960, is "an Act to consolidate and amend the laws relating to co-operative societies in Madhya Pradesh."

Section 55 (2) of the Act runs as follows—

"55. (2) Where a dispute including a dispute regarding terms of employment, working conditions and disciplinary action taken by a society, arises between a society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees."

The language of this provision is clear enough to show that under the Act, which is a special enactment dealing with the special subject of co-operative societies, a dispute with regard to termination of services of an employee of a co-operative society can be decided only by the Registrar or any officer appointed by him, not below the rank of Assistant Registrar. Section 55 (2) contains a special provision for adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. It is no doubt true that the definition of "industrial dispute" given in section 2 (k) of the Industrial Disputes Act, 1947, is wide enough to include disputes between a co-operative society and its employees regarding the terms of employment, working conditions and disciplinary action. The Industrial Disputes Act, 1947, is also a special enactment dealing with the special subject of industrial disputes and their adjudication.

But whereas the Industrial Disputes Act, 1947, deals generally with industrial disputes arising between "employers" and "employees" as defined in that Act, section 55 (2) of the M. P. Co-operative Societies Act is concerned only with the adjudication of disputes between a co-operative society and its employees. There is no provision in the Industrial Disputes Act, 1947, that disputes arising between a body or a society governed by a special enactment and its employees, also governed by that special enactment, with regard to terms of employment, working conditions and disciplinary action, shall be adjudicated upon in accordance with the Industrial Disputes Act, 1947, notwithstanding the fact that a special provision has been made for adjudication of those disputes in the special enactment regulating the society or body and its employees.

5. There is thus a conflict between the Industrial Disputes Act, 1947, a Central Law, and the M. P. Co-operative Societies Act, 1960, a law by the State in regard to the adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. But as "industrial and labour disputes" is one of the matters enumerated in the Concurrent List and the M. P. Co-operative Societies Act, 1960, received the assent of the President, section 55 (2) of the Act must prevail in the State over the provisions of the Industrial Disputes Act, 1947, in regard to disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. This is clear from article 254 (2) of the Constitution.

6. Learned counsel referred us to the decisions in Co-op. Milk Societies Union v. W. B. State, AIR 1958 Cal 373 and Julundur T. C. Society v. Punjab Society, AIR 1959 Punj 34, where it has been held that the provisions of the Bengal Co-operative Societies Act, 1940, and the Punjab Co-operative Societies Act, 1955, have to yield to the provisions of the Industrial Disputes Act, 1947. This conclusion of the Calcutta and Punjab High Courts proceeded on the reasoning that the Industrial Disputes Act, 1947, was a special enactment dealing with the special subject of industrial disputes and the relevant Co-operative Societies Act was, on the other hand, a general enactment which must yield to the special provisions of the Industrial Disputes Act, 1947. It is not necessary to examine this reasoning. It is sufficient to point out that section 55 (2) of the M. P. Co-operative Societies Act, 1960, and the material sections of the Bengal Co-operative

Societies Act, 1940, and the Punjab Co-operative Societies Act, 1955, differ *toto coelo* and thus render the two decisions cited on behalf of the petitioner altogether inapplicable in the present case. In these Acts there is no provision analogous to section 55 (2) of the Local Act. It may, however, be pointed out that both under the Bengal Co-operative Societies Act and the Punjab Co-operative Societies Act a dispute regarding disciplinary action taken by a co-operative society against its employees is expressly excluded from the purview of the Registrar's jurisdiction.

7. Learned counsel also urged that section 93 of the Act, which said that certain Acts including the M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act, made no mention whatsoever, of the Industrial Disputes Act, 1947, and that, therefore, it must be taken that the Act of 1947 would apply to a co-operative society. We are unable to accept this contention. The omission of any reference in section to the Industrial Disputes Act, 1947, cannot be read as a positive direction that the Industrial Disputes Act, 1947, would apply to a society registered under the Act, even though that Act, as pointed out earlier, does not regulate adjudication of disputes between a co-operative society and its employees regarding terms of employment, working conditions and disciplinary action. On the other hand, the provision in section 93 of the Act that the M. P. Industrial Relations Act, 1960, shall not apply to a society registered under the Act only emphasizes the fact that a dispute falling under section 55 (2) of the Act can be decided by the authorities pointed out therein even though the dispute may be capable of adjudication under the M. P. Industrial Relations Act, 1960, as an industrial dispute.

8. For all these reasons, our conclusion is that the Presiding Officer of the Labour Court, Jabalpur, rightly held that the references made to him under section 10 (1) of the Industrial Disputes Act, 1947, were illegal. This petition is, therefore, dismissed with costs of the respondent No. 1. Counsel's fee is fixed at Rs. 75/- The outstanding amount of security deposit, if any, after deduction of costs, shall be refunded to the petitioner.

YPB/D.V.C.

Petition dismissed.

P. V. DIXIT, C. J.
AND G. P. SINGH, J.

Gwalior Red Chalk Corporation, Partnership firm Lashkar, Gwalior, Petitioner v. Additional Tahsildar, Pargana Gird, Gwalior, Madhya Pradesh and another, Respondents.

Misc. Petn. No. 402 of 1966, D/- 11-9-1968.

Mines and Minerals (Regulation and Development) Act (1957), S. 25 — Sums due under mining lease — Recovery of, as land revenue — Can be ordered, even if lease was executed or amount became due before commencement of Act — (Words and Phrases — Due — Meaning of) — (Civil P. C. (1908) Pre — Interpretation of Statutes — Retrospective effect).

Section 25 enables the Government to recover any sum due under a mining lease as an arrear of land revenue irrespective of whether the sum became due or the mining lease was executed prior to or after the coming into force of the Act. Misc. Petition No. 384 of 1964 D/- 18-11-1964 (M. P.) Rel. on. (Para 4)

It is true that the first part of S. 25 regarding recovery of dues, due to the Government under the Act or Rules thereunder, is clearly prospective and refers to sums falling due after the operation of the Act or the Rules, for a sum cannot become due under an Act or Rules made thereunder unless the Act or Rule, as the case may be, has come into force. But there is no reason to restrict the second part of the section regarding recovery of dues, due to the Government under any prospecting licence or mining lease, to mining leases executed or sums falling due after the coming into force of the Act. The word "due" merely means 'payable' without reference to any time and is not limited to rent etc. falling due in future. The section does not create any liability but provides a procedure for enforcing liability and being a procedural section, will enable recovery after coming into force of the Act of any rent, royalty or other sum due under any prospecting licence or mining lease in the same manner as an arrear of land revenue irrespective of whether the sum to be recovered became payable prior to or after the coming into force of the Act. AIR 1964 SC 1256, Foll. (Paras 3, 4)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1256 (V 51)=
(1964) 6 SCR 837, Abdul Karim
v. Deputy Custodian General, New Delhi 4
(1964) Misc. Petn. No. 384/1964, D/-
18-11-1964 (MP), Veljee Chawra
v. State of M. P. 4

appearing before the Confirming Authority applied for the confirmation, the Justices were of the view that they had no jurisdiction to grant it in the circumstances. There was no objection from any quarter to removal. The licensing Justices had the same power to grant ordinary removal applied for as they had to grant a new Justices' licence. Under the Licensing Act 1953 Section 22 (1) provided that where the holder of Justices' licence died, Section 120 of the Act shall not prohibit the sale or exposure for sale of intoxicating liquor by the personal representatives during a period ending with the next transfer sessions or if the next transfer sessions were held within fourteen days after the death, the next transfer sessions but one. Lord Goddard, C. J., after pointing out that it had been held that the executor cannot apply for confirmation of a licence where the application is for a new licence and the applicant died before the confirmation, posed the question whether that principle would apply to a case of application for removal of the existing licence and answered it in the following words:

"The Court were not saying that the licence only existed for the purpose of enabling the representatives to get a transfer, but also that it enabled them to maintain an appeal, because it was for the protection of the licence and the licence was still in existence the licence being still in existence and an order having been made by the licensing Justices that it should be removed, the confirming authority can consider, on the application of the executrix, the application for confirmation."

11. The case may not be exactly in point; but the principle of the decision is clear. To us it appears that the power of the Regional Transport Authority to recognise the successor in interest is implicit under the law which it administers. The preferential right to renewal is not a mere expectation. Should the accident of the death of a permit holder before the order for renewal deprive the successor to the possession of vehicles, the permit attached to them? The consequences of such a view of the Act could be disastrous and may affect the public also. It is a business in which the public are interested. There may be delay in the disposal of the application for reasons beyond the control of the permit holder. No doubt the Act has provided for the application being made, well in advance. But it does envisage the possibility of the renewal getting delayed and has provided for temporary permits in the interregnum. If the permit holder dies before the expiry of the permit, to our mind, there can be no doubt about the successor's right to press the renewal application, as he is then deemed to be

the permit holder himself. Suppose instead of dying on the last day of the period of the permit the permit holder dies the next day, is the successor to be denied the right to press the renewal application? Should the 'mischance' of the death coming a few hours later, extinguish the heritable right which the statute recognises in the permit? That is what follows from the appellant's contentions before us. But Actus Dei Nemini Facit Injurium — the act of God is prejudicial to no one.

Once we take the view that there is no abatement of the proceeding and the right to secure renewal does not lapse with the death of the permit holder, the objection to the recognition of the successor in possession of the vehicles as the applicant for renewal falls to the ground. We hold him to be in the same identical position as the deceased permit holder. To view otherwise will be to nullify the provisions of the Act which do recognise substantial rights in the permit in the person succeeding to the possession of the vehicles. To deny the successor audience at the hearing of the renewal application, will be to extinguish rights without a hearing. The cardinal rule of natural justice, Audi Alteram Partem will require the Authority to hear him on the application. As we hold that the successor if otherwise equal to fresh applicants for permits will be entitled to renewal under the provisions of the statute, the Authority administering the Act in the absence of statutory provisions or Rules in that regard would be under an implied obligation to adopt its procedure to meet the requirements of natural justice. Unless expressly ruled out, the Rule of Audi Alteram Partem could supplant gaps in statutory provisions governing Tribunals adjudging rights of parties. The omission of the Legislature will be supplied by the fundamental principles governing all adjudications whether judicial or quasi-judicial affecting the interests of individuals or their property.

In our view, if the endeavour is to administer the Act so as to avoid injustice and work the Act, reading the language of the enactment and the Rules thereunder when it can be done so without violence, there can be no insurmountable difficulty. While the Authorities have to proceed under the Act and in terms of the provisions, they cannot ignore the related laws. They may have no inherent jurisdiction like a Court. But in the proceedings before them when they have to abide by the law and formulated rules, in the absence of specific provisions, while not exceeding their powers they have to act as demanded by natural justice for the purpose of discharging the duties imposed on them by

the Act. In Capel v Child, (1832) 2 C. & J. 558 at p. 579, Bayley, B. said:

"..... is it not a common principle in every case which has in itself the character of a judicial proceeding, that the party against whom the judgment is to operate should have an opportunity of being heard?"

The order on the renewal application will vitally affect the successor to the possession of the vehicles. If the renewal is refused, the permits of the vehicles get extinguished. The successor to the possession of the vehicles will therefore be entitled to a hearing on the renewal application.

12. No doubt in the present case two kinds of right in respect of the permit which the deceased operator held, have to be considered. One is the right of renewal under Section 58. The other is the right under Section 61 to transfer of permit to the successor to the possession of the vehicles. Reading the two provisions, it is clear that the person who has succeeded to the possession of the vehicles, if otherwise qualified, secures the transfer of the permit and if the requisites of Section 58 are complied with he gets the permit renewed and effective for a further period. If necessary to effectuate the object of the Act, the common law power to enter judgment nunc pro tunc exercised to prevent prejudice to a suitor from the delay occasioned by the act of Court may be indented upon. It is a power not statutorily conferred on anybody but recognised as a necessary power to prevent injustice. Here further no one else has acquired any rights meanwhile.

13. The other objection that had been raised before our learned brother Srinivasan, J., that Balasubramaniam by himself cannot prosecute the application for renewal of the permits as there are other heirs, is without substance and has rightly been rejected. It may be, that there were a body of persons who became entitled to the assets of the deceased. But by mutual arrangement they had left the possession of the vehicles with Balasubramaniam. So even strictly speaking, he can be regarded in the circumstances as the person succeeding to the possession of the vehicles. He is certainly one of the heirs of the deceased and his co-heirs have given up their rights in his favour. We are not here concerned with the mutual rights inter se between the heirs and how they have adjusted their claims. Clearly the possession by Balasubramaniam is one that is provided for under Section 61. No other point arises for consideration.

14. We are satisfied that the contentions of the appellant that the renewal ordered is opposed to the provisions of

the Act and that the Tribunal had no jurisdiction in the matter are without substance. Even otherwise we could hesitate to interfere in the matter under the special jurisdiction, as the order of the Tribunal below is in perfect accord with justice. In the result the appeals fail and are dismissed with costs. Counsel fee Rs. 150/- in each.

AKJ/D.V.C.

Appeal dismissed.

AIR 1963 MADRAS 66 (V 56 C 11)

RAMAKRISHNAN, J.

Syed Mustafa Peeran Sahib and another, Petitioners v. State Wakf Board represented by its Secy., Madras, Respondent.

Writ Petn. No. 833 of 1964 and 1048 of 1965, D/- 6-1-1967.

(A) Muslim Wakf Act (29 of 1954), S. 6 — Scope — Not resorting to remedy under section will preclude party from raising same question in writ proceedings.

Where an aggrieved party fails to resort to the provisions of S. 6 of the Wakf Act for settling a dispute about the wakf character of the property, by filing a civil suit, he will be precluded from agitating the same question over again in writ proceedings: AIR 1963 SC 985, Ref: W. P. No. 1402 of 1963 (Mad) decided by Venkatadri, J., and W. A. 144 of 1966 (Mad), Rel. on: 1960 AC 260 & (1885) ILR 11 Cal 275, Disting. (Para 7)

(B) Muslim Wakf Act (29 of 1954), S. 3 (f) — Mutawalli — Definition of — It includes person who for time being manages wakf property.

The definition of 'mutavalli' in S. 3 (f) of the Act, will include a person who for the time being manages or administers the wakf property as such. That the person has not admitted the wakf nature of the properties will be a different question, which may lead to other steps to be taken under the Act. But that will not be a ground under which he can challenge the demand for contribution made against him. (Para 9)

Cases Referred: Chronological Paras

(1966) W. A. No. 144 of 1966 (Mad) 7

(1963) AIR 1963 SC 985 (V 50)=

1963-1 SCR 469, Zain Yar Jung

v. Director of Endowments

(1963) W. P. No. 1402 of 1963 (Mad) 7

(1960) 1960 AC 260=1959-3 All

ER 1, Pyx Granite Co., Ltd.

v. Ministry of Housing and Local

Govt.

(1885) ILR 11 Cal 275, Nandolal

Bose v. Corporation for the Town

of Calcutta

T. R. Srinivasan, for Petitioners; M. A. Sathar Sayeed, for Respondent.

ORDER:— In these two petitions the prayer is for the issue of a writ of Mandamus under Article 226 of the Constitution restraining the respondent, Secretary of the State Wakf Board, Madras, to forbear (?) from taking any action under the Muslim Wakf Act (Central Act 29 of 1954) in regard to the levy of contribution under the aforesaid Act for the properties mentioned in the schedule to the petitions.

2. The petitioners contend that in Naduhalli village, Dharmapuri Taluk, Salem, District there is a certain extent of land which has been entered in the village accounts as Kairathi personal inam. This property had been enjoyed by the petitioners and their predecessors-in-title for over 100 years as their personal property. The properties are not attached to any mosque or religious or charitable muslim institution, nor was there at any time a dedication in respect of them permanently or otherwise by any person. Nevertheless, the respondent Secretary of the Wakf Board, called upon the petitioners to render accounts on the footing that the properties are wakf properties and had been so registered under the Wakf Act and contributions are liable to be paid in respect of them to the Wakf Board. The petitioner in W. P. No. 833 of 1964 alleged that he was not aware of any enquiry by the Board before they declared the properties to be wakf properties. On the other hand, the petitioner in W. P. No. 1043 of 1965 stated that he had made certain representations in writing to the respondent Board pointing out that the properties were not wakf properties and that he was not the Mutavalli of any such wakf. Both the petitioners urged that the properties have never been in the nature of wakf and that the respondent Board, acted entirely without jurisdiction in proceeding to demand contribution under the Wakf Act from the petitioners.

3. In the counter-affidavit filed by the respondent, Secretary of the Wakf Board, it is alleged that there was a detailed enquiry as prescribed in Section 4 of the Wakf Act, conducted by the Assistant Commissioner of Wakfs, Salem. During that enquiry, the petitioner in W. P. 1048 of 1965 represented that the land was granted by Nawab Tippu Sultan and that it was to be used for feeding Fakirs at the time of Meela-de-nabi and Giarween Urs, that he and the other beneficiaries were doing so every year spending about Rs. 400 for the purpose, that they had divided the lands into 17 parts and were enjoying the same and that the annual income ordinarily from

the lands would be Rs. 5000. On the basis of the Assistant Commissioner's report the lands were included in the list of wakfs and the list was published in the Fort St. George Gazette on 29-4-1959. It is alleged in the counter-affidavit that if the petitioners were aggrieved by such a declaration in the notification, they should have agitated the matter by filing a suit within the time prescribed in Section 6 of the Central Wakf Act, and having failed to do so, it is not open to the them in these writ proceedings to contend that the properties are not wakf properties and that they were not liable to meet the demand for contribution.

4. Learned Counsel Sri T. R. Srinivasan appearing for the petitioners urged as a question of fact that the available data in the case will serve to estblish that the properties are not wakf properties at all, as defined in Section 3 (1) of the Act. According to the definition in Section 3 (1) wakf means the permanent dedication by a person professing Islam of any moveable or immoveable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes a wakf by user. Learned Counsel refers to the entries in the Inam settlement register for the lands in these cases wherein it is recorded that no one was able to give the particulars of the name of the grantor or the purposes for which the inam was granted. But, however, the Inam Commissioners were prepared to confer the inam of Kairathi. The word "Kairathi" according to the Wilson's Glossary, can have any one of the following meanings: "alms, charity, lands given as charitable endowments the term is more especially applicable to grants or alms given by or to Mohammadans. Kairathi Zamin means the lands given in charity".

5. It is clear that the word Kairathi used by the Inam Commissioner can also include lands given as charitable endowments to or by Mohammadans. The concerned file of the Wakf Board dealing with the enquiry under Section 4 of the Wakf Act, was produced before me by the learned advocate for the Wakf Board, at the time of the hearing of the writ petitions. The file shows that in 1955 both the village karnam as well as Syed Sahib Peeran the petitioner in W. P. 1048 of 1965 gave statements which clearly show (1) that according to the tradition, the lands were granted by Tippu Sultan to a number of Mohammadan families; but no documents were available with them (2) that the lands were enjoyed without any alienation by the aforesaid Mohameidan families for several years (3) that one of the conditions under which they held the lands was the feeding of Fakirs or Muslim Bairagis during certain Muslim festivals (4) that the amount they

spent on this feeding was about Rs. 400 as against the estimated income of about Rs. 5000. These particulars elicited at the time of the enquiry will certainly be consistent with the properties being wakf properties. No doubt the persons in enjoyment were not able to produce the deed of dedication but they knew of a clear tradition that the grantor was Tippu Sultan, that the properties never left the hands of the grantees and their descendants at any time, and that one of the objects which they had consistently followed was the feeding of a certain number of Muslim Bairagis during the time of certain muslim festivals. That they were prepared to spend only a small proportion of the total income will not have any significance in the absence of the express terms of the grant, because by process of negligence they might have spent less on feeding Bairagis with the passage of time than what they were expected to spend originally. So, no argument can be pressed, to infer the nature of the grant from the fact that at the present moment the enjoyers are spending only a small proportion out of the total income for the performance of a charity for which the properties might have been originally granted. Therefore, one cannot hold on *prima facie* grounds in the face of the data made available at the enquiry by the Wakf Board, that the properties on these cases, are so totally unconnected with an endorsement in the nature of a wakf, that the wakf Board acted entirely without jurisdiction in the proceeding to treat them as wakf properties, and including them in the list of wakfs published in the Gazette under the provisions of the Act.

6. The further argument stressed by the learned Counsel for the petitioner is this. He refers to Section 6 (1) of the Act, which gives a right to a party, where a dispute arises, whether a particular property is a wakf property or not, to file a suit in a civil Court of competent jurisdiction. The section also states that decision of the civil court in such a matter shall be final. The proviso to this section gives one year time limit for filing such a suit from the date of the publication of the list of wakfs under Section 5 (2). Section 6 (4) says that the list of wakfs published under sub-section (2) of Section 5 shall, unless it is modified in pursuance of a decision of the Civil Court under sub-section (1) be final and conclusive. When the respondent relied upon these provisions of the Wakf Act, for negativing the right of the petitioners to obtain relief in the present writ proceedings, the learned Counsel for the petitioner urged that this being a case of there being no wakf at all, the remedy under Article 226 of the Constitution, will be available

to the petitioners. But as mentioned above on the data made available in the case it cannot be held conclusively that there is no *prima facie* or arguable case, about the wakf nature of the properties. On the other hand, there is considerable evidence including the statement of the petitioner in W. P. No. 1048 of 1965 as well as the village karnam which would support the view that the properties are wakf properties, and that out of the income from those properties only a small amount of Rs. 400/- was spent on feeding of Fakirs at the time of certain muslim festivals.

7. The decision cited by the petitioner Zain Yar Jung v. Director of Endowments, AIR 1963 SC 985 lays stress on the trust character of a wakf. But as mentioned already, it cannot be held on the data made available in this case that such a test must totally fail in this case. Learned Counsel for the respondent refers to a series of decisions of this Court which have held that where an aggrieved party fails to resort to the provisions of Section 6 of the Wakf Act, for settling a dispute about the wakf character of the property, by filing a civil suit, he will be precluded from agitating the same question over again in writ proceedings. It is sufficient to refer to a recent decision of Venkatadri, J., in W. P. No. 1402 of 1963 (Mad) and a decision of a Bench of this Court to (which I was a party) in W. A. No. 144 of 1966 (Mad).

8. Two other authorities referred to by the learned Counsel for the petitioners Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government, 1960 AC 260 and Nundolal Bose v. Corporation for the Town of Calcutta, (1885) ILR 11 Cal 275 have no application to the circumstances of this case. Thus in 1960 AC 260 under the Town and Country Planning Act of 1947 in England there was a provision enabling a person who wants to carry out certain operations on the land to apply to the local planning authority to determine the question. There was a provision also for attaching finality to the decision of a minister in appeal, against the decision of the local planning authority. It was held that these provisions would not whittle down the subjects' rights to have recourse to the ordinary Court. But in the present case in Section 6, the statute specifically gives the remedy to the aggrieved party to contest the decision of the Wakf Board in the Civil Court, and also provides that in the absence of such a decision the list of Wakfs published under the Act will become final. This is a case, therefore, where the statute itself provides for the appropriate remedy for relief by resort to the ordinary Courts of the land, within a specific period of limitation prescribed for that purpose, and also provides

that in the event of failure to resort to these steps, the decision of the Wakf Board shall be final. I am of the opinion therefore that the respondent's contention that the petitioners having failed to avail themselves of the remedies under the Act within the time allowed under the statute cannot be permitted to agitate the same issue over again in writ proceedings has to be accepted.

9. There was a final argument of the learned Counsel for the petitioners, that since the petitioners do not satisfy the definition of Mutavalli under the Act they cannot be compelled to pay contribution. But this overlooks the fact that the definition of 'mutavalli' in Section 3 (f) of the Act, will include a person who for the time being manages or administers wakf property as such. The petitioners are admittedly managing the wakf properties and performing the service of feeding poor fakirs. That they have not admitted the wakf nature of the properties will be a different question, which may lead to other steps to be taken under the Act. But that will not be a ground under which they can challenge the demand for contribution now made against them. The writ petitions are dismissed with costs. Advocate's fee Rs. 150 one set.

V.G.W/D.V.C.

Petitions dismissed.

AIR 1969 MADRAS 69 (V 56 C 12)
VEERASWAMI AND RAMAPRASADA
RAO, JJ.

K. Mahesh and others, Applicants v.
Commissioner of Income-tax, Madras,
Respondent.

Tax Case Nos. 216 to 219, 222 and 223
of 1965, (Ref. 110 to 113, 116 and 117
of 1965), D/- 27-9-1967.

Income-tax Act (1961), Ss. 57 (iii) —
Income-tax Act (1922), S. 10 (2) (xv) —
Scope and applicability — Wealth-tax
paid on assessee's share stock holding is
not an admissible deduction under S. 57
(iii). (Wealth Tax Act (1957), Ss. 3 & 4).

For an expenditure to come within the
ambit of S. 57 (iii) of the Income-tax Act,
the expenditure should be laid out or
incurred wholly and exclusively and
should be for the purpose of making or
earning such income. It should be inci-
pient with in the sense it must be inci-
pient to the making or earning of the
income. There must be a nexus between
the character of the expenditure and the
making of income. (Para 2)

Since the Wealth Tax paid is not for
the purpose of making or earning in-
come and the assessee paid the tax as

owner and on the value of the totality
of his assets, it is not an admissible de-
duction. The production of income from
the assets appears to be wholly uncon-
nected with the payment of Wealth Tax.

(Paras 2 and 3)

Payment of Wealth Tax is not inciden-
tal to the making of income. The fact
that the payment is with a view to
preserve the assets without which there
can be no earning of income, does not
establish the nexus required for the
expenditure by way of Wealth Tax to be
a permissible deduction. (Para 6)

Section 57 (iii) must be construed in
the same way as the provision under
Sec. 10 (2) (xv) of the Act of 1922 in
spite of the fact that the concluding
words of S. 10 (2) (xv) of the Act of
1922 are wider in their scope. The ques-
tion of deductibility of an expenditure
depends on the scope of the words "pur-
pose of" which provides the link between
the expenditure and the carrying on of
business in Section 10 (2) (xv) or the
making or earning income in S. 57 (iii).
(1963) 50 ITR 809 (Mad) & AIR 1966 SC
1250, Rel. on. AIR 1930 PC 209 & AIR
1951 SC 278 & (1962) 1962-45 ITR 61
(Mad) & (1964) 41 Tax Cas 450, Dist.

(Para 4)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 1250 (V 53)= 1966-60 ITR 277, Travancore Tita- nium Products Ltd. v. Commr. of Income-tax, Kerala	3
(1964) 41 Tax Cas 450=108 SJ 117, Harrude (Buenos Aires) Ltd. v. Taylor Gooby	5
(1963) 1963-50 ITR 809=ILR (1964) Mad 93, Kumbakonam Electric Supply Corporation Ltd. v. Commr. of Income-tax, Madras	1, 3
(1962) 1962-45 ITR 61=ILR (1962) Mad 549, Commr. of Income-tax, Madras v. Jagannatha Govindas	5
(1951) AIR 1951 SC 278 (V 38)= 1951-20 ITR 1, Eastern Invest- ments Ltd. v. Commr. of Income Tax, West Bengal	5
(1930) AIR 1930 PC 209 (V 17)= 5 ITC 1, Raja Prohbat Chandra Bama v. Commr. of Income-tax, Bengal	5

S. Swaminathan and K. Ramagopal,
for Applicants; V. Balasubramaniam and
J. Jayaraman, for Respondent.

VEERASWAMI, J.:— These tax cases
raise a common question as to whether
on the facts and in the circumstances,
the claim for deduction of Wealth Tax
paid by the assessee as an admissible
expenditure is lawful. The Revenue as
well as the tribunal negatived the claim
and the references have come before us
under Section 66 (1) of the Income-tax
Act 1922 or under Section 256 (1) of the
Income-tax Act 1961. Each of the assess-

ees as an individual received dividend income and interest in the relative previous year and paid Wealth Tax in a certain sum on his holding of stock. The sum paid as Wealth Tax was sought to be deducted from the income that comprised of dividends and interest as an allowable expenditure under Section 57 (iii) of the Income-tax Act 1951, but unsuccessfully before the Revenue.

The Tribunal relied on Kumbakonam Electric Supply Corporation Ltd. v. Commissioner of Income-tax Madras, (1963) 50 ITR 809 (Mad) and dismissed the assessee's appeal in each case. That was of course a case under Section 10 (2) (xv). In which a Division Bench of this Court was of opinion that Wealth Tax paid on the net wealth of the company there was not an allowable expenditure in computing its taxable income.

2. The assessee in each case as an individual was charged to income-tax under the head "other sources". In computing his net income chargeable to tax, he will be entitled to allowance of any expenditure not being in the nature of capital expenditure, laid out or expended wholly and exclusively for the purpose of making or earning such income. The point is whether the Wealth Tax paid by each of the assessees on the net value of the stock held by him is such expenditure. Though the question is by no means capable of an easy answer, we have come to the conclusion that the Wealth Tax paid is not an expenditure of that character. In order an expenditure to come within the ambit of Section 57 (iii) it must satisfy the tests which obviously suggest themselves from the language employed by that provision. The expenditure should be laid out or incurred wholly and exclusively and should be for the purpose of making or earning such income. It should be connected with in the sense it must be incidental to the making or earning of the income. In other words, there must be a nexus between the character of the expenditure and the making or earning of income. If the sum laid out is on a capacity different from that in making or earning income, that will clearly be outside the scope of Section 57 (iii).

3. In the present cases, we fail to see how the wealth tax paid is for the purpose of making or earning income. The assessee paid wealth Tax as Owner and on the value of the totality of his assets. That has nothing to do with his making or earning income from such assets. The production of income from the assets appears to be wholly unconnected with the payment of wealth Tax. This view of ours, as we think, receives support from a parity of reasoning in (1963) 50 ITR 809 (Mad) and Travancore Titanium Products Ltd v. Commissioner of Income-

Tax Kerala, (1966) 60 ITR 277=(AIR 1966 SC 1250). These cases, no doubt, are related to Section 10 (2) (xv) but what fell for decision in them was the scope of the words "any expenditure laid out or expended wholly and exclusively for the purpose of such business, profession or vocation". A Division Bench of this Court in the first case and the Supreme Court in the second, have expressed the view that Wealth Tax paid by an assessee was not an allowable expenditure in computing the taxable income of that assessee under Section 10 (2) (xv). The Supreme Court in the second case pointed out—

"In determining whether an amount expended by the assessee is deductible under Section 10 (2) (xv) of the Indian Income-tax Act, the nature of the expenditure or outgoing must be adjudged in the light of accepted commercial practice and trading principles. The expenditure must be incidental to the business and must be necessitated or justified by commercial expediency. It must be directly and intimately connected with the business and must be laid out by the taxpayer in his character as a trader. To be a permissible deduction, there must be a direct and intimate connection between the expenditure and the business i.e., between the expenditure, and the character of the assessee as a trader, and not as owner of assets, even if they are assets of the business".

4. The Supreme Court repelled an argument on behalf of the assessee in that case that for the purpose of its business, it held assets and by the use of those assets profits were earned, and, therefore, tax paid in respect of those assets was expenditure laid out for the purpose of the business. The deduction sought for is disallowed because the nexus required was not established and the Wealth Tax paid by the assessee there was as an owner on its net worth and not as a trader for the purpose of carrying on its business. It is true that the concluding words of Section 10 (2) (xv) are wider in their scope than those of Section 57 (iii). But for purposes of answering the reference before us, that can make no difference; because in the case of both the provisions, the question of deductibility of an expenditure depends on the scope of the words "purpose of" which provide the link between the expenditure and the carrying on of business in the one case or making or earning income in the other.

5. But Mr. Swaminathan, for the assessee, strenuously pressed before us Raja Prohhat Chandra Barua v. Commissioner of Income-tax Bengal, 5 ITC 1=(AIR 1930 PC 209), Eastern Investment Ltd. v. Commissioner of Income-tax West Bengal, (1951) 20 ITR 1=(AIR 1951)

SC 278), Commissioner of Income-tax, Madras v. Jagannath Govindas, (1962) 45 ITR 61 (Mad) and Harrode (Buenos Aires) Ltd. v. Taylor Gooby, (1964) 41 Tax Cas 450. He argues that preservation of assets is incidental to the purpose of making or earning income, that these are cases in which the assets themselves automatically produced income and that, therefore, payment of Wealth Tax was virtually a condition for making or earning income, because default in payment of such tax will endanger the ownership of the asset which in its turn will destroy the very source of income. The argument thus presented at first sight looks attractive. But on further scrutiny we are of opinion that it cannot be accepted. We do not think that the cases relied on by him support his proposition.

The Privy Council in 5 ITC 1=(AIR 1930 PC 209) held that in bringing to tax income derived from lands in permanent settled estates, allowance should be made for the jama paid by the land-holder. The income was brought to charge under the head "other sources" and dealing with the eligibility of the jama to deduction, Lord Russell of Killowen, who delivered the judgment for the Board, expressed the view—

"Their Lordships were unable to ascertain upon what footing the appellant had been assessed in respect of the income derived from his zamindari, i.e., whether on the gross income or after some allowance had been made in respect of the jama assessed and paid upon the lands. Their Lordships are of opinion that, in assessing the appellant to income-tax in respect of the income derived from his zamindari, his income, profits and gains from that source should be computed after making proper allowance in respect of the jama assessed and paid".

A perusal of the judgment of the Privy Council shows that in taking that view it was persuaded to think that payment of the jama was a condition of the land-holder holding the estate. Apart from that, it seems to us that the nature and incidence of the jama have no relation to those of Wealth Tax under the provisions of the Wealth Tax Act. Further, the land-holder paid the jama in that capacity and also was charged to tax on income received by him from the estate which he held as a landholder.

1962-45 ITR 61 (Mad) allowed deduction of municipal tax paid by the assessee on his talkie cinema equipment including machinery and furniture, in computing his chargeable income consisting of the rents received by him as a lessor of the equipment. It may be seen that the municipal tax was paid by the assessee not as owner per se of the cinema

equipment. The nature of such tax is that its incidence is on the property itself and is collected from the owner or occupier thereof, and it is not comparable to Wealth Tax in its character and incidence. While we think that Mr. Swaminathan is justified in relying on this case, we are at the same time not satisfied that the principle of the decision can properly govern the references before us.

1951-20 ITR 1=(AIR 1951 SC 278) is even less helpful to the assessee. There the interest sought to be deducted in the computation of chargeable income of the investing company was paid on certain debentures which were issued by it in lieu of the value of certain shares which it had purchased. The Supreme Court in that case considered that the payment of interest was an expenditure within the ambit of Section 12 (2) and was a permissible deduction. The investing company earned income in that capacity and also paid interest under the debenture in the same capacity, it was apparently for this reason a nexus was found between the expenditure and its purpose, namely, making or earning income within the meaning of Section 12 (2).

In (1964) 41 Tax Cas 450 the English Court of Appeal held that a foreign Tax charged annually on percentage of capital was a permissible deduction as the Tax was incurred wholly and exclusively for the purpose of the assessee's trade. The basis for this view appears to be that payment of such tax was a condition precedent to the carrying on of the assessee's business in Argentine.

6. As we mentioned earlier, we find it difficult to hold that the Wealth Tax was paid by each of the assessees in these cases as incidental to the making or earning of income. In a sense it may be that in order to preserve the total net assets, the assessee has to pay Wealth Tax and that without such assets there can be no question of making or earning the income. But these facts do not establish the nexus required for the expenditure by way of Wealth Tax to be a permissible deduction. The connection, if any, of the expenditure by way of Wealth Tax with the assessee's making or earning the income appears to be too remote. The expenditure in order to be a permissible deduction, should be directly connected with the purpose of making or earning of income, for, otherwise it cannot be said that the expenditure is for the purpose of making or earning income.

7. Mr. Swaminathan appealed to us that if the expenditure tax paid is not allowed to be deducted, the result would be that having regard to the higher slabs of the income-tax rate which the assessee will be subjected to, the assets would

prove more a liability. That may be so; not that we express any opinion on that. That is not, however, a matter in respect of which we can possibly give any relief. That is a question of policy which should be left to the Legislature.

8. The question referred to us is answered against the assessee. There will be no order as to costs.

TVN/D.V.C.

Reference answered
accordingly.

AIR 1969 MADRAS 72 (V 56 C 13)

RAMAMURTI, J.

Arumuga Udayar and others, Appellants v. Valliammal and others, Respondents.

Second Appeal No. 1622 of 1962, D/-20-6-1967, against decree of Sub-Court, Cuddalore, in A. S. No. 206 of 1961.

(A) Hindu Succession Act (1956), Preamble — Hindu Adoptions and Maintenance Act (1956), Preamble — Schemes of Acts and their relation with each other.

The main scheme of the Hindu Succession Act, 1956 is to establish complete equality between male and female with regard to property rights and the rights of the female were declared absolute, completely abolishing all notions of a limited estate. In many respects, this Act and the Hindu Adoptions and Maintenance Act, 1956 are inter-related and complementary; in particular, the scheme under the latter Act is to project into the law of adoption the result and consequences of the introduction of the conception of absolute estate for males and females alike and the abrogation of the conception of the limited estate. These two Acts have introduced far-reaching vital changes sweeping away and cutting at the root of the old traditional and conservative notions and concepts of customary Hindu law. (Para 5)

Under the Hindu Adoptions and Maintenance Act, 1956 adoption is now a purely secular institution and has lost all its religious significance. It is because of this vital change that the Act now provides that a woman can make an adoption, whether married or unmarried, and the child adopted may be a boy or girl. The necessary consequence is, the discrimination between a male and a female based upon religious considerations in the law of adoption has to disappear under the Act. (Para 7)

(B) Hindu Law — Adoption — Widow's right to adopt.

Under customary Hindu Law, in the case of adoption by a widow, she could adopt only to her deceased husband but never to herself, nor could she adopt to

any other person. A mother cannot adopt to her son, nor a sister to her brother. An adoption by a woman of a son to herself is invalid and it confers no legal rights upon the person adopted. When a widow makes an adoption, she acts merely as a delegate or representative of her husband that is to say, she is only an instrument through whom the husband is supposed to act. The substitution of a son of the deceased for spiritual reasons is the essence of adoption and the consequent devolution of property is a mere accessory to it. (Para 7)

In Mithila a widow cannot adopt at all even if she has the express authority of her husband. In Bengal, Benares and Madras, a widow may adopt under an authority from her husband in that behalf. In Madras, a widow may also adopt without her husband's authority, provided she had obtained the consent of the husband's sapindas, if the husband had separated at the time of his death, or, with the consent of his undivided coparceners, if the husband was joint. In Bombay, a widow may adopt even without any authority. AIR 1933 PC 155 & AIR 1947 PC 124 & AIR 1963 SC 185 & Mullah's Hindu Law, 13th Edn. Pages 479 and 480, Secs. 449 and 452, Ref.

(C) Hindu Law — Adoption — Capacity to give and take. (Para 8)

The purpose of adoption is to ensure spiritual services for a man after his death by the offering of oblations and rice libations of water to the manes periodically and women having no spiritual needs to be satisfied, a woman was not allowed to adopt to herself. That is the reason why Hindu law did not recognise a power by an unmarried woman to take a child in adoption. For the same reason, since according to Hindu law, women were ineligible to cater to the spiritual requirements of person, the adoption of a daughter was not permitted. (Para 7)

(D) Civil P. C. (1908), Preamble — Interpretation of Statutes — Codifying statutes — Rule of construction.

In the case of codifying statutes, it is a settled rule of construction that in respect of matters specifically dealt with by the statute, earlier law cannot be invoked for the purpose of adding to it something which is not there. The true meaning of the provisions of the Act ought not to be influenced by considerations derived from the previous state of law. 1891 AC 107 & (1896) ILR 23 Cal 563 (PC), Rel. on. (Para 9)

(E) Hindu Adoptions and Maintenance Act (1956), Ss. 4, 5, 7, 8, 11, 12, 14 — Effect of adoption — Adoption by widow — Adopted boy does not become adopted son of deceased husband conferring upon him rights of inheritance to estate

of deceased husband. AIR 1966 Bom 174 & AIR 1967 All 148, Dissent from.

Reading Ss. 4 and 5 of the The Hindu Adoptions and Maintenance Act, 1956, together it is clear that there is no field in which any portion of customary law could operate with regard to adoption as unabrogated Hindu law. The inference is clear that the basic and fundamental assumption under the Act is that any person, a male or female, when he or she adopts, adopts to himself or herself only and cannot adopt to another. The object underlying Sec. 7 is to completely abrogate the customary Hindu law under which male Hindu can foist the relationship of an adoptive mother upon his wife without her consent or even despite her objections. After the Act, if the requisite consent of the wife is obtained, the wife is regarded as the adoptive mother because the adoption so made by a male Hindu is not only by himself but by his wife as well. In the case of a Hindu female, there is so such provision for her taking an adoption during the husband's life time even if he consents and there is no provision corresponding to S. 14 for affiliation of the adopted child to the deceased husband.

Before the Act came into force, the husband during his lifetime, could have completely prohibited the widow from making an adoption. In the case of plurality of widows, he could have conferred the power upon any one of the widows even preferring a junior widow. Under the customary law, if there is a violation of any one of these conditions, the adoption made by the widow would be void. But under the Act, the capacity of the widow to adopt is absolute and unqualified having no relation to the wishes of her deceased husband. His volitions in the matter which he might have manifested during his lifetime imposing a prohibition or a restriction in the matter of an adoption would have no controlling force on his widow, after his death. The main scheme of Ch. II is, that the affiliation cannot be forced upon the other spouse unless the adoption takes place as a result of mutual agreement between both the spouses.

(Para 10)

It is also important to notice that all the 'deeming' provisions relating to affiliation in Section 14 are only in relation to living persons and not to persons who were dead at the time of the adoption. If in the case of a deceased wife there is no such affiliation the position is a fortiori in the case of a deceased father. S. 8 which confers the capacity upon a female Hindu to take a child in adoption is general in terms and a spinster, a divorced woman, a widow, a wife of an apostate or an ascetic are all clubbed together without any distinction. Reading Ss. 8 and 14

together the widow has no capacity to make an adoption to the deceased husband and such an adoption will not therefore be in accordance with the provisions contained in Ch. II within the meaning of S. 5. (Para 11)

A reading of S. 11 also tends to the same inference. Under the customary Hindu law, if a Hindu dies leaving a plurality of widows and if authority is given by the husband to one of them only, she alone can adopt and she can do so without even consulting the other widows. If the authority is given to the widows severally, the preferential right is to the senior widow and the junior widow will have no right to adopt unless the senior refuses to do so. Again a widow cannot adopt when a co-widow has validly adopted and the adopted son is living.

If the theory of affiliation to the deceased spouse is accepted, it would cut at the root of Section 8, which confers unqualified power upon all the widows irrespective of what any one of the widows may do in the matter and also would render many of the important provisions of the Act useless and unworkable. Apart from the four specified classes of cases dealt with under Sec. 14 there is no further affiliation by fiction. In the face of Secs. 4 and 5 it is impossible to read into the Act any such power of affiliation by necessary implication. Further, the rule of necessary implication cannot be invoked when it would be inconsistent with what is expressly declared in the statute itself, i.e., Ss. 7, 8 and 14. (Paras 9, 12)

As regards S. 12, it does not state that all the ties of the child in the family of its birth are severed and they are replaced in the adoptive family. The replacement is not all ties lost in the natural family, but it is only those created by the adoption in the adoptive family. Section 12 by itself is not decisive and does not lead to the necessary conclusion that there is an affiliation to the deceased spouse. Under the Act an adoption by a male and a female are placed on the same footing and there is no scope for invoking the doctrine that the widow makes the adoption as the surviving half of the husband and on his representative. Section 12 states that the adopted child shall be deemed to be the child of his "or" her adoptive father. The word used is "or" and not "and". Further the relationships are replaced only with effect from the date of the adoption and not retrospectively. If on an interpretation of Ss. 5, 8, 11 and 14, the tie of an adoptive father based upon the theory of affiliation is not created, Sec. 12 does not improve the position. Moreover, the theory of vesting and divesting has no place after the Act as seen from proviso (c) to S. 12.

If the main affiliation by fiction to the husband does not exist, the other collateral relationships do not arise at all. AIR 1966 Bom 174 & AIR 1967 All 148, Dissent from, AIR 1956 Mad 323 (FB) & Mullah's Hindu Law, 13th Edn. page 483, Sec. 455, Ref. (Paras 13, 15)

Cases Referred: Chronological Paras (1967) AIR 1967 All 148 (V 54)=

1966 All LJ 891, Subhash Missir v. Thagai Missir 4, 16

(1966) AIR 1966 Bom 174 (V 53)= 67 Bom LR 864, Ankush v. Janabai

(1963) AIR 1963 SC 185 (V 50)= 1963 2 SCR 440, Chandrasekara v. Kulandaivelu

(1956) AIR 1956 Mad 323 (V 43)= 1956-1 Mad LJ 441 (FB), Sivagami Achi v. Somasundaram Chettiar

(1947) AIR 1947 PC 124 (V 34)= ILR (1948) Mad 362, China Rama-subbaya v. Chenchuramayya

(1933) AIR 1933 PC 155 (V 20)= ILR 12 Pat 642, Amarendra Mansingh v. Sanatan Singh

(1896) ILR 23 Cal 563=23 Ind App 18 (PC), Narendranath Sircar v. Kamal Basini Dasi

(1891) 1891 AC 107=60 LJQB 145, Bank of England v. Vagliano Brothers

M. S. Venkatarama Iyer and V. Krishnan, for Appellant; V. C. Veeraraghavan, for Respondent

plaintiffs have no title to sue and that as a result of the adoption minor Ganapathi became the nearer heir to the estate of Nallathambi. The Sub-Judge found that the adoption had been made out. But (on the question of law) he differed from the trial Court and decreed the suit holding that the son adopted by a widow would be an heir only to the properties of the widow and not to the estate of her deceased husband. Hence the present second appeal by the defeated defendants.

4. The widow was not in actual possession of the properties of her husband she having alienated the same long before the Hindu Succession Act came into force and the reversioners of Nallathambi would be entitled to recover possession of the properties from the alienees on the death of the widow Balayee. This right of the reversioners would be unavailing if the adopted son is to be regarded as an heir not only to the widow, Balayee, but also to her husband Nallathambi. My attention was drawn to a recent Bench decision of the Bombay High Court reported in Ankush v. Janabai, AIR 1966 Bom 174 in which it was held that as a result of an adoption by either spouses, the adopted son becomes the child of both the spouses and that this result necessarily followed from the combined operation of the customary Hindu law and the provisions of the Hindu Adoptions and Maintenance Act. Central Act LXXVIII of 1956, hereinafter referred to as the Act. In a recent decision reported in Subhash Missir v. Thagai Missir, AIR 1967 All 148, a similar view has been taken. In the Bombay decision the main reasoning is that under Section 12 and sub-section (6) of Section 11 of the Act, there is a complete severance of all ties of the child given on adoption in the family of his or her birth and correspondingly "these very ties of the child became automatically replaced in the adoptive family". The effect of the adoption is to completely transfer the child from the family of its birth to the family of its adoption. The several deeming provisions in Section 14 of the Act tend to the same view. Section 5 and Section 8 of the Act do not warrant the view that after the commencement of the Act, the widow can make an adoption only to herself and it was not competent for her or permissible for any widow to take any child in adoption to her deceased husband. The acceptance of the rival view that the deceased husband cannot be regarded as the adoptive father would result in absurd results that while the adopted son would lose all his ties in the family of his birth, he would not become related to the deceased husband or the husband's collateral relations and there is nothing in the Act to

2. One Balayee Ammal succeeded to the properties of her husband, one Nallathambi. She made several alienations and Nallathambi's sisters (plaintiffs in the present litigation) instituted proceedings in 1951 and obtained a declaration that the alienations would not be binding on the reversioners after the lifetime of Balayee. She died on 17-1-1960 and Nallathambi's sisters have filed the present suit for recovery of possession of the properties from the alienees on the basis of the declaration secured in the prior litigation aforesaid.

3. Balayee appears to have adopted her younger sister's son, minor Ganapathi on 31-12-1959 and on the same day, she had also executed a registered deed of adoption acknowledging the said adoption. The contesting defendants, i.e., the alienees and their representatives, resisted the suit on the ground that the

Indicate that the provisions in the Act were intended to abrogate the position which existed under the customary Hindu law as regards the new ties of the adoptive son in the adoptive family in consequence of his adoption by a widow.

5. Before proceeding further some preliminary observations require to be made concerning the background and the setting in which this Act was enacted and the rules of statutory construction to be observed in construing the provisions of the Act. In the scheme of codification of vital aspects of Hindu law, the first is, the Hindu Marriage Act 1955 on the topic of Marriage and Divorce. Next came the Hindu Succession Act (Act XXX of 1956) which has codified the Hindu Law relating to intestate succession. The main scheme of this Act, Act XXX of 1956, is to establish complete equality between male and female with regard to property rights and the rights of the female were declared absolute, completely abolishing all notions of a limited estate. Next came in Act XXXII of 1956 concerning the topic of Minority and Guardianship. Last in the series is the Hindu Adoptions and Maintenance Act, Act LXXVIII of 1956. In many respects the Hindu Succession Act, Act XXX of 1956 and the Hindu Adoptions and Maintenance Act, Act LXXVIII of 1956 are inter-related and complementary; in particular, the scheme under the latter Act is to project into the law of adoption the result and consequences of the introduction of the conception of absolute estates for males and females alike and the abrogation of the conception of limited estate. These two Acts have introduced far-reaching vital changes sweeping away and cutting at the root of the old traditional and conservative notions and concepts of customary Hindu Law.

6. The whole of Hindu Law of adoption, its evolution and the case law is evolved from a few texts and the metaphor. The metaphor is that of Saunaka, that the boy to be adopted must bear "the reflection of a son". The texts are: Manu, Vasishta, Budhayana, Saunaka and Sakala (Mayne's Hindu Law, 11th Edn. 1950 page 188). In giving full acceptance to the fundamental conception of this fiction of the reflection and image of a real son in the son adopted, several aspects of Hindu Law had emerged. The wealth of case law which has given (?) round this fiction reveals in an amusing manner that this fiction when pressed into its logical conclusion had led to fantastic and absurd results and on certain aspects of Hindu law this fiction had even degenerated into a farce.

7. The customary law in several parts of India on the topics of adoption was not uniform, particularly with regard to the powers of a Hindu widow to take a

boy in adoption. There were also several restrictions and prohibitions like caste, the sex of the child to be adopted etc. etc. The one important aspect which is crucial for the present discussion is that under the customary Hindu Law, in the case of adoption by a widow, she could adopt only to her deceased husband but never to herself, nor could she adopt to any other person. A mother cannot adopt to her son, nor a sister to her brother. An adoption by a woman of a son to herself is invalid and it confers no legal rights upon the person adopted (Vide Mullah's Hindu Law, 13th Edn. p. 479, Section 449). Intimately and inseparably connected with this conception that the adoption by the widow could only be to her husband, is the religious aspect which pervaded the doctrine of adoption and the wealth of case law. When a widow makes an adoption, she acts merely as a delegate or representative of her husband, that is to say, she is only an instrument through whom the husband is supposed to act. The substitution of a son of the deceased for spiritual reasons is the essence of adoption and the consequent devolution of property is a mere accessory to it: Vide Amarendra Mansingh v. Sanatan Singh, AIR 1933 PC 155 at p. 158, China Rama-subbayya v. Chenchuramayya, AIR 1947 PC 124 and Chandrasekara v. Kulandaivelu, AIR 1963 SC 185 at p. 193. The inevitable conflict between the spiritual and the religious aspect of an adoption as against the secular and temporary considerations, resulted in any amount of difficulties in demarcating the line as to when the religious or spiritual background should receive full recognition as against the secular aspect. The fiction of projecting back the existence of an adopted son (to an earlier date) on the date of the death of the husband, in its turn created complications on the question of vesting and divesting of estates. But the foundation of the basic conception always remained the same under customary Hindu Law i.e., the widow could adopt only to her husband, never to herself and the religious and spiritual aspect was its predominant feature. The Act, has completely swept away all these basic notions. Under the Act adoption is now a purely secular institution and has lost all its religious significance. It is because of this vital change that the Act now provides that a woman can make an adoption, whether married or unmarried, and the child adopted may be a boy or a girl. The purpose of adoption is to ensure spiritual services for a man after his death by the offering of oblations and rice libations of water to the manes periodically and women having no spiritual needs to be satisfied, a woman was not allow-

ed to adopt to herself. That is the reason why Hindu Law did not recognise a power by an unmarried woman to take a child in adoption. For the same reason, since according to Hindu Law, women were ineligible to cater to the spiritual requirements of a person, the adoption of a daughter was not permitted as the religious considerations in the law of adoption have now been abolished and the institution of adoption has been made wholly secular. The necessary consequence is, the discrimination between a male and a female based upon religious considerations in the law of adoption has to disappear and has been rightly abolished under the Act.

8. The Act has considerably simplified the law on the subject furnishing a uniform code for the whole of India. The law as to adoption by a widow is different in different States. In Mithila a widow cannot adopt at all, even if she has the express authority of her husband. In Bengal, Benares and Madras, a widow may adopt under an authority from her husband in that behalf. In Madras, a widow may also adopt without her husband's authority, provided she had obtained the consent of the husband's sapindas, if the husband had separated at the time of his death, or, with the consent of his undivided coparceners, if the husband was joint. In Bombay, a widow may adopt even without any authority. (Vide for the statements of law, Mullah's Hindu Law, 13th Edn. page 480 Section 452). The difference of opinion between the various schools of Hindu Law in different parts of India arose from varying and different interpretations put upon the following text of Vasistha "nor let a woman give or accept a son unless with the assent of her lord". The mass of law case law with the subtle refinement, that had crept into the law relating to the capacity of a widow to adopt have been totally abolished or superseded under the Act which now empowers a woman to adopt at any time, either a boy or a girl, without the obligation of obtaining the consent of any person thereto. The most vital and important change that has been brought about under the Act is to confer equality in a woman in the matter of adoption and to confer upon her a power to adopt, whether married or unmarried, in her own right and not as a representative of her husband and to adopt a boy or a girl without any restriction as to caste. In fact, she can even adopt a boy though her deceased husband had expressly prohibited her from taking a child in adoption.

9. In interpreting the provisions of this Act, which as observed above is a revolutionary piece of social legislation based solely upon secular considerations

of the institution of adoption, Courts cannot approach the problem with any preconceived notions based upon customary Hindu Law. It had to be borne in mind that this Act is not introducing an amendment of an existing statutory law to remedy a particular evil, defect or mischief in which case, it may be presumed that the legislature did not intend to make any substantial change in the existing law beyond what it declared (in the amending statute) either in express terms or by clear and necessary implications. This Act being a comprehensive uniform Code on the entire topic of adoption, governing the whole of India, the pre-existing law cannot afford a safe guidance in the matter of proper and correct interpretation of the provisions of the Act. Reference may be made to the oft-quoted observations of Lord Macnaghten in *Bank of England v. Vagliano Brothers*, 1891 AC 107—

"The proper course is, in the first instance, to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions".

In the case of codifying statutes, it is a settled rule of construction that in respect of matters specifically dealt with by the statute, earlier law cannot be invoked for the purpose of adding to it something which is not there. The true meaning of the provisions of the Act ought not to be influenced by considerations derived from the previous state of law. It is sufficient to refer to the following headnotes *Narendranath Sircar v. Kamal Basini Das*, (1896) ILR 23 Cal 563 (PC)—

"The object of codifying a particular branch of law should thenceforth be ascertained by interpreting the language used in that enactment. Instead of, as before, searching in the authorities to discover what may be the law, as laid down in prior decisions. The language

of such an enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before".

The provisions of the Act may now be examined to ascertain whether there is anything in the Act, express or by necessary implication, to warrant the view that a boy adopted by a widow should be deemed to be an adopted son of the deceased husband conferring upon the boy so adopted, rights of inheritance to the estate of the deceased husband. Section 4 declares the overriding effect of the Act, that save as expressly provided in the Act, the entire previous law (on the topic of adoption) customary, statutory, textual or any other law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act and that any other law in force, immediately before the commencement of the Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act. True, this Act has to be regarded as a governing code only on the points dealt with under the Act and the Act cannot have the effect of nullifying the customary or any other law in force with respect to matters on which the Act is silent, containing no provision to the contrary express or by necessary implication. But the unabrogated part of the pre-existing Hindu Law cannot be invoked in a manner which will produce results opposed to the main scheme and structure of the Act and directly destructive of the very object underlying the Act. The crucial question for decision is whether in the face of this overriding effect as declared in Section 4, the rule of Hindu Law that when the Hindu widow makes an adoption, she makes the adoption only as a delegate and a representative of her husband bringing about an affiliation of the child with the other spouse, namely, the deceased husband, making the boy so adopted an heir to the estate of the deceased husband, would still continue to apply after the Act. On a careful consideration of the matter, I am clearly of the view, that after the passing of the Act, it is impossible for a widow to adopt to her deceased husband and there is no question of the boy's adopted being affiliated to the deceased husband. Such a view would not only be inconsistent and opposed to the main and relevant provisions of the Act, but would also defeat and frustrate the main scheme and the object of the Act which was to establish equality between males and females and the conferment of a power upon a woman to adopt to herself. It is impossible to fit into the scheme of the Act the old notion that

when a widow makes an adoption, she does so as a surviving half of her husband because the vital keynote underlying the Act is the conferment of powers and authority upon a 'woman' purely as such and not as a widow.

10. Section 5 which is clear and unambiguous in its terms, provides that no adoption can be made after the commencement of the Act 'by or to' a Hindu except in accordance with the provisions contained in Ch. II and that any adoption made in contravention of the said provisions shall be void. There is no provision in the Act enabling a widow to adopt to her deceased husband. A perusal of the provisions of Chapter II shows that they are exhaustive and deal with (i) the capacity of a male Hindu to take a child in adoption; (ii) the capacity of a female Hindu to take a child in adoption; (iii) persons capable of giving in adoption; (iv) persons capable of being taken in adoption and (v) conditions which should be complied with for making a valid adoption like the age of the adoptive parents and the adoptive child, the existence of the son or daughter or a son's daughter as a bar to the adoption of a son or a daughter as the case may be. The language of Section 5 is quite emphatic and an adoption by or to "a" Hindu which is not in accordance with the provisions contained in Chapter II is void. The customary law concerning an adoption by or to a Hindu is completely abrogated and every adoption should come within the four corners of the provisions of Ch. II. Reading Sections 4 and 5 together there can be no doubt that there is no field in which any portion of customary law could operate with regard to adoption as unabrogated Hindu law. The inference is clear that the basic and fundamental assumption under the Act is that any person, a male or female, when he or she adopts, adopts to himself or herself only and cannot adopt to another. The other relevant provisions in Chapter II lead to the same inference, Section 7 provides that a male Hindu shall not be entitled to adopt if he has a wife living except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. The explanation to this section provides that if a male Hindu has more than one wife living at the time of adoption, the consent of all the wives is necessary, unless the consent of any one of them is unnecessary for the reason specified above. Section 8 provides that a female who is married can take a son or daughter in adoption only if her marriage has been dissolved or her husband is dead or he has completely and finally renounced the world

or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind. These two sections indicate that the relationship of adoption can be brought about by the person, male or female only for himself or herself and that that relationship cannot be foisted upon the other spouse except with his or her consent. Reference may be made to the following portion of the Statement of Objects and Reasons when the Act was introduced, not as an aid to the construction of the provisions of the statute, but solely for the purpose of ascertaining the circumstances which led to the legislation in order to find out the mischief or the evil sought to be remedied and the reform underlying the legislation:

"With the passing of the Hindu Succession Act 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for the adoption of boy as well as girls. There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right. No person need be divested of any property which has vested in him by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been the cause of many a ruinous litigation".

Sections 7, 8 and 12 of the Act show how this object was sought to be achieved by the Legislature. The object underlying Section 7 is to completely abrogate the customary Hindu Law under which a male Hindu can foist the relationship of an adoptive mother upon his wife without her consent or even despite her objections. After the Act, if the requisite consent of the wife is obtained, the wife is regarded as the adoptive mother because the adoption so made by a male Hindu is not only by himself but by his wife as well. In the case of a Hindu female, there is no such provision for her making an adoption during the husband's lifetime even if he consents. In other words, in the case of an adoption by a Hindu female, there is no question of her making an adoption in any contingency in which the adoption could be held not only for herself but to her husband as well. Section 14 contains the "deeming provisions" so-called, in the case of an adoption by a male or female and this has to be read along with Sections 7 and 8. Section 14 contains the provision that in the case of such an adoption (under Section 7) by a Hindu male, the living wife shall be deemed to be the adoptive mother and in the case of plurality of wives, the seniormost shall

be deemed to be the adoptive mother and the other wives to be step-mothers. Section 14 sub-section (3) provides that if a widower or a bachelor adopts a child any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child. In the case of an adoption by a Hindu female there is no such corresponding provision for affiliation of the adopted child to the deceased husband. Section 14, sub-section (4) only provides that if the woman marries a husband subsequent to the adoption, the latter shall be deemed to be the step-father of the adoptive child. A perusal of the provisions of Section 14 shows that the Legislature has deliberately provided for affiliation only in the limited manner provided in sub-sections (1) to (4) and no other. It is quite clear that the absence of specific provision for the affiliation to the deceased-husband of a child adopted by his widow is not an inadvertent omission but a deliberate departure abrogating this doctrine of affiliation under the customary law. Otherwise it is difficult to understand the qualified manner in which the deeming provisions in Section 14, sub-section (4) is worded; the affiliation referred to therein is only to the husband whom she may marry after the adoption. It cannot be that an express provision for an affiliation of the adopted boy to the deceased husband was not made, because the Legislature thought it was so obvious; for we find a specific provision in the case of an obvious affiliation arising as a result of an adoption by a male Hindu with the concurrence of his living wife. The reason is not far to seek. When the Hindu female takes a child in adoption under Section 8 none of the restrictions under customary law like caste, sex etc., apply. The conditions, by way of restrictions, that are imposed under Section 11 have nothing to do with the wishes or ideas of the deceased husband about an adoption. Before the Act came into force, the husband during his lifetime, could have completely prohibited the widow from making an adoption. One can visualise the husband having conferred the authority upon his widow to adopt a specific person or to adopt any person with the consent of a specific person or the husband might even have specified and restricted the period within which the widow should take the boy in adoption. In the case of plurality of widows, he could have conferred the power upon any one of the widows even preferring a junior widow. Under the customary law, if there is a violation of any one of these conditions, the adoption made by the widow would be void. But under the Act, the capacity of the widow to adopt is absolute and unqualified having no relation to the wishes of her

deceased husband. His volitions in the matter which he might have manifested during his lifetime imposing a prohibition or a restriction in the matter of an adoption would have no controlling force on his widow, after his death. Take for instance a Hindu male, who was violently averse to an adoption, dying before the Act, having expressly precluded his wife from taking a child in adoption. After the Act came into force the widow would be entitled to take a child in adoption under Section 8 ignoring this clear prohibition by her husband. It would be absurd to say that in such a situation there would nevertheless be an affiliation to the deceased husband deeming him to be the adoptive father. Take again, the case of a husband dying after the coming into force of the Act without taking a child in adoption, being totally averse to an adoption. Here too, after his death, his widow would be entitled to take a boy in adoption and if the rival view were accepted, the deceased husband would be the adoptive father of this child. There is nothing in this Act to warrant such an absurd result, on the other hand, the main scheme of Chapter II is, that the affiliation cannot be forced upon the other spouse unless the adoption takes place as a result of mutual agreement between both the spouses.

11. It is also important to notice that all the 'deeming' provisions relating to affiliation in Section 14 are only in relation to living persons and not to persons who were dead at the time of the adoption. Section 14 (1) refers only to the living wife who should be deemed to be the adoptive mother and it does not include a wife who was dead at the time of the adoption; this shows the deceased wife is not to be regarded as the adoptive mother of the boy adopted. If in the case of a deceased wife there is no such affiliation the position is a fortiori in the case of a deceased father. Section 8 which confers the capacity upon a female Hindu to take a child in adoption is general in terms and a spinster, a divorced woman, a widow, a wife of an apostate or an ascetic are all clubbed together without any distinction. If a spinster takes a child in adoption it is obviously on her own behalf and to herself only. Equally, if a divorced woman takes a child in adoption it is on her own behalf and to herself only. Having regard to the context in which the provision is made for an adoption by a widow and from the collocation of the words used in Section 8, it is perfectly clear that the widow adopts only to herself and there is no warrant for holding that the Legislature envisaged different legal consequences where the "Hindu female" under Section 8 happens to be a widow. I have said enough to show that read-

ing Sections 8 and 14 together the widow has no capacity to make an adoption to the deceased husband and such an adoption will not therefore be in accordance with the provisions contained in Chapter II within the meaning of Section 5.

12. A reading of Section 11 also tends to the same inference. Under the customary Hindu Law, if a Hindu dies leaving a plurality of widows and if authority is given by the husband to one of them only, she alone can adopt and she can do so without even consulting the other widows. If the authority is given to the widows severally, the preferential right is to the senior widow and the junior widow will have no right to adopt unless the senior refuses to do so. Again a widow cannot adopt when a co-widow has validly adopted and the adopted son is living. Vide Mullah's Hindu Law, 13th Edn. page 483, Section 455. Let us examine what would be the result of the theory of affiliation to the deceased is accepted. Under Section 8, the widows can act severally and every one of them can adopt a boy or a girl; they need not do so simultaneously but are at liberty to take a child in adoption on different occasions and as and when they like. Section 11 contains the provision that if there is in existence a son or a daughter by adoption, the female Hindu cannot exercise the power of adoption. If one widow makes an adoption (under Section 8), according the rival view, the child will be an adopted son or daughter of a deceased husband as well as of the widow making the adoption. The consequence will be the other widow cannot under Section 11 take a boy in adoption for the reason that the deceased husband had already become an adoptive father of a child adopted by the other widow. There will be a race amongst the widow and any widow who first takes a child in adoption could easily defeat the rights of the other widows to adopt. Any such view would cut at the root of Section 8, which confers unqualified power upon all the widows irrespective of what any one of the widows may do in the matter. The theory of affiliation to the deceased spouse, on the assumption that this feature of customary law should be deemed to continue in force as unabrogated, would result not only in absurd and anomalous consequences, but would also render many of the important provisions of the Act useless and unworkable. I have no hesitation in holding that apart from the four specified classes of cases dealt with under Section 14, there is no further affiliation by fiction. In the face of Sections 4 and 5 it is impossible to read into the Act any such power of affiliation by necessary implication. Further, the rule of necessary implication cannot be invoked when it would be inconsistent

with what is expressly declared in the statute itself, i.e., Sections 7, 8 and 14.

13. I may now take up for consideration Section 12 on which considerable reliance was placed in the Bench decision of the Bombay High Court referred to earlier, AIR 1966 Bom 174. The portion relevant in the section may be extracted:

"Section 12. An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family;

Provided that (c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption".

The argument is that after the adoption, all the ties of the child in the family of its birth are severed and they are replaced in the adoptive family and that such a replacement is possible only if the child adopted becomes related to the deceased adoptive husband as well as the husband's collateral relations. In the Bombay decision it appears to have been conceded that the adoptive child would become collaterally related to the husband's collateral relations such as the husband's father, mother, brother etc. It also appears to have been conceded that the son adopted by the widow will become a coparcener with the other coparceners who had survived the deceased husband. This concession appears to be wrong, further it is not of much significance as the concession accepts the very point which arises for decision. Taking the language of the section itself, it has to be noted that the section does not state that all the ties of the child in the family of its birth are severed and they are replaced in the adoptive family. The replacement is not ~~fall~~ ties lost in the natural family, but it is only those created by the adoption in the adoptive family. The question therefore arises what are the ties or rights which are created as a result of the adoption in the adoptive family and we are necessarily thrown back upon Sections 4, 5, 7, 8, 11 and 14. In other words, Section 12 by itself is not decisive and does not lead to the necessary conclusion that there is an affiliation to the deceased spouse. The argument that because an adoption had taken place somehow an adoptive father for the boy should be found cannot be accepted. In the Full Bench decision in Sivagami Achchi v. Somasundaram Chettiar, 1956-1 Mad LJ 441=(AIR 1956 Mad 323) (FB), it was held that a widower by making an adoption cannot make his deceased wife even by fiction the mother of

the deceased boy; that affiliation of an adopted son to his dead wife has never been in the contemplation of any of the authoritative text writers and that it is not a sound reasoning that a mother should somehow be found for the adopted boy. In the Full Bench judgment, after a reference to the authoritative texts, it was pointed out that by a widower's adoption, the adopted boy can have no maternal relations as nothing in a deceased wife survives in her husband, whereas the body of the husband survives in the wife and that the fiction of the adoptive mother based on a widower's adoption is a misnomer. Under the Act an adoption by a male and a female are placed on the same footing and there is no scope for invoking the doctrine that the widow makes the adoption as the surviving half of the husband and on his representative. It is important to notice that Section 12 states that the adopted child shall be deemed to be the child of his "or" her adoptive father. The word used is "or" and not "and". Further the relationships are replaced only with effect from the date of the adoption and not retrospectively. If on an interpretation of Sections 5, 8, 11 and 14, the tie of an adoptive father based upon the theory of affiliation is not created, Section 12 does not improve the position. If a spinster or a divorced woman takes a boy in adoption under the Act, there is no question of somehow finding an adoptive father for the boy so adopted. The boy so adopted would get collaterally related only to the relations of the woman who makes the adoption i.e., the spinster or the divorced wife as the case may be. The same consequence would follow in the case of an adoption by a widow since the avowed object of the legislation is to confer an independent status upon the woman and a right to adopt in her own right. I do not see any reason why, what applies to the case of a spinster or a divorced woman should not apply in the case of an adoption by a widow. In my view all the sections including Section 12 should be read together and it will be a wrong perspective of approach to take Section 12 alone divorced from its context in Chapter II, as though it provides for any overriding effect. It is only if the adopted child becomes related to the deceased husband (as adoptive father) that the adopted child would acquire collateral relationship with the husband's collateral relations. If the main affiliation by fiction to the husband does not exist, the other relationships do not arise at all.

14. No argument can be built upon a speculative theory that the son adopted would become a coparcener with the surviving coparceners of the deceased husband. After the Hindu Succession

Act came into force, on the death of the husband his share gets earmarked or demarcated and devolves upon the heirs under Section 6 of the Act which includes the wife, the sons and the daughters. The wife and the daughters do not become coparceners with the surviving coparceners of the deceased husband. The scheme of the Hindu Succession Act is that on the death of a member of the coparcenary, leaving the heirs specified in Class I of the schedule, there is a statutory division between the surviving coparceners and the deceased, at the moment of his death.

15. There is also another vital aspect to be taken into consideration and that is the proviso (c) to Section 12, which embodies the principle that as a result of the adoption, the child shall not divest any person of any estate which vested in him or her before the adoption. All this argument about the fiction of an affiliation to the deceased husband will have some meaning if as a result of the adoption, the adopted child becomes entitled to the estate of the deceased, the intermediate vesting between the death of the husband and the adoption being merely temporary. The theory of vesting and divesting has no place after the Act. The moment the husband dies, the widow and the other heirs, the daughters if any, would take the property under the Hindu Succession Act with absolute rights and the adoption made by the widow would not divest the estate vested on the widow and the daughters. It is impossible to conceive any purpose which this fiction of affiliation would serve when the secular aspect so completely pervades the whole Act. It is too much to argue that this fiction of affiliation to the deceased husband has been kept alive for the limited classes of cases in which the estate of the widow did not become absolute by reason of the widow not being in possession of the property within the meaning of Section 14 of the Hindu Succession Act.

16. For all these reasons, with great respect, I am not inclined to follow the Bench decision of the Bombay High Court or the decision of the Allahabad High Court. The following statement in AIR 1967 All 148 at p. 150 with respect is not correct.

"In Madras even before the Act under the old Hindu Law a widow could adopt without the permission of her husband and the various authorities of the Madras High Court would show that such adopted son was always treated as the son of the husband of the widow. In my opinion, the same status should be given to the adopted son after the passing of the Act in other provinces as well."

The Law in Madras has not been correctly set out. Further these observations overlook the important aspect that before the Act, if a widow took a boy in adoption it was as a surviving half of her husband and as his representative a position which does not exist after the Act.

17. The result is, the decree and judgment of the learned Subordinate Judge are confirmed and the second appeal is dismissed with costs. No leave.

MBR/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 81 (V 56 C 14)

ALAGIRISWAMI, J.

P. Jagajothi Mudaliar, Appellant v. Gopalaswami Gounder and others, Respondents.

Second Appeal No. 208 of 1962, D/- 23-8-1967, against decree of Sub-J., Cuddalore, in Appeal No. 285 of 1960.

Civil P. C. (1908), O. 21, Rr. 35 (2), 96 — Undivided interest of coparcener sold in execution — Symbolical possession delivered to purchaser — Symbolical delivery though not correct in law does interrupt adverse possession against purchaser — Limitation Act (1963), Arts. 64 and 65. AIR 1966 SC 470, Full.; AIR 1955 Mad 288 & AIR 1964 Mad 53 (FB), held impliedly overruled by AIR 1966 SC 470.

(Para 4)

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 470 (V 53)=
 (1966) 1 SCR 628, Manikayala Rao v. Narasimhaswami 3
 (1964) AIR 1964 Mad 53 (V 51)=
 (1963) 2 Mad LJ 162 (FB), Rama-ganesan Pillai v. Rajah Ayyar 2
 (1955) AIR 1955 Mad 288 (V 42)=
 (1955) 1 Mad LJ 414, Thani Chettiar v. Dakshinamurthi Mudaliar 1, 2

V. Thyagarajan and V. Veeraraghavan, for Appellant; R. Ramamurthi Iyer and S. R. Nagarajan, for Respondents.

JUDGMENT:— The plaintiff is the appellant. He purchased the one-fourth share belonging to defendants 1 and 2 in the properties described in Schedule-A belonging to the joint family of which they were members, from one Abdul Rahiman Rowther. This Abdul Rahiman Rowther purchased the one-fourth share belonging to defendants 1 and 2 in the Court auction sale on 20-11-1944, and he took symbolical delivery of the properties on 19-9-1947. On 10-12-1958, the plaintiff purchased the suit properties. It appears that subsequently there has been a partition in the family of the defendants, under which the B Schedule properties were allotted to the share of defendants 1 and 2. The plaintiff filed the

suit out of which the present appeal arises for partition and possession of one-fourth share in the A Schedule properties, or, in the alternative for the 'B' Schedule properties being allotted to him on 14-7-1959. The trial Court held that the symbolical delivery obtained by the plaintiff's vendor was not valid in law and that therefore it would not interrupt the adverse possession of the defendants. Following the decision in *Thani Chettiar v. Dakshinamurthy Mudaliar*, (1955) 1 Mad LJ 414 it held that the period of limitation began to run from 23-12-1944, that is, the date of confirmation of the Court-auction sale in favour of the plaintiff's vendor. The Appellate Court agreed with the view of the trial Court, and holding that the plaintiff's suit was barred by limitation, dismissed the plaintiff's appeal. The plaintiff has therefore preferred the present appeal.

2. In (1955) 1 Mad LJ 414, a Bench of this Court held that in a case of this kind, it is not competent for a Court, on a mere application for execution by the purchaser of an undivided share to pass an order directing delivery of possession and that such a purchaser cannot have the benefit of a fresh cause of action by any symbolical delivery, which in law could not have been made. This Court held that the case of a purchaser of an undivided share in joint family property was one where there can be no delivery, either symbolical or actual. This view was approved by a subsequent Full Bench of this Court and the decision is reported in *Ramaganesan Pillai v. Rajah Ayyar*, (1963) 2 Mad LJ 162.

3. The view taken in these two decisions is no longer good law in view of the decision of the Supreme Court in *Manikayala Rao v. Narasimhaswami*, AIR 1966 SC 470. That was also a case where a purchaser of the undivided interest of a joint family member applied for delivery of possession under Order XXI, Rule 35 (2), C. P. C. and obtained joint possession. Their Lordships held in discussing the question whether this symbolical delivery would interrupt the adverse possession, as follows—

"It seems to us that the question of adverse possession is one of fact. If the person against whom adverse possession is set up, shows that he had in fact obtained possession, whether lawfully or not, that would interrupt any possession held adversely against him. The question is whether there was in fact an interruption of the adverse possession and not whether that interruption was justifiable in law. Under the order for delivery of symbolical possession, whether it was legal or otherwise, Prakasalingam did obtain possession and this was an interruption of the

adverse possession by the respondent. In respect of the present suit, time under Article 144 must, therefore, commence from that interruption."

It was however sought to be argued by Mr. Ramamurthi Iyer, for the respondent, that, in that case, the court-auction purchaser had actually obtained possession and that is not the case here. But I do not think Mr. Ramamurthi Iyer's contention is correct. It is specifically referred to in the judgment that the order for delivery was one under Order XXI Rule 35 (2), C. P. C. and in paragraph 11 their Lordships again stress the fact that the only order for delivery of possession that could possibly be made under the Code in the case was one under Order XXI, Rule 35 (2), C. P. C. because the other members of the family, whose share had not been sold, were entitled to remain in possession. They further remark that the fact that under the provisions of the Hindu Law, the order made is illegal is irrelevant for their purpose. It would thus be seen that the present case is exactly on all fours with the facts in the decision of the Supreme Court. In this case also, Ex. A-2 shows that the court-auction purchaser obtained symbolical possession and that possession would only be under Order XXI, Rule 35 (2), C. P. C. Ex. A-2 shows that the exact provisions of Order XXI, Rule 35 (2), C. P. C., have been complied with. It is clear beyond doubt that the delivery in the present case was also one under Order XXI, Rule 35 (2), C. P. C. and the decision of the Supreme Court will govern the facts of this case.

4. It follows therefore that the view of the Courts below that limitation began to run from the date of the confirmation of the court sale in favour of the plaintiff's vendor and that the symbolical delivery obtained by him would not interrupt the adverse possession of the defendants, because no order for symbolical delivery could have been made under the provisions of the Hindu Law, is not correct, and the suit should be held to be in time.

5. It is not necessary to say anything more except that whatever questions might arise in a suit by an alienee of a joint family property for partition and possession of the share alienated to him would have to be considered before the suit is disposed of, the fact that subsequent to the court-auction purchase by the plaintiff's vendor, there has been a partition in the family and the B Schedule properties were allotted to the share of the defendants 1 and 2, whose undivided share in the joint family properties it was that the plaintiff's vendor purchased in the court-auction, or the fact, as it appears, that defendants 1 and 2 have disposed of either the whole or part

of the B Schedule properties to other persons, are all matters which should be taken into consideration in the decree for partition to be passed by the trial Court.

6. The appeal is therefore allowed. The trial Court will take the suit on file and dispose it of in the light of the observations above. The costs of the plaintiff before the lower Appellate Court and this Court will abide by and be provided for in the fresh decree to be passed. The plaintiff will get a refund of the Court-fee paid in this Court and in the lower Appellate Court.

BDB/D.V.C. Appeal allowed.

AIR 1969 MADRAS 83 (V 56 C 15)

M. ANANTANARAYANAN, C. J.

V. P. Periakaruppan, Petitioner v. P. Mayalagan and another, Respondents.

Civil Revn. Petns. Nos. 708 and 839 of 1966, D/- 11-7-1968 from decree of Dist. Munsif Court, Melur, in S. C. Nos. 294 and 341 of 1965 respectively.

(A) Negotiable Instruments Act (1881), Ss. 48, 50, 9 — Indorsement for collection by Principal — Indorsee filing suit — Death of Principal — Suit is not affected.

When the suit on a negotiable instrument was validly instituted by the indorsee for collection it cannot be dismissed because of a subsequent event, such as the death of the principal, which does not affect the substance of the claim. The plaintiff can claim to be an holder in due course, ex facie. 17 Mad LJ 414, Disting. (1910) 8 Ind Cas 967 (LB), Ref. (Para 3)

(B) Negotiable Instruments Act (1881), Ss. 48, 50 — 'A' executing negotiable instrument in favour of 'B' — B endorsing it in favour of 'C' for collection — C filing suit against A — B, principal dying pendentite lite — 'A' can be saved from possible further claim by heirs of 'B', by impleading them as parties.

'A' executed a negotiable instrument in favour of 'B' who indorsed it for collection to 'C'. C filed a suit against 'A' and B died during the pendency of the suit. The question was that 'A' should not be required to pay to C and also to heirs of B.

Held, the true equity in favour of the executant of any such instrument, where the principal happens to die pendentite lite, is that he (the executant) should be protected against a possible double jeopardy, namely, a further claim on the bill or instrument by the heirs of the deceased principal. This can be very simply avoided by the Court calling on the plaintiff to implead the legal representatives of the deceased principal as parties to the action, so that the matter can be

adjudicated upon in their presence. This is all the more essential where it is not a bare agency for collection at all, but an agency coupled with an interest in the agent in the proceeds of the bill, acknowledged by the principal. (Para 4)

Cases Referred: Chronological Paras (1910) 8 Ind Cas 967=5 Low Bur Rul

198, Ramzan Ali v. Vellaswami 5 (1907) 17 Mad LJ 414=ILR 30 Mad

441, Subramanian Chetty v. Alagappa Chetty 3

T. V. Balakrishnan, for Petitioner; S. Sankar Ramakrishnan, for Respondents.

JUDGMENT:— Both these revision proceedings involve only one short ground. In two suits on a negotiable instrument, all the pleas upon which the executants resisted the decrees of the suits have been negatived on the merits. But, in each of these two suits, the same plaintiff sues under an assignment in his favour, constituting him as an agent for collection, even on a minimal interpretation. It is claimed that the principal was alive, at least when one of the two suits was filed, and the learned counsel for the revision petitioner claims that the principal was alive on the date of institution of both the suits.

2. However that might be, the principal died shortly thereafter. The suits have been dismissed, though they were otherwise entirely justified on the merits of the findings, on the short point that the agency for collection having come to an end with the death of the principal, the suits were no longer maintainable.

3. In my view, this is a quite erroneous conception of the respective legal rights of the parties. So long as there is an endorsement of assignment in favour of the plaintiff in each case, the plaintiff can claim to be a holder in due course, ex facie. It is not in dispute that the suit is perfectly maintainable, if it is instituted when the principal was alive, as is actually claimed. The decision relied upon by learned Counsel for the respondent in Subramanian Chetty v. Alagappa Chetty, (1907) 17 Mad LJ 414, a judgment of Benson and Wallis, JJ., does not at all help to advance the contention that, with the death of the principal, the suits themselves are extinguished. All that this decision states is that, as between the endorser and the endorsee, the endorsement for collection simpliciter does not pass the property in the bill to the endorsee. Again, when the suit was validly instituted on the date when it was instituted, I am quite unable to see how it can be dismissed because of a subsequent event, such as the death of the principal, which does not affect the substance of the claim.

4. In my view, the true equity in favour of the executant of any such in-

strument, where the principal happens to die pendente lite, is that he (the executant) should be protected against a possible double jeopardy, namely, a further claim on the bill or instrument by the heirs of the deceased principal. This can be very simply avoided, by the Court calling on the plaintiff to implead the legal representatives of the deceased principal as parties to the action, so that the matter can be adjudicated upon in their presence. That is all the more essential in the present case, as Mr. Balakrishnan, for the plaintiff, contends that this is not a bare agency for collection at all, but an agency coupled with an interest in the agent in the proceeds of the bill, acknowledged by the principal.

5. I accordingly allow the revision, set aside the dismissals of the two suits, and direct that they be restored to file and disposed of in the light of the observations that I have made. I may add that there is a decision of the Lower Burma Chief Court — Ramzan Ali v. Vellawamni, 1910-8 Ind Cas 967 (LB) for the view that, with the death of the principal, the authority of the endorsee for collection does not end, the promissory note being negotiable, and that he is a holder under the law to whom payment has to be made. Of course, if there is any claim available to the defendants which is not already res judicata, concerning the actual liability, the defendants may be at liberty to agitate that claim. After the legal representatives are brought on record, it will be for them to state whether the decree should be in the joint names of both the plaintiff and themselves, or they will be satisfied with decrees of these suits in the name of the plaintiff. Remitted accordingly. No costs.

BDB/D.V.C.

Revision allowed and
case remitted.

AIR 1969 MADRAS 84 (V 56 C 16)
ISMAIL, J.

Doraiswami Reddiar and another, Appellants v. Venkatakrishna Reddiar, Respondent.

Appeal against Order No. 188 of 1968, D/- 8-4-1968, against order of Sub. Court, Chingleput, in E. P. 79 of 1966 in O. S. No. 4 of 1961.

Stamp Act (1899), Ss. 3 and 36 — Compromise decree providing interest on amount payable by one party to another — Stamp on decree paid late — Interest for earlier period can be claimed.

There is no provision of law in the Stamp Act which compels parties to a document not to act upon or perform the obligations as between them before hav-

ing it stamped. The requirement of stamping and the prohibition of admitting an unstamped document as evidence will be operative only in relation to proceedings before Courts or other officers. As between the parties themselves, that too parties to a compromise decree, it becomes operative immediately and the rights and obligations between them spring forth in accordance with the terms of the decree itself. (Para 3)

Thus where a compromise decree in a partition suit provided for a payment of interest on the amount payable by one party to another from the date of decree, the fact that the decree was stamped much later will not affect the claim for interest for the earlier period as per terms of the decree. (Para 3)

R. Sundaravaradan, for Appellants.

JUDGMENT:— In O. S. No. 4 of 1961 on the file of the Court of the Subordinate Judge at Chingleput, a suit for partition, a compromise decree was passed between the parties on 21st January, 1963. Under the terms of the compromise, the respondent was to give up all his claims to the property in suit, but to receive a sum of Rs. 70,000/-, from the appellants herein. The compromise decree itself stated that a sum of Rs. 25,000 had been paid to the respondent on the date of decree and the balance of Rs. 45,000 should be paid within one year's time, that is, on or before 21st January, 1964, time being the essence of the compromise.

A further provision in this behalf was that the said sum of Rs. 45,000 or so much of it as remained unpaid by that time would thereafter carry interest at six per cent per annum. This sum of Rs. 45,000 was payable by the appellants herein on or before 21st January, 1964. The amount was actually deposited into Court only on 21st July, 1965. It is under these circumstances the respondent herein filed E. P. 79 of 1965 for recovery of a sum of Rs. 4122-12 consisting of Rs. 4,050 being interest on Rs. 45,000 from 21st January, 1964, the date on which the amount should have been paid and 21st July, 1965, the date on which the amount was actually deposited into Court, and Rs. 72-12 being execution charges. The appellants herein resisted the claim, but the learned Subordinate Judge of Chingleput by his judgment and order dated 1st April, 1966, overruled the contention of the appellants. It is against the judgment and order the appellants have filed the present appeal.

2. Mr. R. Sundaravaradan, learned Counsel for the appellants, put forward two contentions. The first contention is that the decree being a partition decree, it does not become operative till it is stamped according to the provisions of the Stamp Act; such stamping having

taken place only in February 1965, the respondent was not entitled to claim interest for any period earlier to that date. The second contention is that in I. A. 33 of 1964, the appellants tendered an amount of Rs. 9000 towards the money payable by the appellants to the respondent and the respondent did not accept the tender and therefore the appellants were entitled to counter interest on the said amount of Rs. 9,000/- from the date of the said I. A. I shall deal with these two points in that order.

3. As far as the first point is concerned, learned Counsel specifically concedes that there is no specific provision in the compromise entered into between the parties as to who should pay the Stamp Duty. However, learned Counsel wants me to imply that there was an agreement between the parties according to which the parties were to bear the Stamp Duty in half and half. The further argument is that the respondent herein not having performed his obligation of bearing half the Stamp Duty, it was not open to him to come to the Court and ask for recovery of interest.

As I pointed out already, the compromise decree not having provided for the payment of Stamp Duty by the respondent, it is not possible to hold that the respondent has failed to perform his part of the obligation under the compromise decree and therefore he cannot claim interest. Before me learned Counsel put forward the argument from a different angle. His contention is that a partition decree, until it is stamped, cannot be admitted in evidence by any Court and therefore it cannot be acted upon and consequently the respondent cannot claim interest from any date anterior to the date when the partition decree was stamped. In my opinion, this argument proceeds on a misapprehension.

There is no provision of law in the Stamp Act which compels parties to a document not to act upon or perform the obligations as between them before having it stamped. The requirement of stamping and the prohibition of admitting an unstamped document as evidence will be operative only in relation to proceedings before Courts or other officers. As between the parties themselves, that too parties to a compromise decree, it becomes operative immediately and the rights and obligations between them spring forth in accordance with the terms of the decree itself.

In this case, admittedly the execution petition was filed by the respondent after the document was stamped. Therefore the document itself can be admitted in evidence in the execution petition for the purpose of deciding the liability of the appellants to pay the interest. It is not the case of Mr. Sundaravaradan that if

a document cannot be admitted in evidence, the Court should ignore or close its eyes to whatever has happened pursuant to the terms of the document prior to the stamping of the document. It may be, so far as the Court is concerned, it can look into the document as a piece of evidence only when it is stamped. But once it has been stamped, it can look into the document for the purpose of finding out the rights and obligations created in favour of and imposed on the parties with reference to the date on which those rights and obligations arise under the terms of the document itself. Hence I reject this contention of the learned Counsel for the appellants.

4. The second contention is that the appellants tendered a sum of Rs. 9,000, but the same was refused by the respondent and therefore the appellants are entitled to counter interest for the said amount. The learned Subordinate Judge in paragraph 8 of this judgment pointed out that no certified copy of I. A. 33 of 1964 in which the said amount was said to have been tendered was produced before him and the circumstances under which the said amount was not received are not known. But the learned Counsel states the Court should have called for the papers in the I. A., and should have decided the question itself.

However, the learned Counsel specifically admits that he did not ask the Court to call for the papers and did not lead any further evidence in relation to the said tender or refusal on the part of the respondent. In these circumstances, I do not consider that there is any justification to interfere with the order of the learned Subordinate Judge. Further, this second argument of the learned Counsel is in a sense self-destructive. Admittedly I. A. No. 33 of 1964 was filed at a time when the compromise decree was not stamped. If the Court cannot look into and take note of anything that has happened prior to the date of stamping, it is too much for the learned Counsel to call upon the Court to take note of his tender prior to the date when the compromise decree was stamped.

5. Under these circumstances, in my opinion, there are no merits in this appeal and the same is dismissed with costs. HGP/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 85 (V 56 C 17)

KRISHNASWAMI REDDY, J.

In re, Valaguru Asari, Petitioner.

Criminal Revn. Case No. 85 of 1966 (Crl. R. P. No. 84 of 1966), D/- 19-9-1967 from judgment of S. J., Tiruchirapalli in C. A. No. 92 of 1965.

Prevention of Food Adulteration Act (1954), S. 16 (1) (b) (c) — Offence under S. 16 (1) (b) — Evidence and proof — Accused when called by inspector pouring milk and running away — Held (1) conviction under S. 16 (1) (b) could not be sustained in absence of evidence that Food Inspector had either expressed his intention to accused that he was going to take sample or that he had demanded the sample, (2) accused could have been prosecuted and convicted under S. 16 (1) (c) but as the complaint was not laid under Cl. (c) and opportunity to meet that charge was not given to him, conviction could not be altered to S. 16 (1) (c).

(Paras 5, 10)

Cases Referred: Chronological Paras (1965) 1965 (1) Cri LJ 389=1964 Mad LJ Cri 661, Perumal Konar.

In re 6, 7

(1961) AIR 1961 All 103 (V 48)= 1961 (1) Cri LJ 204, Municipal Board v. Jhamman Lal 6, 7

(1957) AIR 1957 All 829 (V 44)= 1957 Cri LJ 1384, Nazim v. State 6, 9

(1954) AIR 1954 Mad 199 (V 41)= 1952-1 Mad LJ 168=1954 Cri LJ 197, Public Prosecutor v. Murugesan 6, 7

N. Suryanarayanan for R. T. Gopalakrishnan, for Petitioner; Calvin Jacob for Public Prosecutor, for the State.

ORDER:— The revision petitioner has been convicted under Section 16 (1) (b) of the Prevention of Food Adulteration Act and sentenced to pay a fine of Rs. 100, in default to undergo simple imprisonment for two months by the District Magistrate, Tiruchirapalli. On appeal the Sessions Judge, Tiruchirapalli, confirmed the conviction and sentence. The following facts are not disputed before me:—

2. The Food Inspector, (P. W. 1) found the petitioner carrying milk in a chombu covered with a tumbler at about 8 a.m. on 13-3-1965 in the outskirts of Manapparai. P. W. 1 called the petitioner for the purpose of taking sample milk when the petitioner was going at a distance of half a furlong from him. The petitioner poured the entire milk from the chombu in the paddy field, threw away the chombu and the tumbler and ran away. P. W. 1 seized the chombu and the tumbler and filed a complaint against the petitioner alleging that he prevented him from taking the sample.

3. It is contended by the learned Counsel appearing for the petitioner that the conviction under Section 16 (1) (b) of the Prevention of Food Adulteration Act cannot be sustained for the reason that there was nothing to show from the evidence of the Food Inspector that he either demanded sample from the petitioner or that he expressed his intention

to take sample from the petitioner. There appears to be substance in the contention of the learned counsel.

4. It is necessary to appreciate the contention of the learned counsel, to set out the relevant portions of Section 16 of the Prevention of Food Adulteration Act.

"16. (1) If any person — (a) (b) prevents a food inspector from taking a sample as authorised by this Act or (c) prevents Food Inspector from exercising any other power conferred upon him by or under this Act, or he shall be punishable."

5. Section 16 (1) (c) deals with preventing the Food Inspector from exercising any other power conferred on him under the Act. This clause deals generally, since a Food Inspector has got several powers to exercise. Though the power of taking sample is also one of the powers conferred on him under the Act, it is specially carved out from the other powers and specifically brought in clause (b) of Section 16 (1). It is, therefore, necessary for the prosecution to show that the person who prevented the Food Inspector from exercising this power, knew, to bring him within the mischief of Section 16 (1) (b), that the Food Inspector wanted to take sample from him. He may be made known either by a demand of sample or a communication of the intention to take sample, by the Food Inspector. It must be strictly proved that the accused, knowing the Food Inspector wanted to take sample, prevented the Food Inspector deliberately from taking such sample. There is no evidence that the Food Inspector either expressed his intention to the petitioner that he was going to take sample or that he demanded the sample from the petitioner. In the absence of such evidence, the conviction under Section 16 (1) (b) of the Act cannot be sustained. However, he would be liable under Section 16 (1) (c) of the Act. The powers of the Food Inspector are enumerated in Section 10 of the Act. Under Section 10, clause (3), any Food Inspector may exercise the powers of a Police Officer under Sec. 57 Cr. P. C. When the Food Inspector called the petitioner while he was taking milk with him, he had prevented the Food Inspector from coming to him and ascertaining his name and residence and other details, by his pouring the milk, throwing the chombu and tumbler and running away.

6. The learned Public Prosecutor contended that though the Food Inspector had not communicated his intention to take sample from the petitioner, he had stated on oath that he called the petitioner with the intention of taking sample from him and that this would suffice to bring him within Section 16 (1) (b) of

the Act. I am unable to agree with his contention. He relied upon the following decisions in support of his contention: Public Prosecutor v. Murugesan, 1952-1 Mad LJ 168=(AIR 1954 Mad 199). Municipal Board v. Jhammanjal, AIR 1961 All 103, Perumal Konar, in re 1964 Mad LJ Crl 661=(1965 (1) Cri LJ 389) and Nazim v. State, AIR 1957 All 829.

7. In the first three decisions, there was a demand of sample by the Food Inspector. In 1952-1 Mad LJ 168=(AIR 1954 Mad 199), the maistry and a cooly of a Panchayat Board deputed by the Sanitary Inspector to take sample of milk asked the accused to give sample; but the accused instead of giving a sample went into the hotel and handed over the milk to a servant who poured it into a milk pan containing other boiled milk. The conviction of the accused was upheld for having prevented the officer from taking the sample. In AIR 1961 All 103, the Food Inspector asked the accused to give him a sample of mustard oil; but he left the shop promising to come shortly. The Food Inspector waited for some time and the accused did not turn up. The accused was prosecuted for having prevented the Food Inspector from taking the sample by abruptly leaving the shop without giving him the sample. The conviction was upheld. In 1964 Mad LJ Crl 661=(1965 (1) Cri LJ 389), the Food Inspector stopped the person carrying milk and demanded sample for analysis; but the accused instead of complying with the demand of the officer placing the can inside the hotel, took to his heels and ran away. The accused was prosecuted under both the clauses 16 (1) (a) and 16 (1) (c) of the Act. The conviction was upheld under both the clauses by Anantanarayanan, J., (as he then was). Anantanarayanan, J., held that the accused was clearly guilty of an offence under Section 16 (1) (c) of the Act as the Food Inspector was prevented by the accused from exercising any other power conferred on him by or under the Act. The conviction under Section 16 (1) (b) was also confirmed. In these three cases, it is clear that there was a demand for sample by the Food Inspector.

8. In this case, as already stated, there was no demand by the Food Inspector; nor he expressed his intention to take sample. Hence, these decisions do not support the contention of the learned Public Prosecutor.

9. In AIR 1957 All 829 the accused who was passing by the road with a bucket of milk in his hand was asked by the Food Inspector to stop, but the accused instead of complying with the request took to his heels and when chased by the peon threw away the milk from

which the Food Inspector intended to take a sample. The accused in this case was charged under Section 30 of the U. P. Pure Food Act and Rule 4 framed under the said Act. Section 30 of the U. P. Pure Food Act is substantially similar to that of Section 16 (1) (c) of the Act. There is no provision in the U. P. Pure Food Act similar to that of Section 16 (1) (b) of the Act. Section 30 of the U. P. Pure Food Act is as follows:

"A person who wilfully obstructs any person acting in the performance of any duty under this Act or any rule, by-law, order or warrant made or issued thereunder, shall be guilty of an offence". This decision may not be of any use for the contention of the learned Public Prosecutor as we are concerned in this case with Section 16 (1) (b) of the Act. This decision will, of course, have relevancy if the petitioner was prosecuted under Section 16 (1) (c) of the Act.

10. As stated already, if the petitioner was prosecuted under Section 16 (1) (c) of the Act, he would have been guilty of having prevented the officer from exercising his powers conferred on him by the Act. I am not inclined to alter the conviction to Section 16 (1) (c) of the Act as the complaint was not laid under the said section and opportunity to meet the charge under Section 16 (1) (c) was not given to the petitioner by the trial Court.

11. The revision petition is allowed and the petitioner is acquitted. Fine amount, if paid, will be refunded.
RSK/D.V.C.

Revision allowed.

AIR 1969 MADRAS 87 (V 56 C 18)
M. ANANTANARAYANAN, C. J. AND
NATESAN, J.

Presidency Talkies Pvt. Ltd., Appellant
v. Presiding Officer, Labour Court, Madras and another, Respondents.

Writ App. No. 249 of 1964, D/- 4-12-1967, against order of Veeraswami, J., in W. P. No. 815 of 1962.

Industrial Disputes Act (1947), S. 33 (2) (b) — Proviso — 'Unless he has been paid wages for one month' — Meaning of word 'paid' — It includes offer to pay and where management makes the offer and employee refuses to accept same, that would be adequate compliance with law — Offer has to be made simultaneously with the sanction seeking application or prior thereto: AIR 1962 SC 1500, Full. W. P. No. 815 of 1962 (Mad), Overruled. (Paras 6 and 7)

(B) Industrial Disputes Act (1947), S. 33 — Misconduct — Employee of a Cinema Theatre showing advertisement slide without permission of Management — It is a misconduct of grave character. (Para 2)

Cases Referred: Chronological Paras
 (1962) AIR 1962 SC 1500 (V 49)=
 (1962) 1 Lab LJ 420, Straw Board
 Manufacturing Co., Ltd. v. Govind 6
 (1961) AIR 1961 SC 860 (V 48)=
 (1961) 1 Lab LJ 211, Lord Krishna
 Textile Mills v. Its Workmen 9

T. V. Balakrishnan, C. V. Mahalingam
 and T. S. Vishwanath Rao, for Appellant;
 Govt. Pleader, V. Krishnan, P. Veeraraghavan
 and B. Kalyansundaram, for Respondent.

M. ANANTANARAYANAN, C. J.:—This appeal has been instituted by Messrs. Presidency Talkies (Pvt) Ltd., Proprietors of Paragon Talkies, Madras, from the judgment of Veeraswami, J., In W. P. 815 of 1962, declining to issue a writ of certiorari quashing the award of the Labour Court in respect of one R. Venugopal, an employee of the petitioner firm and the main respondent.

2. The facts are quite simple, and may be briefly referred to, at the outset. The employee (R. Venugopal) was suspended on 19-6-1961 upon the main charge that he exhibited an advertisement slide without the permission of the management. It will be easily appreciated that advertisement slides are exhibited during a performance as a consequence of contracts between the advertising firms and the management; the management derives a revenue from such exhibition of slides, which may be considerable. Hence, if a slide, the exhibition of which is not authorised by the management, is deliberately exhibited by an employee during a performance, the concerned firm obtains the benefit of the advertisement, to the definite loss of the management. Such behaviour on the part of an employee, if deliberate and not otherwise justified, may certainly amount to misconduct, and even misconduct of a grave character.

3. An enquiry was held by the Management on 17-7-1961, and on 25-7-1961, the Management drew up minutes referring to the evidence, holding that the charge was proved, and purporting to record the dismissal of the employee. As this occurred during the pendency of proceedings in respect of an industrial dispute, the management sought the sanction of the Labour Court, for approval of the contemplated action of dismissal, under Section 33 (2) (b) of the Industrial Disputes Act. Independently of this, the employee seems to have filed an application under Section 33-A, before the Labour Court complaining that the management had not complied with the requirements of Section 33 (2) (b) and that the petition of the management was therefore liable to be dismissed. Both these petitions were apparently tried together, and disposed of by a single award

or order of the Labour Court, declining to grant the sanction. The writ petition was filed, as we stated earlier, to quash this award.

4. The learned Judge, (Veeraswami, J.) has dealt only with one ground of alleged non-compliance on the part of the management, under Section 33 (2) (b). That ground was that the worker was not paid his wages for one month, as required by the proviso to Section 33 (2) (b) before the management purported to record his dismissal. The learned Judge went into this question, and negatived the argument of learned Counsel for the management that an offer of one month's wages, where this offer is refused by the worker, would be adequate compliance with the law. The learned Judge appears to have thought that, In any event, there was no plea that one month's wages were offered on or prior to the date of dismissal. The learned Judge observed that there was a plea that one month's wages were offered and that the offer was refused.

5. On the facts, we are afraid that there has been more than one misconception of misstatement of fact before the learned Judge, as the facts have been referred to and discussed in the judgment. We have gone into this matter carefully, and there can be no doubt whatever that the management did allege, and alleged repeatedly, that there was an offer of one month's wages to the concerned employee (respondent) prior to the filing of the application, which was not accepted. In view of the vagueness, on this aspect, in the judgment of the learned Judge, we think that it would be desirable to refer to the actual record. On 25-7-1961, the management filed the first application before the Labour Court under Section 33 (2) (b) of the Act. This is paragraph 1 (a) of that petition—

"The workman has been dismissed for the reasons stated below, under the provisions of Section 33 (2) (b) of the Industrial Disputes Act 1947, and has been paid one month's wages".

A counter statement to this was filed by the workman, which is also on record. It is a matter both of record and admission that, in this counter statement, this averment has not been refuted in any manner. Consequent upon the return of this petition for technical reason, the management filed a second petition before the Labour Court under Section 33 (2) (b), namely I. D. No. 31 of 1961. In this it is stated that

"he (the workman) has been paid one month's wages according to the proviso thereto, but the said workman has refused to receive the same".

6. There are two points here, which can be very briefly clarified. The first point

Is, what is the legal interpretation of the word 'paid' as occurring in Section 33 (2) (b) proviso? Does it mean not merely that the Management should make the offer of one month's wages, but also that the workman should necessarily accept the wages, a matter depending entirely on his volition, before the Management could act further? The answer to this is to be found in Straw Board Manufacturing, Co., Ltd. v. Govind, AIR 1962 SC 1500, wherein their Lordships observed 'that the employer when he takes the action under Section 33 (2) by dismissing or discharging an employee, should immediately pay him, or offer to pay him, wages for one month and also make an application to the Tribunal for approval at the same time.' Therefore it is clear that, where as in this case, the employee spurns the offer, the Management would have fulfilled its obligation by making the offer; the Management need not secure, as indeed it cannot secure, the acceptance of the offer by the employee before filing the application.

7. The second point is, what is the precise point of time at which, or prior to which, such an offer should have been made, for the offer to be considered as compliance with the law? This, again, is answered by the same observations of the Supreme Court that we have just referred to. As will be clear from those remarks, the offer should have been made simultaneously with the application or prior thereto, depending on the facts of each case. In the present case, even the very first application claimed that the pay was offered to the workman, or had been "paid" in that sense. And this claim was not even refuted by the workman. In the second application, treating that as the effective one, the same averments are to be found, and there was no denial or counter-statement.

8. Under these circumstances, we are afraid that the learned Judge, (Veeraswami, J.) was under a misapprehension when he thought that there was non-compliance with Section 33 (2) (b) of the Act, on the part of the employer. As regards the offer of one month's wages to the employee, there has been no non-compliance whatever, and the employee did not even controvert the allegation of the employer made at the material point of time that, at that time or prior to it, a month's wages had been offered to the employee and had been rejected by the employee. It is clear that the employer organisation has no means of compelling an unwilling employee to accept one month's wages. If indeed that were to be the law, every application under Section 33 (2) (b) could be defeated, by the

simple device on the part of the workman of not taking the offered wages.

9. It follows that the only ground on which the writ petition was dismissed, cannot be sustained by us. But before the Labour Court, there was another ground mooted though it was not dealt with by the learned Judge. In referring to this ground, we might briefly cite the observations of their Lordships of the Supreme Court in Lord Krishna Textile Mills v. Its Workmen, (1961) 1 Lab LJ 211 = (AIR 1961 SC 860). As the Supreme Court pointed out, the appropriate authority dealing with an application under Section 33 (2) (b) cannot examine the facts, as an appellate court might do. It is only if the authority is satisfied that the finding recorded at the domestic enquiry is perverse, in the sense that it is not justified by any legal evidence whatever, that the authority may be entitled to decline approval. Their Lordships have stressed the difference between a finding not supported by legal evidence, which is sometimes loosely called the "No evidence" rule of Judicial Review, and a finding supported by evidence, which an authority exercising jurisdiction under the Industrial Law, may not itself consider adequate or satisfactory.

10. In the present case the complaint appears to be that the evidence about the misconduct was forthcoming only from witnesses referred to by the employee himself. We find that even this complaint strictly speaking, may not be justified. For, though the record refers to the manager and the operator as witnesses referred to by the employee, they appear to have been examined in chief for the employer organisation, and cross-examined by the employee. However, since we are not in a position to judge whether there was legal evidence in support of the charge or otherwise, this matter not having been dealt with at all by the learned Judge (Veeraswami, J.), we allow the appeal to the extent of setting aside the judgment of the learned Judge, and issuing a writ of certiorari quashing the award. This displacement of the award now releases the proceeding for further action by the Labour Court, if the employee desires to ventilate his grievance further, and the management also wants the approval of the Labour Court now under Section 33 (2) (b). No order as to costs.

AIR 1969 MADRAS 90 (V 56 C 19)
ISMAIL, J.

Perumal Naidu, Appellant v. Krishnaswami Naidu, Respondent.

Second App. No. 48 of 1968, D/- 29-1-1968, against decree of Dist. Court, Ramanathapuram at Madurai in A. S. No. 43 of 1967.

Oaths Act (1873), S. 12 — Constitutionality — Does not offend Art. 14 of the Constitution — Constitution of India, Art. 14.

Section 12 which deals only with the case of a person who agreed to take an oath and not with a person who agrees to abide by the oath is not unconstitutional as being violative of Art. 14.

The position of a person who agreed to take an oath is essentially and basically different from the position of a person who agreed to abide by the taking of such an oath. In the case of the former resiling from his agreement, from the very nature of the case, the Court cannot compel him to take the oath, if he was unwilling to take. That is not the case with reference to a challenger. Therefore even this basic difference in the position between the two parties is sufficient to justify the resiling of the two parties from their agreement being treated differently. (Para 4)

Where an agreement to take a special oath is arrived at between two parties to the suit in the presence of the Court, and when one of the parties, namely, the challenger goes back on the understanding without proper reasons, all that the Court does is to allow the other side, namely, the proposer to make the oath which he agreed to take and to decide the dispute on the basis of such oath being taken. The principle of mutuality available in relation to specific performance of contracts cannot arise in such cases. (Para 5)

R. Alagan, for Appellant.

JUDGMENT:— The appellant and the respondent are brothers. The respondent instituted a suit for redemption of an othi dated 1-11-1941, executed by him in favour of the appellant over his undivided half share in the property and for partition and separate possession of his half share. In the written statement filed by him, the appellant contended that the name of the respondent was included in the sale deed in respect of the suit property "benami for namesake" and that the othi executed by the respondent arising out of the benami purchase did not in any way affect the position and hence the respondent was not entitled to any relief.

2. The learned District Munsif framed necessary issues and the suit was ad-

journed from time to time for trial and when the suit came up for trial on 30-1-1967, both parties filed a joint memo stating that if the respondent took special oath putting out camphor and wearing an arali garland in front of Adisolaik Pulukandi Koil stating that the respondent had a share in the suit property and had paid consideration, the suit might be decreed. This memo was signed by the respondent and the appellant and their advocates. On this, the learned District Munsif appointed a commissioner to administer the oath and posted the case for return of the warrant to 4-2-1967. On 3-2-1967 the respondent made an endorsement on the warrant that he was prepared to come for taking the oath. But on that date the appellant made an endorsement on the warrant saying that for some reason he did not agree to the oath. Thereupon the Commissioner returned the warrant on 4-2-1967. On the return of the warrant, the learned District Munsif posted the case to 6-2-1967. On 6-2-1967 he recorded what happened before the issue of the warrant and stated that since the appellant, the challenger had resiled from his agreement without assigning any reason to satisfy the court, the appellant was again given an opportunity to carry out his part of the agreement and light the camphor before the temple at 12 noon on 7-2-1967. He further observed that the appellant again refused to fulfil his part of the agreement. Consequently the learned District Munsif directed the Commissioner to administer the oath after lighting the camphor and giving an opportunity to the appellant to perform his part of the agreement. In pursuance of this direction, the Commissioner executed the warrant and the respondent took the oath as per the joint memo on 7-2-1967. On 8-2-1967 the learned District Munsif, after referring to the above facts, decreed the suit of the respondent.

3. The appellant herein preferred A. S. No. 43 of 1967 on the file of the Court of the learned District Judge, Ramanathapuram, at Madurai and the learned District Judge on 23-12-1967 dismissed the said appeal. I must point out that the only contention urged before the learned District Judge was that the learned District Munsif erred in straightway decreeing the suit without giving an opportunity to the appellant to explain the circumstances under which he resiled. Along with the memorandum of appeal, an affidavit was also filed by the appellant stating that the members of his family were opposed to the decision of the suit on the basis of the oath and that was the reason for his resiling from the agreement. The learned District Judge after considering the materials placed before him came to the con-

clusion that the learned District Munsif had given every possible opportunity to the appellant and the reasons adduced in the affidavit filed before him were not sufficient to justify the appellant resiling from the agreement. Hence the present second appeal.

4. Mr. Alagar, learned Counsel for the appellant, contended that Section 12 of the Indian Oaths Act 1873, is unconstitutional as being opposed to Article 14 of the Constitution. That section states—

"If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it and that he refused it, together with any reason which he may assign for his refusal".

Mr. Alagar himself conceded that Section 12 does not deal with the case of a challenger but only with the case of the person who agreed to take an oath and that even if Section 12 is held to be unconstitutional, that will not help the appellant. Apart from this I am of the view that no question of unconstitutionality arises with reference to Section 12. The position of a person who agreed to take an oath is essentially and basically different from the position of a person who agreed to abide by the taking of such an oath. In the case of the former resiling from his agreement, from the very nature of the case, the Court cannot compel him to take the oath, if he was unwilling to take. That is not the case with reference to a challenger. Therefore even this basic difference in the position between the two parties is sufficient to justify the resiling of the two parties from their agreement being treated differently.

5. The next ground urged by Mr. Alagar is that if this position is allowed to prevail, it will merely result in there being a contract which cannot be mutually enforced. I do not think that the principle of mutuality available in relation to specific performance of contracts can be applied to cases of the nature in question. The essential thing is, here is an understanding arrived at between the two parties in the presence of the Court; and when one of the parties, namely, the challenger goes back on the understanding without proper reasons, all that the Court does is to allow the other side, namely the proposer to take the oath which he agreed to take and to decide the dispute on the basis of such oath being taken. I do not think any question of mutuality arises under such circum-

stances. Therefore, in my view, there are no merits in the second appeal and the same is dismissed.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 91 (V 56 C 20)

VENKATADRI, J.

P. Thirumurthi Chettiar, Petitioner v. State of Madras and another, Respondents.

Writ Petn. No. 2013 of 1964, D/- 10-3-1967.

(A) Sales Tax — Madras General Sales Tax Rules (1959), R. 23 (3) (i) — Madras General Sales Tax Act (1 of 1959), S. 4 — Proviso — Prescribing period of limitation for refund under R. 23 (3) (i) is not valid and should be declared ultra vires, as main Act does not prescribe any period of limitation: AIR 1964 Mad 376 & AIR 1967 Mad 171, Rel. on. (Para 5)

(B) Sales Tax — Madras General Sales Tax Act (1 of 1959), S. 4 Proviso (prior to amendment by Act 6 of 1963) — 'Tax so levied shall be refunded' — For claiming refund, assessee need not pay tax — He can claim it as soon as it is levied. (Para 6)

Cases Referred: Chronological Paras (1967) AIR 1967 Mad 171 (V 54)=
1967-18 STC 370, Haji J. A. Karim Sait v. Dy. Commercial Tax Officer, Mettapalayam

(1964) AIR 1964 Mad 376 (V 51)=
ILR (1964) 1 Mad 906, Solar Works v. Employees State Insurance Corporation, Madras

P. R. Ranganathan, for Petitioner; Special Govt. Pleader, for Respondents.

ORDER:— The petitioner, who is carrying on business in cotton in Tiruppur filed this writ petition to quash an order dated 16-1-1963 refusing refund of tax paid by him and another order dated 7-7-1964, passed by the Board of Revenue rejecting his application for revision preferred against the order dated 16-1-1963. It is just necessary to state a few facts before I dispose of this writ petition.

2. The matter that led to the filing of this writ petition was an application filed by the petitioner for refund of sales-tax paid by him under the Madras General Sales Tax Act. As the petitioner was carrying on business in cotton, he was assessed under the local Act and the point for levy of sales tax is the last purchase if it is within the State. As cotton is declared goods under the Central Sales Tax Act, if the petitioner sells his cotton outside the State, he will again be assessed. In order to avoid injustice,

Section 4 of the Madras General Sales Tax Act provided by a proviso that an assessee would be entitled to a refund on the tax so levied under the Central Sales Tax Act, that is, if he has paid the tax at the last purchase point and if he sells cotton outside the State and if tax is levied on that sale, he would be entitled to refund of the tax.

3. In this case, the petitioner applied for a refund from time to time in the months of August to November, 1962. His applications for refund were dismissed mainly on the ground that he did not pay part of the taxes so levied both under the Madras Act and the Central Act. When he filed a revision to the Deputy Commissioner, the order was confirmed on 29th January, 1963. The petitioner subsequently paid all the taxes and then wrote a letter dated 17-12-1963 to the assessing officer informing him that he has paid all the taxes and praying for a refund already asked for. But this letter was summarily disposed of by the Commercial Tax Officer informing the petitioner that the matter had already been settled and the revision petition filed by him had also been dismissed by the Deputy Commissioner and that the petitioner might, if so advised, seek remedy from higher authorities. This order was passed on 22-12-1963, but it was actually received by the petitioner on 28-12-1963. Under Section 35 (1) of the Madras General Sales Tax Act, he filed a revision to the Board of Revenue but it was only on 7-3-1964. When that came up before the Board of Revenue, it was rejected mainly on the ground that it was barred by limitation, and it was not disposed of on merits. Now it is to quash this series of orders that the present writ petition has been filed.

4. The learned Counsel contended before me that under the proviso to Section 4 of the Madras General Sales Tax Act, the words used are "the tax so levied shall be refunded to such person in such manner and subject to such conditions as may be prescribed". The local authority framed rules under the Act. Rule 23 (3) (i) which is relevant for our purpose states that such an application for refund should not be made more than three months from the date on which the movement of the goods from this State to any other State commenced. The contention of the learned Counsel for the petitioner is that such period of limitation prescribed in the rule is ultra vires, illegal and not binding on him. In support of this contention, the learned Counsel has cited the decision in *Solar Works v. Employees State Insurance Corporation*, ILR 1964-1 Mad 906=(AIR 1964 Mad 376), where at p. 911 (of ILR Mad)=(at p. 379 of AIR) it was observed by Anantnarayanan, J., (as he then was)

which observations will be useful for our purpose, and they are to the effect that where an Act does not provide for limitation with reference to a particular matter and the delegation of the power to make rules is conferred by a section of the Act, which does not, expressly or impliedly relate to the power of prescribing time, the authority to which the power is delegated, viz., the State in this case, cannot make a rule prescribing limitation. This principle has been reiterated and followed by a Bench of this Court in *Haji J. A. Kareem Salt v. Dy. Commercial Tax Officer*, 1967-18 STC 370, at p. 374=(AIR 1967 Mad 171 at p. 173), where the Bench observed—

"No doubt limitation is procedural but it is also substantive. A rule covering those matters cannot, therefore, be made unless it be in the exercise of specific conferment of enabling rule-making power".

5. There is much force in the contention of the learned counsel for the petitioner that prescribing period of limitation for refund under Rule 23 (3) (i) is not valid and should be declared ultra vires, because the main Act does not prescribe any period of limitation. The words used are "shall be refunded" and there is no period of limitation prescribed.

6. The next question that would arise is whether the petitioner is entitled to claim a refund only after he had paid the taxes. Here again, the petitioner's learned Counsel contended before me that it was not necessary for the petitioner to claim refund after he actually paid the taxes. It is enough for him to have claimed a refund as soon as the tax is levied under the Act. The words used in the proviso are "tax so levied shall be refunded". But there was a subsequent amendment by Act 6 of 1963 and Section 4-A was introduced to this effect: "Tax so levied and collected under Section 4 shall be refunded", and the rules were suitably amended. The importance of collection came into prominence only when the new provision came into force on 1-4-1963. At the time of the application for refund by the petitioner, it was not necessary for him to have paid the tax and then claimed the refund. In the instant case, on the dates when the petitioner filed his applications for refund, this amended Section 4-A was not in force and therefore the petitioner was entitled to claim refund without having paid the tax.

7. When once I come to the conclusion that the rule-making authority has no jurisdiction to prescribe a period of limitation for obtaining a refund as provided in Section 4, then the petitioner can file an application for refund with-

out any period of limitation. In the instant case, all the authorities have found that the petitioner had paid the taxes and was entitled to claim the refund but rejected that claim on the ground that such a claim was barred by limitation under Section 35 (1) of the Madras General Sales Tax Act. Of course, there was a delay of about a year, but in the affidavit in support of this writ petition, the petitioner has given plausible reasons for not making his claim for refund for so long. Since I am taking the view that there is no time prescribed for claiming the refund and since the petitioner has paid all the taxes due, I hold that the petitioner is entitled to claim refund.

8. In the result the writ petition is allowed. The refund application filed by the petitioner will be taken on file after the delay is excused and they will be disposed of afresh. There will be no order as to costs in this writ petition.

AKJ/D.V.C.

Petition allowed.

AIR 1969 MADRAS 93 (V 56 C 21)

RAMAKRISHNAN, J.

The State of Madras represented by the Secretary, Home Dept. Madras, Petitioner v. S. Krishnan and another, Respondents.

Writ Petn. No. 2762 of 1965, D/- 30-1-1968.

Motor Vehicles Act (1939), Ss. 64, 68—State Transport Appellate Authority, being authority constituted under Act, in absence of authorisation to do so, cannot question validity of Act or rule framed thereunder. AIR 1966 SC 1089, Rel. on. (Para 5)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 1089 (V 53)= (1966) 17 STC 418, Venkataraman and Co. v. State of Madras 5

S. T. Ramalingam for the Govt. Pleader, for Petitioner; K. Ramachandran and G. Desappan, for Respondents.

ORDER:—The Superintendent of Police, Tanjore, suspended for a period of ten days the driving licence of one Krishnan, a lorry driver, for the alleged offence of overspeeding. For exercising this power, the Superintendent relied upon the delegation mentioned in Rule 134-AA of the rules framed under the Motor Vehicles Act read with Section 44 (5) and Section 16 of the Motor Vehicles Act. The Motor Vehicles Act under Section 16 conferred this power on the Regional Transport Authority. A power of delegation is conferred on the Regional Transport Authority under Section 44 (5) of the Act. Section 44 (5) of the Act con-

tains a qualification that such delegation by the Regional Transport Authority of its powers and functions can be made only if authorised in this behalf by rules framed under Section 68. Rule 134-AA is a rule so framed. It was relied upon by the Superintendent of Police as the rule making such delegation to him of the power of suspension of a driver's licence.

2. The driver aggrieved against this order appealed to the State Transport Appellate Tribunal. The Tribunal was of the view—

"It will however be seen that Rule 134-AA, which authorises the Regional Transport Authorities to delegate their powers and functions under Section 16 of the Act, is framed under Section 68 of the Act under Chapter IV. It seems to me that there cannot be any delegation of powers vested in the Regional Transport Authorities under Section 16 of the Act even if rules are framed under Chapter II, for the simple reason that the only enabling provisions of the Act authorising the Regional Transport Authorities to delegate powers is sub-section (5) of Section 44, which, as already indicated, restricts the powers that are capable of delegation to those that appear in Chapter IV".

The State Transport Appellate Tribunal thereupon allowed this appeal.

3. The State of Madras has filed this writ petition for the issue of a writ of certiorari quashing the order of the State Transport Appellate Tribunal, the second respondent in this writ petition, allowing the appeal of the driver, Krishnan, the first respondent for the reason set out above, namely, the absence of jurisdiction of the Superintendent of Police for disqualifying the driver.

4. Learned Counsel appearing for the State urged that the interpretation given to the scope of delegation enunciated in Section 44 (5) of the Act, by the State Transport Appellate Tribunal is incorrect. It was urged that though Section 68 of the Act in terms confers power to make rules for the purpose of carrying into effect the provisions of Chapter IV, the purport of Rule 134-AA is to give effect to the general power of delegation contained in Section 44 (5) which is a section found in the Chapter. It is only to find out what power conferred in the Regional Transport Authority which is sought to be so delegated under Section 44 (5), that one has to go to Section 16 of the Act, which confers the power to disqualify a driver on the Regional Transport Authority. In fact, there is a cross reference in Section 16 to Chapter IV, when it refers to a Regional Transport Authority constituted under Chapter IV. Therefore, the power to disqualify a dri-

ver is a power initially conferred on the Regional Transport Authority constituted under Chapter IV. Thereafter under the scope of the power of delegation contained in Section 44 (5), read with Rule 134-AA, the Superintendent of Police has exercised the power in this case. This is the course of reasoning adopted by the Government Pleader for the State for sustaining the attack against the finding of the second respondent, the State Transport Appellate Tribunal.

5. While I am generally inclined to accept this argument, it is not necessary to decide this question finally in this writ petition for the simple reason that the decision of the Supreme Court in Venkataraman and Co. v. State of Madras, (1966) 17 STC 418=(AIR 1966 SC 1089), has clearly laid down the principle that an authority constituted under an Act cannot, unless expressly so authorised, question the validity of any of the provisions thereof (vide page 438 of the report) (STC)=(at p. 1099 of AIR). Consequently, the State Transport Appellate Authority, as an authority constituted under the Motor Vehicles Act, in the absence of an authorisation to do so, cannot question the validity of the Act or a Rule framed thereunder. Therefore since the order of the State Transport Appellate Tribunal in this case, amounts to a declaration that Rule 134-AA is an invalid Rule, as it suffers from the defect of improper delegation, it was beyond the jurisdiction of the State Transport Appellate Tribunal to give such a decision.

6. I therefore allow the writ petition and issue a writ of certiorari quashing the order of the State Transport Appellate Tribunal. No order as to costs.

MBR/D.V.C.

Petition allowed.

AIR 1969 MADRAS 34 (V 56 C 22)
SADASIVAM, J.

S. K. Pothilingam Pillai and another, Petitioners v. Nagoor Meeran Rowther, Respondent.

Criminal Revn. Cases Nos. 487 and 747 of 1966 (Cr. Revn. Petns. Nos. 480 and 731 of 1966). D/- 10-11-1967. from judgment of Sub-Divisional Magistrate of Koilpatti D/- 16-12-1965

Penal Code (1860), Ss. 482, 486 — Trade and Merchandise Marks Act (1958), Ss. 78, 79 — Offence of infringement of Trade Mark and that of infringement of property mark — Distinction — Complaint only of infringement of property mark — Sub-Magistrate held could try that offence.

The offence of infringement of Trade Mark is distinct from an offence of in-

fringement of property mark. In fact the existence of such a distinction is clear from the provisions in the Penal Code with regard to Trade Mark prior to the enactment of the Trade and Merchandise Marks Act, when the offences relating both to Trade Mark and property mark were triable by Sub-Magistrates. If A is known not to be the maker or manufacturer of the goods he sells, but only to have selected and put them up and he uses a certain mark to indicate to his customers that they will thus have the benefit of his skill in selection, then, in the terminology of the Penal Code, the mark would be a property mark and not a Trade Mark, but if the main purpose of the mark was to indicate the quality of the goods, then even though A was not the maker of them, it would be a Trade Mark and not a property mark. Even in cases of goods which have no Trade Mark or in cases in which the Trade Mark has not been registered, a person could have a cause of action both in Civil and Criminal Courts for infringement of property mark. It is only in respect of offences falling under Ss. 78 and 79 of the Trade and Merchandise Marks Act the complaint should be filed before the First Class Magistrate. Where the complaint of A, a manufacturer and seller of bug killer called "Bayron" was only for infringement of his property mark by reason of the conduct of accused persons in trying to pass off their goods called "Bairavan" as A's goods by adopting property mark of A, the Sub-Magistrate could take cognizance and try offences relating to infringement of property mark.

(Paras 6, 7)

S. Thyagaraja Iyer, for Petitioners; K. Ramaswami and A. Sarojini Bai, M. R. Krishnan, T. Srinivasan, for Respondents; R. Veeramani, for Public Prosecutor, for the State.

ORDER:— The petitioners in both these revision cases are the same. The first petitioner has been convicted under Sections 482 and 486, I. P. C. and sentenced to pay a fine of Rs. 50/- on each count and in default to rigorous imprisonment for one month and the second petitioner has been convicted under Sec. 486, I. P. C. and sentenced to pay a fine of Rs. 50/- and in default to rigorous imprisonment for one month in C. C. 1846 of 1965 on the file of the Sub-Magistrate of Sankarankoil. The criminal case was initiated on a private complaint filed by the respondent for an alleged offence of using false property mark imitating that of the complainant in manufacturing and selling bug poison. The complainant is a manufacturer and seller of a bug killer liquid called "Byron" and his concern is known as Laila Co. M. O. 1 is a cardboard box containing the bottle of bug killer. The second petitioner was origi-

nally working as an accountant under the complainant but he was discharged from service. The complainant's case is that the first petitioner manufactured bug killer by name "Bairavan" in bottles enclosed in card board box M. O. 3, similar in shape, size and design to M. O. 1 and that both the petitioners sold the said bug killer as that of the complainant.

2. Both the petitioners have been prosecuted in the Court of the Sub-Magistrate (I) Tirunelveli in C. C. No. 1739 of 1966 for again infringing the property mark of the respondent complainant. There the petitioners raised a preliminary objection that the complaint against them would also constitute offences under Sections 78 and 79, Indian Trade and Merchandise Marks Act of 1958 that such offences are triable, according to Section 89 of the said Act, by a magistrate not inferior to a First Class Magistrate and that they could not therefore be tried by a Sub-Magistrate. The Sub-Magistrate overruled the objection and the petitioners have filed Crl. R. C. 747 of 1966 against that order. It is stated by the learned advocate for the respondent that a case has been filed in the Court of the Sub-Divisional Magistrate of Koilpatti, against the petitioners for infringement of the Trade Mark of the respondent complainant.

3. The contention of the learned advocate for the petitioners in both these cases is that the trial Court, namely, the Court of the Sub-Magistrate, had no jurisdiction to entertain the complaints by virtue of Section 89 of the Trade and Merchandise Marks Act, as the offences alleged against the petitioners really fall under Sections 78 and 79 of that Act. The further contention of the learned advocate for the petitioners is that even if the facts alleged in the complaint of the respondent amount to offences both under Sections 78 and 79 of the Trade and Merchandise Marks Act as well as under Sections 482 and 486 of the Indian Penal Code, the Sub-Magistrate would be clutching at jurisdiction in trying the offences under Sections 482 and 486, I. P. C. ignoring the offences under Sections 78 and 79 of the Trade and Merchandise Marks Act of 1958.

4. "Property mark" is defined in Section 479 I. P. C. as a mark used for denoting that moveable property belongs to a particular person. "Trade mark" is defined in Section 2 (v) of the Trade and Merchandise Marks Act as a registered Trade Mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark, in relation to Chapter X of

that Act, and in relation to other provisions of that Act, as a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person and includes a certification of trade mark registered as such under the provisions of Chapter VIII of that Act. After the passing of the Trade and Merchandise Marks Act, offences relating to infringement of Trade Marks have been omitted in the Indian Penal Code leaving intact offences relating to property mark.

5. The term "property mark" as used in the Indian Penal Code, is not known to English law. The distinction between trade mark and property mark is however found in the Indian Penal Code. If a person passes off the goods of another as his own, the English Law, provided a cause of action for the same which is independent of the cause of action for infringement of the trade mark. It is pointed out in Ratanlal's Law of Crimes that the distinction between a 'trade mark' and a 'property mark' is, that the former denotes the manufacture or quality of the goods to which it is attached and the latter denotes the proprietor of them.

6. I am unable to accept the contention of the learned advocate for the petitioners that the complaint filed by the respondent is only for infringement of trade mark. In para 2 of the complaint in C. C. No. 1846 of 1965 on the file of the Sub-Magistrate, Sankarankoil, the complainant has stated that in respect of his bug poison under his trade mark "Bayron" and in respect of shape of bottles and shape or size of card board box, as stated in the previous paragraphs and with colour as found therein, they are distinctive of his goods and he has acquired property rights in respect of them. In fact in the subsequent paragraphs the complainant has stated that the petitioners have been passing off their goods as his goods by infringing his property mark. A mere comparison of M. Os. 1 and 3 in the case is sufficient to convince the correctness of the findings of the Courts below that the petitioners have infringed the property mark of the respondent complainant in C. C. 1846 of 1965. It is true the alleged infringement of property mark in the other case has yet to be enquired into. It is sufficient to state that the Sub-Magistrate, Sankarankoil, in the first revision case and the Sub-Magistrate I, Tirunelveli in the second case had materials before them to take cognizance of the offence for infringement of property mark, punishable under Sections 482 and 486, I. P. C.

on complaint of the respondent in respect of the same.

7. The only other question to be considered is, whether by reason of the infringement of the trade mark, which is also evident from the complaints and which would amount to offences under Sections 78 and 79 of the Trade and Merchandise Marks Act 1958 the Sub-Magistrate would have no jurisdiction to entertain the complaints under Sections 482 and 486, I. P. C. on the ground that he would be clutching at jurisdiction by ignoring obvious facts. The offence of infringement of trade mark is distinct from an offence of infringement of property mark. In fact the existence of such a distinction is clear from the provisions in the Penal Code with regard to trade mark prior to the enactment of the Trade and Merchandise Marks Act, when the offences relating both to trade mark and property mark were triable by Sub-Magistrates:

At page 1240 of Ratanlal's Law of Crimes (20th Edn.) it is pointed out that if A is known not to be the maker or manufacturer of the goods he sells, but only to have selected and put them up and he uses a certain mark to indicate to his customers that they will thus have the benefit of his skill in selection, then, in the terminology of the Penal Code, the mark would be a property mark and not a trade mark, but if the main purpose of the mark were to indicate the quality of the goods, then even though A was not the maker of them, it would be a trade mark and not a property mark. Even in cases of goods which have no trade mark or in cases in which the trade mark has not been registered, a person could have a cause of action both in civil and criminal Courts for infringement of property mark. It is only in respect of offences falling under Sections 78 and 79 of the Trade and Merchandise Marks Act the complaint should be filed before the First Class Magistrate.

The complaints of the respondent in the cases before me are only for infringement of his property mark by reason of the conduct of the petitioners in trying to pass off their goods as his goods, by adopting the property mark of the respondent. I am therefore unable to accept the contention of the learned advocate for the petitioners that the Sub-Magistrate of Sankarankoil in the first case or the Sub-Magistrate (I) of Tirunelveli in the second case has no jurisdiction to try offences relating to infringement of the property mark of the complainant. The criminal revision cases are therefore dismissed.

SSG/D.V.C.

Petition dismissed.

AIR 1969 MADRAS 96 (V 56 C 23)
M. ANANTANARAYANAN, C. J. AND
NATESAN, J.

Sinnaraj Pillai and others, Appellants
v. Ramayee Ammal and another, Respondents.

Letters Patent Appeal No. 97 of 1964,
D/- 24-8-1967, against decree of Srinivasan,
J., in S. A. No. 15 of 1962.

(A) Succession Act (1925), Ss. 106, 107
— Hindu testator — Bequest in favour
of wife and daughter — Held, on con-
struction of will, that bequest was not
joint bequest. S. A. No. 15 of 1962 (Mad).
Reversed.

It is well established that the principle of joint tenancy is unknown to Hindu Law, except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law, which, under that law, passes by survivorship. But that does not mean that because the principle of joint tenancy is unknown to Hindu Law outside the coparcenary, there can never be a bequest to be taken by two persons jointly. A Hindu testator is perfectly at liberty like any other testator to make a joint bequest in favour of two or more legatees and such a bequest can be inferred from the explicit language used, or from the language interpreted in the light of the surrounding circumstances, which justify a joint bequest as the only reasonable inference. Case law Ref. (Paras 5 and 10)

The material portion of the will of a Hindu testator was — "With a view to avoid all disputes relating to these properties after my lifetime and claims by others to the same, under the terms of this Will I give these properties to my wife Meenakshiammal for her maintenance and for my minor daughter for her stridhana, 'seer' and other expenses ... — After my lifetime these two persons shall take items 1 and 2 hereunder absolutely and enjoy the same with powers of gift, sale etc., they themselves discharging the debts specified hereunder. Neither of them shall have power to alienate the third item. Whoever performs the obsequies of Meenakshiammal, shall take the same".

Held that the intention of the testator as disclosed in the above provisions may be defeated, if the principle of joint tenancy with its incident of jus accrescendi should be applied to the bequest. Such an estate is unsuitable when we are concerned with beneficial owners like a Hindu widow and her unmarried minor daughter, who has to be married and provided with stridhana and seer etc. The language of the will, did not permit treating the bequest in favour of Meenakshiammal and Muthammal as a joint be-

viso to Sec. 44 lays down the penal consequences if the Sarpanch and Sahayak Sarpanch are not elected within the prescribed period, in which case the prescribed authority "may" appoint the Sarpanch or the Sahayak Sarpanch. In the proviso the word used is "may" (underlined by me (here in " ")) as contradistinguishing from the word "shall" used in the section. So, in the context of S. 44 of the Act read with Rule 146 (1) of the Rules, it is abundantly clear that the Sarpanch and the Sahayak Sarpanch "must" be elected within one month from the date of the completion of appointment of the panchas. But, the election was postponed as can be seen from Exts. B/1 to B/6 from 6-7-1964 to 16-9-1964. As such, the election is illegal and is contrary to the provisions of Section 44 of the Act and Rule 146 (1) of the Rules.

7. The second contention of the learned Counsel for the petitioners is that the alleged election of the respondents 1 and 2 on 26-9-1964 was held under fraudulent circumstances. The strength of the petitioners' party was "8" while that of the party of the respondents 1 to 7 was "7". The petitioners' case is that if all the 15 members were present, then the petitioners' group would have elected some of the petitioners as Sarpanch and Sahayak Sarpanch and that they would have succeeded in the election, because the strength of their group was "8" as against "7" the strength of the group of the respondents 1 to 7. But, at about 10-00 a.m. on 16-9-1964 when the petitioners were entering into the meeting hall, the petitioners 3, 7 and 8 were arrested by the Police of Imphal Police Station at the gate of the meeting hall and were taken away. The petitioners allege that they requested the Police Officers to release them so that they might attend the meeting and might be re-arrested after the election was over, but that the Police Officers did not heed their request and that they took away the petitioners 3, 7 and 8.

It seems, they were released on bail at about 3 p.m. after the election was over. Ext. A/3 shows that ultimately the investigating officer filed a report on 19-6-1965 stating that in the course of the investigation it transpired that there was a mistake of fact against the accused persons under Section 379, Indian Penal Code and that, therefore, they might be discharged. Ext. A/2 shows that the Judicial Magistrate (I), Imphal, discharged them on 19-6-1965 on the basis of the report of the Police. So, ultimately it is proved beyond doubt that the petitioners 3, 7 and 8 were arrested on 16-9-1964 just before the commencement of the meeting for the election of the Sarpanch and Sahayak Sarpanch to prevent them from taking part in the election and vote.

It is therefore evident that they were got arrested on false and flimsy grounds, and that, the respondents 1, 2 and others, at whose instance they were arrested, played fraud and made the election a simple farce and mockery. In as much as they succeeded in getting rid of the petitioners 3, 7 and 8 by getting them arrested by the Police, the respondents 1 to 7 were in a majority in the meeting and could elect their own candidates as Sarpanch and Sahayak Sarpanch. This is nothing but an abuse of the democracy and the democratic set up of the Nyaya Panchayat. The so-called election was a sham and a colourable election. For this reason also the election is liable to be set aside.

8. The third contention of the petitioners' counsel is that there was no quorum as required by Rule 146 (4) of the Rules at the actual time of election of Sarpanch and Sahayak Sarpanch and that, therefore, their election is void. Sub-rule (4) of Rule 146 lays down that half the number of members of a Nyaya Panchayat, fixed under Rule 9, shall form the quorum for the meeting. The remaining petitioners 1, 2, 4, 5 and 6 presented a petition as per Ext. B/7 before the 8th respondent, bringing to his notice the fact of illegal arrest of the petitioners 3, 7 and 8 and requested him to adjourn the meeting. They immediately left the meeting without signing the list of voters present. Ext. B/8, report sent by the 8th respondent to the 11th respondent, shows that he subsequently conducted the election, that at about 11-15 a.m. the first respondent was unanimously elected by the respondents 1 to 7 as Sarpanch, that at about 11-17 a.m. the second respondent was unanimously elected as the Sahayak Sarpanch and that he dissolved the meeting at 12-00 a.m. As the strength of the Nyaya Panchayat was 15, the quorum required for the meeting was "8". But, there were only 7 members, namely, the respondents 1 to 7 when the election was held. So, the election contravened the provisions of sub-rule (4) of Rule 146 of the Rules.

9. The contention of the learned Counsel for the respondents is that there was quorum in the beginning at about 10-00 a.m. when the meeting commenced with 12 members and that though the 5 petitioners — 1, 2 and 4 to 6 subsequently left the meeting without signing the list of voters present, before the actual election was held, the election was not liable to be set aside. But, the petitioners 1, 2 and 4 to 6 left the meeting at 10-00 a.m. and were not present when the election was actually held. It would have been quite a different matter, if they continued to stay in the meeting at 11-15 a.m. and 11-17 a.m. and refrained from voting. Then, their physical pre-

sence in the meeting could be taken as their actual attendance for the purpose of the meeting and it could be said that there was quorum. But, even though they were present when the meeting commenced, by no stress of imagination could it be said that there was requisite quorum of the members for the meeting at the time of the actual election of the Sarpanch and the Sahayak Sarpanch as they left the meeting and did not sign the rolls even.

Almost a similar question cropped up in Dwarika Nath Dutta v. Chandra Mohan Roy, Mainamati Union Board Case No. 115, reported at page 61, Doabia's Election Cases, 1864-1935 Vol. 2, 1955 edition. In that case 6 voters were present as against 5 for a quorum in a meeting to elect the President of the Union. But 3 voters, who were present, did not vote. It was held that the fact that they did not vote at the meeting would not make them any the less persons present at the meeting. It was pointed out further that if, after joining the meeting, they did not want to be members of the Union, the easiest and usual course for them was to leave the place and that their conduct in simply taking no active part in the meeting did not make them absent from the meeting when as a matter of fact they were present. In the present case there was no quorum at the time when the actual election took place. The petitioners 1, 2 and 4 to 6 had already left the meeting. The election of the respondents 1 and 2 is thus contrary to the provisions of sub-rule (4) of Rule 146 of the Rules and is void. It is liable to be set aside for this reason also.

10. The 8th respondent himself felt doubt over the legality and validity of the proceedings held by him. He did not declare the result of the election on 16-9-1964. On the other hand, he submitted a report to the 11th respondent District Magistrate, as can be seen from Ext. B/8, copy of the report dated 17-9-1964. Therein the 8th respondent did not declare that the respondents 1 and 2 were duly elected. But, he left the matter to the 11th respondent for his decision. The petitioners also challenged the proceedings by applying to the 11th respondent. But, the 8th respondent finally sent notices to the petitioners (which were not dated) stating that he was directed to declare the result of the election of the Sarpanch and Sahayak Sarpanch held on 16-9-1964 and that the respondents 1 and 2 were elected to the Offices. In the copy addressed to the 9th respondent-Assistant-Panchayat Officer, there is a reference to the latter's letter dated 25-2-1965. So, evidently this declaration was made after 25-2-1965. The parties received the notices on 27-2-1965. Thus, the results were not declared until at

least 27-2-1965. Their election is vitiated as there was no quorum in the meeting when the election was held.

11. The next question, which is of some general importance, is whether the present writ petition lies. Rule 147 of the Rules lays down that any dispute relating to the election of a person as Sarpanch or Sahayak Sarpanch shall be decided in the manner provided by Rule 79 for decision of disputes relating to election of Upa-Pradhan. Rule 79 lays down that any person desiring to dispute the election of an Upa-Pradhan shall, within 30 days after the date of election, present an application to the Sub-Divisional Officer of the division, in which the Sabha concerned is situated, setting forth the grounds on which he disputes the election. The S. D. O. should dispose of the election petition according to the provisions of Rules 77 and 78 in so far as they are applicable. But, the petitioners did not seek their remedy under Rule 147 read with Rule 79. The contention of the respondents' counsel is, therefore, that the writ petition does not lie.

12. Article 226 (1) of the Constitution of India, under which the present writ petition was filed, empowers the High Court to issue to any person or authority, orders or writ including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any rights conferred by part III and for any other purpose. Clause (2) lays down that the power conferred on a High Court by Clause (1) or Clause (1A) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32. The contention of the learned counsel for the respondents is that the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India can be invoked only for enforcement of any of the personal rights conferred by part III or other rights akin to the said rights but not for the enforcement of franchise rights and relied on Orissa Mineral Development Co. v. Commissioner of Sales Tax, Orissa, AIR 1960 Ori 79, Calcutta Gas Co. (Proprietary) Ltd. v. State of West Bengal, AIR 1962 SC 1044 and Ram Chandra Malpani v. State of Assam, AIR 1963 Assam 168.

The first case recognised the fact that the existence of an alternative remedy may not always be a sufficient ground for the High Court to refuse to exercise its jurisdiction under Article 226 and held that cases may arise where the unconstitutionality or the illegality of the order under challenge is so apparent that notwithstanding the existence of the alternative remedy the High Court may interfere under that Article. But, it was further ruled that at the same time a party should not be permitted to escape the rigorous effects of the law of limitation by applying to the High Court under Art. 226 of the Constitution, after the expiry of the

period prescribed by law, to get relief from the appropriate revisional or appellate authorities. That case arose under Orissa Sales Tax Act (Act XIV of 1947) as amended by Act XXVI of 1958.

In the second case the constitutional validity of the Oriental Gas Company Act, 1960 (West Bengal Act XV of 1960) was in question. It was held by the Supreme Court that Article 226 in terms does not describe the classes of persons entitled to apply thereunder, but that it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right, that the existence of the right is the foundation of the exercise of jurisdiction of the High Court and that the legal right must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. It was further held that the right, which can be enforced under Article 226, must be ordinarily the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified. The Supreme Court held in that case that the legal personal right of the petitioner was infringed by the provisions of the impugned Act.

But the third case of AIR 1963 Assam 168 has some bearing on this case. Rule 11 of the Rules framed under the Assam Municipal Act (Act XV of 1957) for election of Commissioners of the Municipal Board was not complied with. The Assam High Court held that the right of franchise is a creature of a statute, that if that right is infacted the remedy of the person is to challenge the election by the procedure provided by the special statute, that in that case the election could be challenged before the District Judge under Section 18 (1) (c) of the said Act and that, therefore, no writ petition would lie. It was also held that it is the infraction of an individual and a personal right which gives a person a right to approach the High Court under Article 226 and that the petitioner in that case could not file a writ petition, as no personal legal right of his was infringed.

13. There is large volume of case law, which has laid down that even if there is an alternative remedy it does not bar the jurisdiction of the High Court to exercise its jurisdiction under Article 226 of the Constitution, if the alternative remedy is not adequate and is not equally convenient, beneficial or effective. Vide Hari Vishnu Kamath v. Ahmad Ishaque, AIR 1955 SC 238, Virindar Kumar Satyawadi v. State of Punjab, AIR 1956 SC 153, Virendra Singh v. Returning Officer, Gaon Panchayat Elections, AIR 1957 All 213, Bhagwati Prasad v. J. K. Tandon, AIR 1957 All 354, Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District 1, Calcutta, AIR 1961 SC 372. Parmatma Ram v. Siri Chand, AIR

1962 Him Pra 19, Municipal Council, Khurail v. Kamal Kumar, AIR 1965 SC 1321, M. G. Abrol, Additional Collector of Customs, Bombay v. Shantilal Chhotelal and Co., AIR 1966 SC 197, Laisram Thainil Singh v. District Magistrate, Manipur, W. P. No. 12/1966; 1966 Mani LJ 49, Dr. (Mrs.) Shabir Fatima v. Chancellor, University of Allahabad, AIR 1966 All 45, Hira v. Chetu, AIR 1967 All 452, Atma Singh v. State of Rajasthan, AIR 1967 Raj 239 (FB) and First Income-tax Officer, Salem v. Short Brothers (P.) Ltd., AIR 1967 SC 81.

14. Article 329 of the Constitution of India bars the jurisdiction of the High Court to issue writs in respect of an election to either House of Parliament or either House of the Legislature of a State. But, there is no such constitutional bar to the exercise of writ jurisdiction in respect of elections to local bodies such as Municipalities, District Boards and the like. Vide also pages 639 and 640 of *Constitutional Law of India*, by H. M. Seervai, 1967 edition. In the following cases, relating to disputes for elections to Local bodies, the High Courts exercised their jurisdiction under Article 226 of the Constitution of India, though no election petitions were filed under the provisions of the relevant Acts. AIR 1957 All 213 was under the same U. P. P. R. Act applicable to the present case in question. After the declaration of an election to a municipality the District Magistrate passed without jurisdiction an order declaring the election void and also fixed a date by which re-election was to be completed. It was held that the order was passed without jurisdiction and that there was no bar to the High Court for issuing direction quashing the order and consequential mandamus. In AIR 1957 All 354, the nomination papers of two candidates for election to the office of Pradhan of Gaon Sabha were accepted by the Assistant Returning Officer after scrutiny. He declared one of the candidates as having been duly elected to the office of Pradhan. But, the Director of Elections held that the Assistant Returning Officer had no jurisdiction to pass the order and quashed it and directed re-election. It was held that the Director of Elections acted wholly without jurisdiction since he was not given any authority to adjudicate whether the Returning Officer had acted without jurisdiction or not and that the result of the election could be challenged only by an election petition and not before the Director of Elections. A writ was issued quashing the orders of the Director of Elections. In Parmatma Ram v. Siri Chand, AIR 1962 Him Pra 19 it was held that the existence of an alternative remedy under the Punjab Municipal Act (Punjab Act III of 1911) and the Municipal Election Rules of 1957 framed thereunder was not a bar to the exercise of the powers under Article 226 of the Constitution of India and that in the circumstances of the case the non-filing of

a petition challenging the election of the successful candidate in accordance with Rules 54 and 55 of the Municipal Election Rules, 1957, did not operate as a bar to the maintainability of the petition praying for writ of quo-warranto.

In Civil Writ Petn. No. 12 of 1966 = 1966 Mani LJ 49 this Court held that a writ would lie to quash the election of the Municipal Commissioners, which contravened Sections 14 and 16 of Assam Municipal Act and Rules 19 and 22 of the Rules of Election of Commissioners of Municipal Board Manipur, though there was an alternative remedy. In AIR 1966 All 45 it was held that though an alternative remedy under Section 42 of the Allahabad University Act (Act III of 1921) of challenging the election lay before the Chancellor, the alternative remedy was neither adequate nor equally appropriate and that, therefore, writ petition lay. In AIR 1967 All 452 it was held that the power of the Court conferred by Article 228 cannot be restricted by a provision contained in an Act of Parliament or of State Legislature, that consequently, even though as a practice and in order to respect the Legislative direction the election shall not be challenged except by means of an election petition, there is no insurmountable hurdle in the way of the Court in granting relief in a suitable and hard case.

In AIR 1967 Raj 239 (FB) there are very pertinent observations at page 247. In para 20 Bhandari, J. stated as follows:

"20. No doubt, jurisdiction of the High Court in exercising the power under Article 228 of the Constitution cannot be taken away by any provision made by the Legislature for ousting the jurisdiction of the civil Court. But, when this Court is passing an order for setting aside an election for any infirmity in pre-election matters, it will no doubt keep in view that the Legislature has laid down certain conditions which must be satisfied before an election could be set aside, and those, who come to this Court for seeking relief under Article 228 of the Constitution should not be permitted to get such relief by evading that provision of law, except when, on strictest scrutiny of the case, the Court finds that there has been such breaches of the provisions of law that the State or the authority concerned should not have proceeded at all to hold the election, or when the holding of an election was merely a farce. Except for such cases, generally speaking election of a person as a member of the Board should not be set aside for defects in pre-election matters."

14A. In the present case, there are the following circumstances which warrant this Court exercising its extraordinary jurisdiction under Article 228 of the Constitution of India, though the petitioners had the alternative remedy of challenging the election before the Sub-Divisional Officer, under Rule 147 read with Rule 79 of the Rules.

Firstly, Section 12 (c) of the Act, which bars jurisdiction of a Civil Court, applies to disputes regarding election to the Office of Pradhan of a Gram Sabha or member of it including the election of a person who may be appointed as a Panch of a Nyaya Panchayat under Section 43 of the Act. In such a case the election can be called into question by an application presented to the authority concerned within the prescribed time and in the prescribed manner. But, it does not apply to disputes regarding the election to office of Sarpanch or Sahayak Sarpanch. Secondly, the election was held in total disregard of the provisions of sub-Rules (1) and (4) of Rule 148 of the Rules read with section 44 of the Act. Thirdly the respondents 1 to 7 played fraud in getting the petitioners 3, 7 and 8 arrested just before the election was to be held on false allegations of theft and manipulated to have a majority of their party at the time of the election. The election was simply a mockery and a farce. It was a colourable one which cannot be allowed to stand.

15. The learned counsel for the respondents stated that the petitioners circumvented the law of limitation by filing the writ petition, that under Rule 147 read with section 79 of the Rules, the election petition should have been filed within one month from the date of election of the respondents 1 and 2, but that the petitioners filed the writ petition on 24-3-1965. They relied on AIR 1960 Orissa 79 where it was held that the law of limitation cannot be allowed to be circumvented by a person by filing a writ petition, where his ordinary remedy is otherwise barred by limitation. But, in the present case the respondents 8 to 11 declared the election of the respondents 1 and 2 only after 25-2-1965 and the present writ petition was filed by the petitioners within one month, namely, on 24-3-1965. So, they cannot be said to have circumvented the law of limitation.

16. In the result, the writ petition is allowed and the election of the respondents 1 and 2 as Sarpanch and Sahayak Sarpanch is set aside. The District Magistrate should fill up according to law the vacancies of the Panchas caused by the death of the petitioners 5 and 6 and the 6th respondent under Sections 43 and 50 of the Act. Later on, he should get the election of Sarpanch and Sahayak Sarpanch held within one month from the date of the completion of the appointment of the panchas. The petitioners are entitled to their costs. Advocate's fee Rs. 50. One set.

L.G.C./D.V.C.

Petition allowed.

AIR 1969 MANIPUR 21 (V 56 C 7)

C. JAGANNADHACHARYULU, J. C.

Kongbrailatpam Benimadhab Sarma, Appellant v. Konbrailatpam Madhsudon Sarma, Respondent.

Misc. Civil Appeal Case No. 1 of 1967
D/- 26-10-1967, from Order of Sub. J., Manipur, D/- 28-2-1967.

(A) Civil P. C. (1908), Order 39, Rule 1 — Applicability — Rule 1 applies to cases of partition of joint properties. AIR 1952 Ajmer 51 (2), Ref. to. (Para 6)

(B) Civil P. C. (1908), Order 39, Rule 1 — Temporary injunction — When issued — Points to be considered by Court.

Before issuing a temporary injunction pending disposal of a suit, the plaintiff has to make out, firstly, that he has got a prima facie title to the properties. Secondly, the plaintiff must establish that he will suffer irreparable injury which is a material one which cannot be adequately compensated for by damages. Thirdly, he must prove that the balance of convenience is in favour of the plaintiffs, who are likely to suffer substantial mischief if the injunction is refused when compared to the mischief which might be caused to the defendants if the injunction is granted. Fourthly, the status quo must be maintained. The Court has to take into consideration all these points before granting a temporary injunction.

(Para 7)

(C) Civil P. C. (1908), Order 39, Rr. I, 2 — Granting of temporary injunction under Rule 1 — Prayer for relief of permanent injunction in suit not necessary. (Para 8)

Cases Referred: Chronological Paras (1962) AIR 1962 Manipur 18 (V 49),

Kongjengbam Babudhon Singh v.

6

Hemam Romonyaima Singh

B

(1962) AIR 1962 Manipur 55 (V 49),

Kangabam Biramangol Singh v.

B

Madhabi Devi

B

(1952) AIR 1952 Ajmer 51 (2)

(V 39) = 1952 AMLJ 9, Kanhayalal v. Surajmal

B

R. K. Manisana Singh, for Appellant;
R. K. Nokulsana Singh, for Respondent.

JUDGMENT: This is an appeal against the order of the Second Subordinate Judge, Manipur, dated 23-1-1967 passed in Judl. Misc. Case No. 34 of 1966 in Title Suit No. 4 of 1963 on his file granting temporary injunction restraining the appellant-defendant from committing acts of waste on the suit home-stead ingkhola pending disposal of Title Suit No. 4 of 1963.

2. The respondent filed Title Suit No. 4 of 1963 in the lower Court against the appellant and some others for declaration that the partition of the plaint schedule property by the Assistant Survey and Settlement Officer, Circle C and confirmed by the

Director of Settlement and Land Records and the Chief Commissioner is illegal and for partition of the same into two equal shares between the plaintiffs on one hand and the defendant-appellant on the other hand and for delivery of possession of their half share to them.

3. The case of the respondent and the other plaintiffs is that the plaint "A" schedule property belonged to one late Kongbrailatpam Krishnachandra Sarma, that he erected a temple in the plaint "B" schedule property, that the plaintiffs 1 to 4 are the descendants of the first degree and plaintiff No. 5 is the widow of late Nadiachand Sarma, one of the sons of late Krishnachandra Sarma, that the defendant appellant is the other son of late Krishnachandra Sarma, that after the death of Krishnachandra Sarma, the defendant-appellant and Nadiachand Sarma enjoyed the properties jointly as co-owners and that after the death of Nadiachand Sarma the plaintiffs succeeded to his share in the said properties. It is also their case that certain proceedings were taken by the A. S. and S. O. Circle (C) for partition of the suit property, that they were confirmed by the Director of Settlement and Land Records and the Chief Commissioner, Manipur, but that they are void and illegal and that they do not bind the plaintiffs. So, they filed the suit for partition of the suit property and for recovery of their shares.

4. The appellant-defendant pleaded in his written statement that the partition effected by the A. S. and S. O. Circle (C) and confirmed by the Director of Settlement and Land Records and the Chief Commissioner are valid and binding on the plaintiffs.

5. During the pendency of the suit, the plaintiffs filed Judicial Misc. Case No. 34 of 1966 under Order 39, Rule 1, Civil P. C. for temporary injunction restraining the defendant-appellant from damaging and otherwise wasting the suit property until the suit is disposed of. The Subordinate Judge granted the temporary injunction. Hence, the present appeal.

6. The contention of the appellant's counsel is that the plaintiffs' suit is in the nature of a suit for declaration of their title simpliciter and that no temporary injunction should have been granted. He relied on two decisions of this Court in Kongjengbam Babudhon Singh v. Hemam Romonyaima Singh, AIR 1962 Manipur 18 and Kangabam Biramangol Singh v. Madhabi Devi, AIR 1962 Manipur 55. In both the cases, the suits were filed for mere declaration to title of the plaintiffs without prayer for any consequential relief like injunction etc. It was held that there was no "property in dispute" within the meaning of Order 39, Rule 1, Civil P. C. and that consequently neither the plaintiff nor the defendant was entitled to apply for temporary

injunction to restrain the other party from interfering with his or her possession. But the present suit is of a different type. It was filed by the plaintiffs for partition of joint property. It is not a suit simpliciter for declaration that the orders for partition passed by the A. S. and S. O. Circle (C), confirmed by the Director of Settlement and Land Records and the Chief Commissioner are illegal and do not bind the plaintiffs. They pray for a decree for partition of the joint property. The provisions of Order 39, Rule 1, Civil P. C. are applicable to suitable cases for partition of joint properties. So, the above rulings have no application to the facts of the present case. Vide also Kanhayalal v. Surajmal, AIR 1952 Ajmer 51 (2).

7. The learned Subordinate Judge did not properly set out the well known principles of law which have to be considered before issuing a temporary injunction pending disposal of a suit. The plaintiffs have to make out, firstly, that they have got a prima facie title, that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of the plaintiffs being entitled to the reliefs asked for by them. The title of the plaintiffs to a moiety of suit properties is not in dispute. The appellant-defendant inter alia supports the order of the A. S. and S. O. and pleads that his order for partition is valid and binding on the plaintiffs. So, the plaintiffs have got prima facie title to the properties. Secondly, the plaintiffs must establish that they will suffer irreparable injury which is a material one which cannot be adequately compensated for by damages. The allegations of the petitioners supported by the affidavit of the respondent herein, show that the appellant committed several acts of waste on and damage to the properties. He admittedly demolished his existing residential house on the ground that it was damaged on account of floods and is now making preparation to construct another permanent house at some other place in the suit property. He removed bricks from the temple situate on the plain "B" schedule land and the plaintiffs allege that he is using the said bricks for the construction of a parapet wall. It appears that the appellant shifted his residence to the "Mandop" and is indulging in unholy and irreligious acts of cooking fish etc. in the temple. The plaintiffs allege that the appellant and his agents have cut away the plants and bamboos growing on the northern side of the suit ingkhol. The appellant cannot be permitted to waste away or damage the suit properties pending disposal of the suit. Thirdly, the balance of convenience is in favour of the plaintiffs, who are likely to suffer substantial mischief if the injunction is refused, when compared to the mischief which might be caused to the appellant if the injunction is granted. Fourthly the status quo must be maintained.

8. The learned counsel for the appellant contended that the plaintiffs did not pray for any permanent injunction and that, therefore, they are not entitled to any temporary injunction. This argument may hold good in a case falling under the provisions of Rule 2 of Order 39, Civil P. C. But, the present case is governed by Order 39, Rule 1, Civil P. C. So, the order of the Subordinate Judge is correct, though he did not discuss the points, which have to be borne in mind by the Court when it issues temporary injunction.

9. The Subordinate Judge is, however, directed to dispose of the suit without delay as it is a very old one.

10. In the result, the appeal fails and is accordingly dismissed with costs.

DRR

Appeal dismissed.

AIR 1969 MANIPUR 22 (V 56 C 8)

C. JAGANNADHACHARYULU, J. C.

Government of Manipur, Petitioner v. Thokchom Tomba Singh and others, Respondents.

Criminal Revn. No. 21 of 1967, D/- 30-8-1968, from Order of Magistrate 1st Class, Manipur, D/- 25-8-1967.

Constitution of India, Article 20 (3) — Identification of Prisoners Act (1920), Section 2 (a), 4, 5, 6 — Evidence Act (1872), Section 73 — Under Sections 4 and 5 of the Identification of Prisoners Act accused can be compelled to give his measurements — His refusal or resistance entitles authorities to use reasonable force to get measurements — Word "Measurements" as defined in Section 2 (a) of that Act does not include specimen hand-writing and accused cannot be compelled to give specimen under Sections 4 and 5 — However, a Magistrate has power under Section 73 of the Evidence Act to direct an accused to give finger impressions as well as specimen writing — Refusal will entail in prosecution under Section 186, Penal Code — Giving of thumb mark or specimen handwriting does not offend against Article 20 (3) of Constitution, AIR 1961 SC 1808, Rel. on. (Para 7)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 1808 (V 48) = 1961 (2) Cri LJ 858, State of Bombay v. Kathi Kalu Oghad 6

N. Ibotombi Singh, Public Prosecutor, for Petitioner.

ORDER: This is a petition in revision filed by the Government of Manipur against the Order of Shri Y. Ibotombi Singh, Magistrate First Class, Manipur dated 23-8-1967 in refusing to obtain the finger impressions and specimen signatures of the accused in F. I. R. Case No. 195(8)67 M. I. P. S. under Section 409, I. P. C.

2. The circumstances leading to the filing of this revision petition are as follows:

On 18-7-1967 one Khumukwam Toyaima Singh, a village Pradhan, collected 15 quintals of rice and 15 quintals of atta from the Civil Supply Office for distribution to the villagers. But, the Pradhan, along with others, is alleged to have misappropriated the food grains by maintaining a register with fictitious names of some villagers, who did not receive any quantity of food grains. A case being F. I. R. Case No. 195(8)67 M. I. P. C. U/S. 409, I. P. C. was registered.

3. The Investigating Officer seized a register containing thumb impressions and signatures. He arrested all the accused persons. He moved the Magistrate—Shri H. Jugeswar Singh on 17-8-1967 and also on 18-8-1967 by filing petitions to make the accused put their thumb impressions and signatures for comparison by a handwriting expert and finger print expert. The Magistrate forwarded the accused to Shri Y. Ibotombi Singh. But, as the accused refused to put their thumb impressions and sign before the Magistrate, the latter sent back the accused without making them give their thumb impressions and specimen writings.

4. Hence the revision petition.

5. Neither the respondents nor their counsel appeared when the case was called. The learned Government Advocate addressed his arguments.

6. It is now clear by the decision of the Supreme Court in State of Bombay v. Kathi Kalu Oghad, AIR 1961 SC 1808 that giving thumb impressions or specimen hand writing does not fall within the expression "to be a witness" under Article 20 (3) of the Constitution of India. So, an accused can be compelled to put his thumb impressions or sign before a Magistrate, so that they can be compared with other thumb impressions or signatures on record.

7. Also, under Section 4 of Identification of Prisoners Act, 1920, any person who has been arrested in connection with an offence punishable with rigorous imprisonment for a term of one year or upwards should, if so required by the Police Officer, allow his "measurement" to be taken in the prescribed manner. Section 5 of the same Act empowers a Magistrate to order a person to be measured or photographed. U/S. 2 (a) of the Act "measurement" includes finger impressions. So, under Section 6 of the Act, if he refuses or resists to allow his measurements or photographs to be taken, it shall be lawful to use all the means necessary to secure the taking thereof. Resistance is an offence punishable U/S. 186, I. P. C. But, the word "measurement" does not include "handwriting". So, though the accused can be compelled to put his thumb marks, he cannot be compelled to sign. But he is liable to be prosecuted U/S. 186,

I. P. C. In any case the Magistrate has got the power to make an accused put his thumb mark or sign. As such, the Magistrate Shri Ibotombi Singh went wrong in sending away the accused. He should have taken steps according to law to obtain thumb impressions or signatures of the respondents.

8. In the result, the order of the Magistrate is set aside and the revision petition is allowed. The Magistrate is directed to obtain the thumb impressions and signatures of the accused respondents. If they refuse to give their thumb impressions or to sign, the Magistrate should take steps according to law to obtain the same.

HGP/D.V.C.

Revision allowed.

AIR 1969 MANIPUR 23 (V 56 C 9)

C. JAGANNADHACHARYULU, J. C.

Aribam Keshorjit Sarma, Plaintiff, Petitioner v. Konjengbam Amu Singh and another, Defendants, Respondents.

Civil Revn. Case No. 12 of 1966, D/-23-2-1967 against Order of Addl. Munsiff (II) Manipur, D/- 13-4-1966.

(A) Stamp Act (1899), Sections 2 (22), 35 and 60 (as applied to Manipur State) — Negotiable Instruments Act (1881), Sec. 4 — "Promissory note" — Document reciting borrowing of money mortgaging certain land and also promise to repay loan within certain period — Document held not a promissory note but a simple mortgage — It can be admitted in evidence after paying deficit stamp duty and penalty — Document can be relied on as evidence of money debt though not as simple mortgage — Question involved was not very intricate and lower court was not bound to make reference under Section 60 — Transfer of Property Act (1882), Section 58 — Registration Act (1908), Section 49.

The plaintiff filed a money suit to recover a sum due on a document which recited that the defendant borrowed a certain sum from him mortgaging his land and that he agreed to repay the loan with interest within a certain period and that he undertook to make good his title to the property if any one raised dispute about it. The plaintiff contended that the document was a promissory note and it was validly stamped with 30 P. revenue labels.

Held that the document was not a promissory note. It was lacking in the essential requisites of a promissory note. There was no unconditional promise to pay the amount. It did not appear to be negotiable.

(Para 6)

It contained the characteristics of a simple mortgage bond. There was firstly the existence of a loan. Secondly, the defendant bound himself personally also to repay the loan. Thirdly, he secured the loan by mortgaging specific immovable property. Fourthly he did not deliver possession of the property to the plaintiff. Under Section 35 of the Indian Stamp Act the trial Court was correct in calling upon the plaintiff to deposit the deficit stamp duty and penalty. If they were deposited, the document in question became an unregistered but validly stamped simple mortgage bond. Under Section 49 of the Registration Act, though the document could not be relied upon as affecting the immovable property and as a simple mortgage bond, still it could be relied on as evidence of the money debt. The document could be admitted as evidence of the personal covenant contained therein to repay the debt: Case law discussed.

Held, further that the question involved in the case was not very intricate and the lower court was not bound to make a reference under Section 60 of Stamp Act to High Court. (Paras 7, 9)

(B) Evidence Act (1872), Section 23 — Admission by Counsel of party made without prejudice to his contention does not bind the party — An incorrect admission on a question of law also does not bind the party. (Para 8)

Cases Referred: Chronological Paras
(1964) AIR 1964 Andh Pra 188

(V 51), Muhammad Jamal Saheb v. Munwar Begum

(1963) AIR 1963 All 376 (V 50) = 1962 All LJ 702, Thakur Harbux Singh v. Satish Chandra

(1963) AIR 1963 Mys 244 (V 50), B. K. Narayana Singh v. H. M. Mohun Shunshere Jung Bahadur

(1961) AIR 1961 SC 787 (V 48) = 1961 All LJ 613, Govt. of Uttar Pradesh v. Raja Mohammad Amir Ahmad Khan

(1961) AIR 1961 Mad 347 (V 48) = ILR (1961) Mad 218, Muthu Gounder v. Perumayammal

(1960) AIR 1960 Raj 20 (V 47) = ILR (1959) 9 Raj 641, Raghunath Prasad v. Mangilal

(1955) AIR 1955 Mad 652 (V 42) = ILR (1955) Mad 1027 (FB), Kuppuswami Chettiar, in the matter of

(1954) AIR 1954 Sau 52 (V 41) = 6 Sau LR 94, Keshavji Thakershi v. Narshi Ramji

(1941) AIR 1941 All 158 (V 28) = ILR (1941) All 264, Sushil Chander Chaturvedi v. Wali Ullah

(1940) AIR 1940 Lah 486 (V 27) = 42 Pun LR 660, Om Prakash v. Mukhtar Ahmad

(1933) AIR 1933 Cal 786 (V 20) = 58 Cal LJ 403, Kantamoni Dassi v. Biswa Nath Pal

(1932) AIR 1932 Lah 172 (V 19) = 33 Pun LR 58 (SB), Amar Singh v. Asa

(1931) AIR 1931 Cal 732 (V 18) = 184 Ind Cas 1269 (SB), Veraj Lal Muljee v. Secy. of State

T. N. Bhattacharjee, for Petitioner; R. P. Dorendra Singh, for Respondent

ORDER: This is a revision petition filed by the plaintiff in Money Suit No. 13 of 1965 on the file of the Court of the Munsif, Imphal, under Ss. 115 and 151, Civil P. C. to set aside his order dated 13-4-1966 passed in the suit.

2. The petitioner filed Money Suit No. 13 of 1965 on the file of the Lower Court to recover a sum of Rs. 615 with further interest from the date of the plaint till realisation of the amount due on a document, executed in favour of the petitioner on 9-5-1962. The petitioner also prayed for a decree for the sale of the respondent's land covered by patta 81/38 Imphal Pana in Taobungkhok Basti by enforcing the charge on the same created by the document.

3. The Munsif passed an order on 3-3-1966 that the document in question is a mortgage bond and not a promissory note, that it was not properly stamped, that it is inadmissible in evidence U/S. 35 of the Indian Stamp Act — Act II of 1899 (applied to Manipur State) and "that the petitioner should take further steps under the Stamp Act if he wished to get it admitted in evidence."

4. Thereupon, the petitioner filed a petition on 22-3-1966 stating that the document in question is a promissory note for the purpose of the Indian Stamp Act, that even an unregistered mortgaged bond is admissible in evidence to support a claim for a money decree, that the lower Court should have collected the deficit stamp duty and penalty and admit the document in evidence and that, without prejudice to his contentions, the lower Court should impound the document after collecting the deficit stamp duty and penalty and admit the same in evidence of the petitioner's claim for money. Then, the lower Court passed the order in question on 13-4-1966 holding that deficit stamp duty of Rs. 3.45 P. (Rs. 3.75 P. minus 30 P. already paid) is payable under Art. 40 (b) of Schedule I of the Indian Stamp Act, that he should further pay Rs. 34.50 P. towards penalty being 10 times the deficit stamp duty and that, after the petitioner deposited the same, the document should be impounded and sent to the District Collector for his endorsement and return.

5. The petitioner's counsel challenged the above orders of the lower Court on several grounds. His first contention is that the document in question is a promissory note, that it was validly stamped with 30 P. revenue labels and that the document is admissible in evidence. The document

in question was written in Manipur language. Its English translation (as done by the petitioner's counsel) is as follows:—

Sd/- Sri Amu Singh Konjengbam,

Lender Shri Aribam Keshorjit Sarma, Uripok Laikhurembi Leikai. I Shri Kongiengbam Amu Singh of Khagempali Huidrom Leikai have borrowed a sum of Rs. 300/- from Mahajan, mortgaging a paddy land U/Patta 81/38 Imphal Pana, Taobungkhok Basti. The amount will be repaid within a period of 3 months with interest at the rate of Rs. 3% per mensem. I undertake all responsibilities in case of any claim from any quarter. Dated 9-5-62."

Thus, the document reads that the respondent borrowed a sum of Rs. 300/- from the petitioner mortgaging his land covered by patta 81/38 in Imphal Pana, that he agreed to repay the loan with interest @ 3% per mensem within a period of 3 months and that the respondent undertook to make good his title to the property, if any one raised dispute about it.

6. The question is whether this document is a promissory note within the meaning of Section 4 of the Indian Negotiable Instruments Act or Section 2 (22) of the Indian Stamp Act as contended by the petitioner's counsel. Section 4 of the Indian Negotiable Instruments Act runs as follows:

A 'promissory note' is an instrument in writing (not being a bank-note or a currency note) containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

6-A. Section 2 (22) of the Indian Stamp Act runs as follows:—

'Promissory note' means a promissory note as defined by the Negotiable Instruments Act 1881; it also includes a note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen."

The contention of the learned counsel for the petitioner is that a promise to pay the amount covered by the document is implied and that the document in question is, therefore, a promissory note. He relied on Sushil Chander Chaturvedi v. Wali Ullah, (AIR 1941 All 158). It was held that it is a question of fact in each case, whether a particular document is to be regarded as an acknowledgment or promise and that in order to decide this question the primary intention of the parties and the real characteristics of the document must be looked into. But, in the present case the document in question shows that it is lacking in the essential requisites of a promissory note. There is no unconditional promise to pay the amount to the petitioner. It does not appear to be negotiable. On the other hand, it shows that the respondent mortgag-

ed his paddy land covered by patta 81/38 Imphal Pana in favour of the petitioner towards security for the amount. The document further shows that the respondent undertook to make good his title to the property, if any dispute was raised by anyone regarding the property. Further, a reading of the plaint and the prayer portion of it shows that the intention of the parties was to treat the document as a simple mortgage bond.

In fact, the petitioner also prayed for a decree for sale of the property by enforcement of the charge on the land covered by the document. So, it is clear that the document is not a promissory note. There are a number of decisions relied on by the counsel for the respondent, which go to show when a document can be said to be a promissory note. In Verajlal Muljee v. Secretary of State, AIR 1931 Cal 732 (SB) the promisor under a document stated that, till the debts were paid to the promisee, he "pledged" all his properties to him and that he would dispose of the same only after discharging the debts due to the promisee. It was held that the document should be construed as a whole and that there was no doubt that it amounted to transfer of the properties by way of assurance or mortgage. In Keshavji Thakershi, v. Narshi Ramji, AIR 1954 Sau 52 it was held that the essential feature of a promissory note is an expressed unconditional promise to pay and that it is not enough that the substantial effect of the instrument should be to make the executant liable to pay a sum of money. In that case there was an acknowledgment of a settled account in an account book. It was held that the mere fact that there was a further statement of the amount being payable in certain instalments did not substantially convert the essence of the document to make it a promissory note. The case law on the subject was discussed.

In the matter of, Kuppusami Chettiar, AIR 1955 Mad 652 (FB), the document ran as follows:—

"Promissory note executed in favour of A residing at P by K. The sum found due to you is Rs. 3000/-. As this sum had to be paid to you, I shall pay the same together with interest at Re. 0-4-0 per month per Rs. 100/- in six equal instalments and discharge the same".

It was held that the document was not a promissory note, as there was no unconditional undertaking to pay a certain sum of money and that it was only a bond as defined by Section 2 (5) (b) of the Indian Stamp Act. In Raghunath Prasad v. Mangi Lal, AIR 1960 Raj 20 the entry of the balance due in an account book was signed by the debtor. There was a statement of the debtor in his own hand-writing that the balance was due after the account was taken. This was followed by a promise by the debtor to pay the amount to the creditor and was again signed by the debtor. It

was held that the document was more in the nature of a settlement of account between the parties with a promise to pay the amount due, that it was never intended to be negotiable and that it did not fall within the definition of a promissory note but that it was only an agreement. In *Muthu Gounder v. Perumayammal*, AIR 1981 Mad 347 the document read as follows:—

"I promise to pay you or your order after a period of two years on demand by you the sum of Rs."

It was held that it was not a promissory note within the meaning of the expression in Section 2 (22) of the Indian Stamp Act.

7. The document in question in the present case is not a promissory note. It contains the characteristics of a simple mortgage bond. They are firstly, the existence of a loan. Secondly, the respondent bound himself personally also to repay the loan. Thirdly, he secured the loan by mortgaging specific immovable property. Fourthly, he did not deliver possession of the property to the petitioner. The fact that the document cannot be registered now is immaterial. So the learned Munsiff is correct in holding that the document in question is a simple mortgage bond.

8. The learned counsel for the respondent argued that the petitioner's counsel admitted in his petition dated 22-3-1966 that the document might be impounded, that stamp duty and penalty might be collected so that the document might be admitted in evidence of the money claim only and that, therefore, the present contention of the petitioner that the document is a promissory note is not tenable. The petition shows that the petitioner's counsel mentioned therein that he made the above request without prejudice to his contentions. Besides under Section 23 of the Indian Evidence Act his alleged admission (made without prejudice to his contentions) does not bind the petitioner. Also, an incorrect admission on a question of law does not bind the party.

9. Under Section 35 of the Indian Stamp Act the Munsiff was correct in calling upon the petitioner to deposit Rupees 34.50 P. towards the deficit stamp duty and penalty. If they are deposited, the document in question becomes an unregistered but validly stamped simple mortgage bond. Under Section 49 of the Indian Registration Act, though the document cannot be relied upon as affecting the immovable property and as a simple mortgage bond, still it can be relied on as evidence of the money debt. Section 49 of the Indian Registration Act runs as follows:—

"49. No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall —

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument."

That the document can be admitted as evidence of the personal covenant contained therein to repay the debt is clear from a number of rulings cited at pages 348 and 349 of Sanjiva Row's Indian Registration Act, 1960 Edition. Vide also *Khantamoni Dassi v. Biswa Nath Pal*, AIR 1933 Cal 786 and *Om Prakash v. Mukhtar Ahmad*, AIR 1940 Lah 486.

10. The learned Counsel for the petitioner argued that the Collector is the final authority who can decide the sufficiency of the stamp duty payable on the document and that, therefore, the lower Court should have sent the document to the District Collector under Section 32 of the Indian Stamp Act. He relied on *Government of Uttar Pradesh v. Raja Mohammad Amir Ahmad Khan*, AIR 1961 SC 787 and *B. K. Narayana Singh v. H. M. Mohum Shumshere Jung Behadur*, AIR 1963 Mys 244. In these cases the documents were produced before the Collector for certificate under Sections 31 and 32 of the Indian Stamp Act. But, the present case falls under Section 35 of the Indian Stamp Act, under which the Court can admit an otherwise inadmissible unregistered document by collecting the deficit stamp duty and penalty. The document in question was not filed by the petitioner before the Collector under Section 31 of the Indian Stamp Act. So, the above decisions have no bearing on the facts of this case.

11. The learned Counsel for the petitioner also relied on *Thakur Harbux Singh v. Satish Chandra*, AIR 1963 All 376 and *Mahammad Jamal Saheb v. Munwar Begum*, AIR 1964 Andh Pra 188 relating to Section 36 of the Indian Stamp Act, which held that when once an instrument is admitted in evidence, its admissibility cannot be questioned at any subsequent stage in the same matter. These decisions also have no application to the facts of this case, as much as the document in question was not admitted by the lower Court as evidence.

12. The contention of the petitioner's counsel is that the lower Court should have made a reference to this Court under Section 60 of the Indian Stamp Act and relied on *Amar Singh v. Asa*, AIR 1932 Lah 172

(SB). But, in that case itself it was held that a reference should be made only when the Judge has any doubt and not in every case. The questions involved in this case are not very intricate and the Munsiff was not bound to make a reference to this Court.

13. However, the Munsiff went wrong in directing that the document should be sent to the District Collector after the deficit stamp duty and penalty are collected. The proper procedure to be followed, when the deficit stamp duty and penalty are paid, is laid down by Sections 42 and 38 of the Indian Stamp Act. Under Section 42 of the Indian Stamp Act the Munsiff shall make an endorsement on the document that proper stamp duty and penalty (stating the amount of each) were levied. The name and residence of the persons paying them should also be mentioned. Thereafter, he should send a true copy of the document together with a certificate in writing stating the amount of duty and penalty levied in respect thereof and send the amount to the Collector, as required by Section 38 of the Indian Stamp Act. The Munsiff should not send the original document to the Collector. After the stamp duty and penalty are collected, he should proceed with the trial of the suit, after observing the provisions of Sections 42 and 38 of the Indian Stamp Act.

14. In the result, the revision petition is dismissed with the above observations and directions. The parties should bear their respective costs.

L.G.C./DVC

Petition dismissed.

AIR 1969 MANIPUR 27 (V 56 C 10)

C. JAGANNADHACHARYULU, J. C.

Longjam Thambalangou Singh and others, Petitioners v. Huidrom Tollamu Singh and others, Respondents.

Criminal Revn. Case No. 23 of 1967, D/17-5-1968.

Criminal P. C. (1898), S. 145 — In passing order under S. 145, Magistrate is not bound by report of Police — He has to make his own judicial enquiry. AIR 1952 Pepsu 29, Rel. on. (Para 7)

Cases Referred: Chronological Paras

(1963) 1963 (1) Cri LJ 823 (Mani),

Kundrakpam Thambalangou Singh v. Laisram Beda Singh 7

(1962) 1962 (1) Cri LJ 821 (Mani),

Yumnam Sajou Singh v. Chanamban Thambalangou Singh 7

(1952) AIR 1952 Pepsu 29 (V 39) =

1952 Cri LJ 482, Harbir Singh v.

State 7

A. Ibopishak Singh, for Petitioners; R. K. Manisana Singh, for Respondents.

GL/IL/D172/68

ORDER: This is a revision petition filed under Section 485, Cr. P. C. to set aside the order of the Sessions Judge, Manipur dated 1-12-1967 in Criminal Misc. Case No. 480/67 dismissing the same, filed to set aside the order of the S. D. M., I. W. dated 8-11-1967 in Criminal Misc. Case No. 48 of 1967 filed under Section 145, Cr. P. C.

2. The brief facts of the case are thus: The Tronglaobi sub-fishery of Leitangpat Fishery No. 128 was de-reserved in 1960. The Chief Commissioner, Manipur, ordered on 1-7-1960 that the said fishery should be settled in favour of a Farming Co-Operative Society, formed by the landless people of a contiguous village, without prejudice to the interest of the Government in the Grass-mahal. On the assurance given by the Settlement Department, the petitioners formed a Farming Co-operative Society in 1965-66. Even, prior to the year of de-reservation, the members of the Society including the petitioners reclaimed the lands and the petitioners were thus in physical possession and enjoyment of the lands for about 10 years.

3. Sometime in the month of October, 1966, the respondents who are the villagers of Thiyam Leisangkhong applied for settlement in the name of a proposed Co-operative Society as "Thiyam Leisangkhong Co-operative Society" (not yet registered). The Settlement Department granted some lands to individuals on 25-10-1966. The petitioners filed C. C. Revenue Appeal Case No. 2 of 1967 before the Chief Commissioner. After hearing the parties, the Chief Commissioner cancelled the settlement and remanded the case to the Settlement Officer for re-consideration and issued direction that the de-reserved area should not be granted in such a way that the order of settlement should flout the intention of the Government, so far as the purpose of de-reservation is concerned.

4. The respondents filed Writ Petition No. 10 of 1967 in this Court to set aside the order of the Chief Commissioner and obtained stay of the operation of his order. The respondents filed an application before the S. D. M., I. W., (Cril. Misc. Case No. 40 of 1967) under Section 144 (2), Cr. P. C. for an order against the petitioners. The S. D. M., I. W. passed an ex parte order on 5-10-1967 under Section 144 (2), Cr. P. C. The order was to remain in force upto 5-12-1967. On account of the said order, the petitioners were ousted from the possession of the disputed 30 paris of "Lou". Being aggrieved by the order, the petitioners filed a petition Cril. Misc. Case No. 4 of 1967 under Section 144 (4) and (5) Cr. P. C. before the District Magistrate on 13-10-1967. The latter passed a stay order on 17-10-1967. By virtue of the stay order the petitioners' party resumed possession of the disputed 30 paris of "lou". The stay order

was operative till the final decision of Criminal Misc. Case No. 4 of 1967. The District Magistrate, however, erroneously added that the Mayang-Imphal Police could report to the S. D. M., I. W. under Section 144 (2), Cr. P. C. if there was need for prevention of any breach of the peace.

5. The Mayang-Imphal Police filed a report dated 29-10-1967 before the S. D. M., I. W. to draw up proceedings under Section 145, Cr. P. C. against both the parties. On a petition filed by the petitioner, the S. D. M., I. W. passed an order on 7-11-1967 that no proceeding would be launched in respect of the disputed lands before the pronouncement of the order by the District Magistrate on 20-11-1967 (so that his order might not flout the purpose of the stay order passed by the District Magistrate). But, again the S. D. M., I. W. passed an order on 8-11-1967 (cancelling his previous order dated 7-11-1967) under Section 145 (1), Cr. P. C.

6. The petitioners moved the Sessions Judge in Criminal Misc. Case No. 480 of 1967 to set aside the order of the S. D. M., I. W. dated 8-11-1967. The learned Sessions Judge dismissed the petition on 1-12-1967. Hence, the present revision petition.

7. The learned counsel for the petitioners raised two grounds for interference by this Court in the present revision petition. Firstly, he urged that as the petitioners obtained possession of the disputed land (rightly or wrongly) after 17-10-1967 by virtue of the stay order passed by the District Magistrate, pending disposal of the Criminal Misc. Case No. 4 of 1967, the S. D. M., I. W. should have protected their possession and that he should have taken action against the respondent under Section 107, Cr. P. C. He relied on Yunnam Sajou Singh v. Chanamban Thambalangou Singh, 1962 (1) Cri LJ 821 (Mani) and Khundrakpam Thambalangou Singh v. Laisram Beda Singh, 1963 (1) Cri LJ 823 (Mani) wherein this Court pointed out the distinction between the proceedings under Section 145, Cr. P. C. and those under Section 107, Cr. P. C. The Magistrate will have to distinguish between a case where one party is clearly in possession of the land and another party, who is not in possession of the land attempts to interfere with the possession of the other party and thereby attempts to create a breach of the peace and a case where a bona fide dispute regarding the land exists, which is likely to create a breach of the peace. In the former case, the course of the Magistrate is to take action against the other party under Section 107, Cr. P. C. and to bind him over to keep the peace. But, in the latter case the Magistrate will have to start proceedings under Section 145, Cr. P. C. It was also pointed out that the Magistrate must apply his mind judicially in such matters. In the present case, the report of the Police dated 29-10-1967, on which re-

liance was placed by the learned counsel for the petitioners to show that the petitioners were in possession of the land, does not, in fact, support his contention. The report reads that it was difficult to find out which party was in actual physical possession of the land and that the petitioners entered forcibly into the disputed land after the District Magistrate passed the stay order on 17-10-1967. Section 145 (4), proviso (2) clearly lays down that, if it appears to the Magistrate that any party has within two months next before the date of the preliminary order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date. As such, the fact that the petitioners obtained forcible possession of the land in dispute after 17-10-1967 during the pendency of the stay order passed by the District Magistrate does not avail the petitioners. The Magistrate is not bound by the report of the Police. He has to make his own judicial enquiry. Vide in this connection, note 18 at page 946 of Sohoni's Code of Criminal Procedure Vol. I 1965 edition and also Harbir Singh v. State, AIR 1952 Pepsi 29. So, the S. D. M., I. W. was correct in starting proceedings under Section 145, Cr. P. C.

8. The second contention of the learned counsel for the petitioners is that the District Magistrate erred in giving a direction in his stay order that the Mayang-Imphal Police could report to the S. D. M., I. W. under Section 144 (2), Cr. P. C. if there was need for prevention of any breach of the peace, that it amounted to a direction under Section 145, Cr. P. C. to the Magistrate through the Police to take action, but that he had no authority to do so. He relied on the commentary at pages 200 and 201 of Sarkar's Law of Criminal Procedure Second Edition, wherein the learned Commentator states that the District Magistrate has no authority to direct a Magistrate to institute proceedings under Section 145, Cr. P. C. But, in this case the District Magistrate did not direct the S. D. M., I. W. to take action under Section 145, Cr. P. C. But, he suggested to the Mayang-Imphal Police to report to the S. D. M., I. W. under Section 144 (2), Cr. P. C. if there was any need for prevention of the breach of the peace. So, the officer-in-charge of the Mayang-Imphal Police was entitled to move the S. D. M., I. W. under Section 145, Cr. P. C., as he did, by filing his report on 29-10-67.

9. The respondents' counsel brought to my notice a number of receipts, documents etc. to show that the respondents were in possession of the disputed land, while the petitioners' counsel stated that the petitioners also had a number of documents to prove their possession but that they did not file them as yet before the S. D. M. and that the petitioners, who are residents of a contiguous village are entitled to settlement.

As the matter is now pending not only before the Settlement Officer but also in this Court in Writ Petition No. 10 of 1967, I refrain from making any observation on the merits of the case.

10. In the result, the petition fails and it is accordingly dismissed.

AKJ/D.V.C. Petition dismissed.

AIR 1969 MANIPUR 29 (V 56 C 11)

C. JAGANNADHACHARYULU, J. C.

Naik Brindhavanrai, Petitioner v. Churamani Thapa and others, Respondents.

Civil Revn. Case No. 8 of 1965, D/- 25-1-1967 against Order of Munsiff, Manipur D/- 12-7-65.

Civil P. C. (1908), Section 115 — Appreciation of evidence — Interference under Section 115 is not to be made in an order based on appreciation of evidence, in the absence of any material irregularity or illegal exercise of jurisdiction — Finding on an appreciation of evidence adduced by both sides that the plaintiff had not established his claim is not to be interfered with in revision. (Para 10).

T. N. Bhattacharjee, for Petitioner; Kameswar Mishra, for Respondents.

ORDER: This is a civil revision petition filed under Sections 115 and 151, Civil P. C. to revise the judgment of the Munsiff, Manipur at Imphal in S. C. C. 22 of 1962 dated 12-7-1965 dismissing the suit filed by the petitioner against the respondents 1, 2 and 3 for recovery of two pieces of timber cut and removed by the respondents or their value of Rs. 50.

2. The petitioner alleged in the plaint that on 9-7-1961 the respondents entered into his land, that they wrongfully cut and carried away 2 pieces of timber existing thereon within the Assam Rifles Colony and in the possession of the petitioner, that the petitioner at once prosecuted the respondents under Section 379, I. P. C. in Criminal Case 12 of 1962 on the file of the Magistrate, Imphal West, that they were discharged on 22-5-1962 by the court with a direction to the petitioner that he should seek relief in a civil Court and that, therefore, the petitioner was entitled to recover the two pieces of timber or a sum of Rs. 50 towards the value of the 2 pieces in the alternative.

3. The respondents 1 to 3 filed a joint written statement alleging that the petitioner-plaintiff was never in possession of the whole area of the Colony, that there are many members who have been in possession of their shares of the land in the Colony and that the petitioner had been possessing his specific share of two paris of land only. The respondents 1, 2 and 3 further stated in their written statement that they were also

occupying lands in the Colony, that there were no big trees existing on the petitioner's land, that the existing Hindi Higher Secondary School in Kanglatongbi was started to be constructed by public enterprise and contribution in cash and kind in June, 1961, that for the sake of convenience the entire contributing area was divided into six blocks, that a resolution in a meeting No. 7 dated 28-5-1961 was passed to the effect that each block should contribute two logs of wood for windows and doors of the said School, that accordingly block No. 4 Assam Rifles Colony contributed two logs which were carried to the destination through a bullock-cart, that without any reasonable or probable cause and after a panchayat was held the petitioner filed Criminal Case 12 of 1962 against the respondents but that they were discharged and that the suit was liable to be dismissed.

4. The petitioner examined one Gagan Bahadur Sunwar as P. W. 1; himself as P. W. 2 and marked Exts. A/1 and A/2. The respondents examined one Mukti Prasad Chhetri as D. W. 1, Dhan Singh Limbu as D. W. 2, and Umanath Chhetri (defendant 3) as D. W. 3 and marked Exts. B/1, B/2 and B/3.

5. The lower court correctly framed the point to be considered, viz., whether the respondents wrongfully cut and carried away the two timber pieces from the land of the petitioner thereby causing damage to him to the extent of Rs. 50. The Munsiff discussed the evidence let in by both parties and held that the claim of the petitioner is not proved and dismissed the suit with costs. Hence the present civil revision petition.

6. The point for determination is whether the interference by this Court under Section 115, Civil P. C. is called for.

7. The learned counsel for the petitioner as well as the respondents argued the matter on merits as though this Court sat in appeal against the judgment of the Court below. The Munsiff discussed the evidence let in by the petitioner in Para 5 of his judgment and held therein that there is variance between his pleading and the proof regarding the number of pieces of timber said to have been taken by the respondents and that it was not proved satisfactorily that the timber in question belonged to the petitioner. Then in para 6 of his judgment he stated that the evidence let in by the respondents proves their case as against the case of the petitioner.

8. I agree with the learned counsel for the petitioner that simply because P. W. 2 the petitioner stated in his plaint that the respondents took away two pieces of timber while in his evidence only one was found to have been delivered to the respondents is not a ground for dismissing the suit, if really there is evidence that one piece of timber of P. W. 2 was wrongfully taken away by D. W. 3.

But, a scrutiny of the evidence shows that the petitioner's case cannot be accepted. According to P. W. 2 in his plaint the respondents entered into his land and cut and removed the timber on 9-7-1961. But, his evidence is otherwise. His evidence is that the Colony was opened in 1952-53, that the Commandant of the Colony ordered its occupants to cut the trees and clear the jungle and keep big timber for construction of their houses, that accordingly they cleared the jungle and stocked some timber including the timber in question, but that the respondents 1 and 2 attempted to carry away three pieces of timber in spite of his protest. He further deposed that he reported the matter to the Ranger of Forest Office, Sekmai, that the Ranger seized the three pieces under exhibit A/1 dated 9-7-1961 that the Ranger kept two pieces with P. W. 2 under Ext. A/2, that he delivered one piece to D. W. 3, the third respondent, that P. W. 2 demanded D. W. 3 to return the timber, that D. W. 2 did not return it and that, therefore, P. W. 2 is entitled to recover that piece or its value. Both Exts. A/1 and A/2 are dated 9-7-1961.

9. As against the above evidence of P. W. 2 there is the evidence of D. W. 1, who deposed that D. W. 1 had only two "paris" of land in the Assam Rifles Colony in the eastern-most extremity, that there were old trees in that part of the Colony upto 1956, that for the purpose of contribution, the Colony was divided into six blocks in June, 1961, that for each block 2 pieces were contributable for the construction of the Hindi Higher Secondary School, that panchayat was held on the allegation that P. W. 2 cut away five pieces of timber on a land beyond his two paris of land, that, P. W. 2 was fined Rs. 20 by the panchayat and that he was required to make over two pieces in dispute to the School. The evidence of D. W. 3, the third respondent, who is the Secretary of the School is to the same effect. He proved Ext. B/1 which shows that P. W. 1 agreed to deliver 2 pieces. He proved P. W. 1's signature, Ext. B/2 on Ext. B/1. Exhibit B/1 is dated 5-9-1958. The contention of the learned counsel for the petitioner is that as Ext. B/1 is dated 5-9-1958, it has nothing to do with the two pieces of timber in dispute covered by Ext. A/1 dated 9-7-1961.

A reading of the evidence in the light of the pleadings shows that the timber must have been cut on or about 5-9-58 and that when it was being taken for the purpose of the construction of the School on 9-7-1961 the dispute was raised by P. W. 2. So, the documents are connected. P. W. 2 denied his signature on Ext. B/1. The lower Court obtained his signatures for the purpose of comparison. Even now, if his signatures are compared with Ext. B/2, they appear to be identical.

10. The evidence let in by P. W. 2 is sufficiently rebutted by the respondents. The

lower court did not act in the exercise of its jurisdiction illegally or with material irregularity in coming to its conclusions. It is a question of appreciation of evidence adduced by both the parties. As such, there are no grounds for interference under Sec. 115, Civil P. C.

11. As pointed out by the learned counsel for the respondents, P. W. 2 appears to have filed the suit on the observation made by the Magistrate in his judgment as per Ext. B/3 that P. W. 2 should have sought redress in a civil court.

12. In the result, the revision petition fails and is accordingly dismissed with costs here and in the court below.

VSD/G.G.M.

Petition dismissed.

AIR 1969 MANIPUR 30 (V 56 C 12)

C. JAGANNADHACHARYULU, J. C.
J. N. Bardhan, Petitioner v. Union Territory of Manipur and others, Respondents.
Civil Writ Appln. Case No. 21 of 1965,
D/ 4-9-1968.

(A) Constitution of India, Article 226 — Affidavit in reply by petitioner — Disputed questions of fact cannot be traversed — Civil P. C. (1908), Order 19, Rule 3.

(Para 8)

(B) Eastern Bengal and Assam Excise Act (1 of 1910) Sections 29, 9 (4) — Licence to sell potable foreign liquor granted by Excise Collector (Deputy Commissioner) to proprietor of restaurant — Cancellation of licence by Finance Secretary — Order is illegal — Board has also no authority suo motu to cancel licence. (Para 9)

(C) Eastern Bengal and Assam Excise Act (1 of 1910), Section 32 — Licence to sell potable foreign liquor to proprietor of restaurant — Breach of some of the conditions by licensee — Proprietor of restaurant held not entitled to claim as a matter of right renewal of his licence — This is matter purely in the discretion of Chief Commissioner — Court cannot compel him to exercise discretion in favour of licensee — AIR 1961 Assam 20 and AIR 1959 SC 65, EPL — (Constitution of India, Article 226 — Mandamus). (Para 10)

Cases Referred: Chronological Paras (1961) AIR 1961 Assam 20 (V 48),
Mahammad Hanif v. State of Assam 10

(1959) AIR 1959 SC 65 (V 46) = 1959 SCR 1424, Chao Mal and Sons v. State of Delhi 10

A. Ibopishak Singh, for Petitioner; N. Ibo-tombi Singh, Govt. Advocate, for Respondents.

ORDER: This is a petition filed under Article 226 of the Constitution of India by one J. N. Bardhan of Paona Bazar Road,

Imphal, against (i) the Union Territory of Manipur, (ii) Chief Commissioner of Manipur and (iii) the Secretary (Finance) to the Government of Manipur for quashing the order of cancellation of the petitioner's licence for running a restaurant "with bar attached" on Paona Bazar Road, Imphal.

2. The petitioner is the proprietor of a guest house, a hotel and restaurant on Paona Bazar Road, Imphal. He applied on 15-5-1964 to the Minister (Finance), Government of Manipur, through the Finance Secretary, Government of Manipur for a licence to sell whisky, rum, gin etc. of Indian make by peg system in his guest house hotel under the Eastern Bengal and Assam Excise Act (Act I of 1910), (hereafter called as the Act) which was made applicable to the Union Territory of Manipur and under the Manipur Excise Rules of 1962 (hereinafter called as the Rules) framed under the Act by the second respondent. Vide Ext. B/1 which is a true copy of his application. Thereafter, the Inspector of Excise, Manipur, sent a letter (Ext. A/1) dated 25-9-1964 to the petitioner asking him to let him know whether he was running a hotel or a restaurant and to which the petitioner would attach the bar.

The petitioner replied to the Inspector of Excise on the same date, as can be seen from Ext. A/2 that he was running a hotel and a restaurant but that he would close the hotel and keep the restaurant with bar attached, the moment the licence was issued to him. After enquiry, the Collector of Excise, Manipur, issued a licence (of which Ext. A/3 is a true copy) dated 7-10-1964 with certain conditions. Exhibit A/3 reads that the petitioner was permitted by the Excise Collector of Manipur to use the restaurant with bar attached for sale of potable foreign liquor to be sold by glass only and to be served and consumed within the premises of the bar. Certain other conditions were also imposed.

3. The petitioner ran the restaurant from 7-10-1964 under the name and style of "Guest House Bar Restaurant" in Paona Bazar, Imphal. The licence was to expire on 31-3-1965. He deposited Rs. 100.00NP. in the Treasury in Manipur for renewal of licence till 31-3-1966 (Vide Exts A/4 and B/3). In the meanwhile, the then Finance Secretary Shri S. Subramaniam, cancelled the licence by his order dated 25-3-1965 (as per Ext. A/5) on the ground that the petitioner opened a separate bar and restaurant in another building, far away from the guest house contrary to the terms of the licence and against the policy of the Government in the gradual enforcement of prohibition and that the petitioner also contravened the terms of the licence by purchasing liquor from dealers outside the Union Territory instead of purchasing it from the local dealers. The rum and other items were all seized under Ext. A/6 dated 6-4-1965 by an Excise Officer. The petitioner

made representation to the Government to rescind the order of cancellation.

The Under Secretary to the Government of Manipur sent Ext. A/7 (letter) to the petitioner dated 5-5-1965 that the Government refused to reconsider its decision to cancel the licence. The respondents adjusted the surcharge and sale fee etc. from the sum of Rs. 100 deposited by the petitioner towards renewal of the licence. The petitioner sent a demand notice (Vide Ext. A/8) dated 26-6-1965. The Finance Department sent a letter Ext. A/9 dated 15-7-1965 stating that the matter was under consideration and that the final reply would follow. But, as no further reply was given, the petitioner filed the present writ petition on 13-10-1965, questioning the authority of the Finance Secretary to cancel the licence and the authority of the Government in adjusting the amount of Rs. 100.00 NP. deposited by the petitioner towards the dues due to the Government.

4. The respondents filed counter alleging that the licence, issued to the petitioner, authorised him to sell potable foreign liquor by glass to the boarders of the guest house within the premises of the building standing on plot No. 286/211, Paona Bazar, Imphal, in which the petitioner was running a restaurant under Municipal Licence No. 81, but that instead of complying with the said condition the petitioner opened bar in another building on a different plot in Paona Bazar, Imphal, which was about 220 yards away from his guest house where he was running his boarding and that the petitioner also imported foreign liquor from outside Manipur in breach of the terms and the conditions of licence.

The respondents further alleged that according to the notification as per Ext. B/2 dated 11-5-1962, the second respondent Chief Commissioner, Manipur was declared to be the "Board" under the Act, that the Government of Manipur as the "Board" came to know about the breach of the terms and the conditions of the licence and that therefore the Board cancelled the licence under its orders in Ext. A/5. The respondents also allege that a sum of Rs. 80.50 NP. was due from the petitioner towards surcharge and sale fee etc., that the respondents adjusted the amount and requested the petitioner to take refund of the balance money but that the petitioner refused to accept the adjustment (vide Ext. B/4) and that, therefore, the stock was seized by the Sub-Inspector of Excise on 6-4-1965. The respondents contend that the cancellation of the licence was legal and that the writ petition is not maintainable.

5. Section 3 of the Act contains the definitions. Sub-section (2) of Section 3 defines "Board" as the Provincial Government of Assam which means the Administration of Manipur in the case of Union Territory of Manipur according to the Rules. Sub-

section (8) of Section 3 defines "Excise Commissioner" as the Officer appointed by the Provincial Government under Section 8 sub-section (2) Clause (a) of the Act.

6. Exhibit B/2 (notification) dated 11-5-1962 reads that the second respondent Chief Commissioner appointed the Deputy Commissioner of Manipur as the Excise Commissioner within the meaning of Section 3 (8) of the Act and that the Chief Commissioner would continue to be the "Board" for the purposes of the Act.

7. It is common ground that the Collector of Excise, Manipur (Deputy Commissioner) was authorised to issue the licence to the petitioner as per Ext. A/3. Though the respondents' counsel stated that the licence was itself illegally granted, they admitted in para 2 of their counter that the Collector of Excise, Manipur issued the licence in the exercise of power conferred on him under the Act, as extended to the erstwhile State of Manipur under Council Resolution No. 23 dated 25-8-1948. So, the validity of the licence cannot now be questioned by the respondents.

8. But, the respondents allege that the petitioner committed breach of the terms of the licence. Firstly, they allege that the petitioner ran the bar in another building on a different plot in Paona Bazar, Imphal, instead of in the guest house building on plot No. 288/211, for which he obtained Municipal Licence No. 81 and that the said building was about 220 yards away from the guest house where the petitioner was running his boarding and where he agreed to run the bar also. The respondents also allege that the petitioner imported foreign liquor from outside Manipur in breach of the conditions of Ext. A/3. The petitioner filed an affidavit in reply. But, he did not specifically deny these allegations of the respondents. He simply stated that the allegations of the respondents, which are inconsistent with the facts mentioned by him in his petition, were denied. In the present writ petition disputed questions of fact cannot be traversed. The Court has to proceed on the footing that he committed breach of the conditions of Ext. A/3.

9. Then the next question is who was competent to cancel the licence. Exhibit A/5 shows that the then Finance Secretary cancelled the licence. But, Section 29 of the Act lays down that, subject to such restrictions as the Provincial Government may prescribe the authority who granted any licence, permit or pass under the Act may cancel or suspend the same for the grounds mentioned therein. In the present case the authority, who granted the licence, was the Excise Collector (Deputy Commissioner). The Finance Secretary had nothing to do with the licence. So, he had no authority to cancel the licence. The learned Government Advocate, however, argued that the Finance Secretary cancelled the licence

under the direction of the second respondent "Board", as can be seen from Ext. A/5 letter of cancellation itself, wherein the Finance Secretary stated that he was directed to issue the letter of cancellation. But, even the "Board" has no authority *suo motu* under the Act or the Rules to cancel the licence.

Section 9 of the Act shows that orders passed under the Act or under the Rules shall be appealable as prescribed by the Rules to the District Collector, if any order was passed by a Collector other than the District Collector, to the Excise Commissioner if any order was passed by the District Collector and to the Board if any order was passed by the Excise Commissioner or by a Commissioner of a Division. No doubt, under Section 9 (4) of the Act, the Board may call for the proceedings held by any officer or person subordinate to it and pass such orders thereon as it may think fit. But, in the present case no order was passed by the Excise Collector. The learned Government Advocate was not able to point out any provision in the Act or the Rules under which the Board can *suo motu* cancel the licence issued by the Collector. So, the order of cancellation of the licence is illegal.

10. Then the next question is whether the petitioner is entitled to renewal of the licence. But, under section 32 of the Act, no person to whom a licence has been granted under the Act shall have any claim to the renewal of the licence, or, save as is provided in Section 30, to lay claim for compensation. So, the petitioner is not entitled as a matter of right to claim that the licence should be renewed in his favour. The respondents' learned counsel contended that, in view of Section 30 of the Act, no writ petition lies and relied on *Mahammad Hanif v. State of Assam*, AIR 1961 Assam 20 in support of his contention. In that case the State Government as lessor of certain land, resumed it in terms of the lease. It was held that the State Government stood on the same footing as any private lessor and that the High Court could not interfere with the rights of the two individuals, even though those rights related to property.

The decision in *Ghajoo Mal and Sons v. State of Delhi*, AIR 1959 SC 85 is more direct to the point. In that case the right of a licensee to get his licence in form L-2 renewed under Delhi Liquor Licence Rules of 1935 was considered. It was held that the usual practice was that, once a licence in Form L-2 is granted by the Chief Commissioner, it was almost automatically renewed by the Collector from year to year, unless, of course, the licensee was found guilty of breach of any excise rule and that in such a case of renewal there was no vacancy entitling any outside competitor to apply for a licence in Form L-2, that if in case it was held that the order granting the licence was a nullity on account of its not

will cannot take effect and the rights of the adopted son cannot be defeated because such vesting is inconsistent with the right of an adopted son who is entitled to claim the properties of his adoptive father. AIR 1927 PC 139 and AIR 1928 Mad 271, Followed. Case law referred.
(Paras 41, 42)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 59 (V 49) =

(1962) 2 SCR 813, Krishnamurthi Vasudeorao v. Dhruwaraj 31, 33, 39

(1955) AIR 1955 Andh Pra 278 (V 42)=1955 Andh WR 344, Lakshminarasimham v. Garimella Rajeswari 44

(1954) AIR 1954 SC 379 (V 41) = 1955 SCR 1, Srinivas Krishnarao Kango v. Narayan Devji 31, 33, 39, 40

(1954) AIR 1954 Mad 19 (V 41) = 66 Mad LW 231, Lalitha Kumari Devi v. Raja of Vizayanagaram 43

(1950) AIR 1950 Bom 271 (V 37)= 52 Bom LR 290, Bhimaji Krishnarao v. Hanmantrao Vinayak 44

(1950) AIR 1950 Bom 289 (V 37) = 52 Bom LR 301, Vithalbhai Gokalbhai v. Shivabhai Dhoribhai 44

(1950) AIR 1950 Bom 319 (V 37)= ILR (1950) Bom 480, Narayan v. Padmanabh 44

(1946) AIR 1946 Nag 203 (V 33)= ILR (1946) Nag 425, Udhao Sambh v. Bhaskar Jaikrishna 44

(1943) AIR 1943 PC 196 (V 30) = 70 Ind App 232, Anant Bhikkappa v. Shankar Ramachandra 38, 39

(1939) AIR 1939 All 348 (V 26) = 1939 All LJ 642, Mt. Izhar Fatma Bibi v. Mt. Ansar Fatma Bibi 16, 24

(1937) AIR 1937 PC 174 (V 24) = 31 Sind LR 379, Mahabir Prasad v. Mustafa Hussain 16, 24

(1932) AIR 1932 Cal 600 (V 19) = ILR 59 Cal 859, Sashi Kantha v. Promode Chandra 44

(1931) AIR 1931 PC 285 (V 18) = 58 Ind App 362, Venkat Rao v. Namdeo 16, 24

(1929) AIR 1929 Mad 296 (V 16) = ILR 52 Mad 398, Veeranna v. Sayamma 37, 39

(1928) AIR 1928 Mad 271 (V 15) = 108 Ind Cas 202, Erram Reddy v. Maram Reddy Lakshminarayana 42

(1927) AIR 1927 PC 139 (V 14) = ILR 50 Mad 508, Krishnamurthi Ayyar v. Krishnamurthi Ayyar 41, 42, 43, 44

(1918) AIR 1918 PC 192 (V 5) = ILR 43 Bom 778, Pratapsingh Shivasingh v. Agarsinghji Raisinghji 31, 34, 35

M. Krishnaswamy, for Appellant; V. Krishna Murthy, for Respondents.

KALAGATE, J.: Plaintiff is the appellant. His suit, in so far as it relates to

the recovery of possession of the suit properties as the adopted son of one Krishnaji, has been dismissed by the trial court. Hence this appeal.

2. Plaintiff, by his plaint, dated 7th March 1958, alleged that he was adopted by Krishnabai (defendant 1), the widow of Krishnaji, on the 26th June 1947. Krishnaji's father Swami Rao had two brothers viz., Venkata Rao and Bheema Rao. Venkata Rao died in 1870; prior to his death he had to become separated from his two brothers Swami Rao and Bheema Rao, and got certain properties. But, after his death, his widow Jeevubai, who died in 1906, released the properties obtained by her husband on partition in favour of Krishnaji and two sons of Bheema Rao. Thereafter there was a partition between Krishnaji (his adoptive father) and the two sons of Bheema Rao, and in that partition, the suit properties came to the share of Krishnaji. Krishnaji died in the year 1900 and it was thereafter that his widow adopted the plaintiff to Krishnaji, and he, by virtue of his adoption, has become the son of Krishnaji.

3. After the death of Krishnaji, his wife Krishnabai went to reside at Poona, and Seetharam, the son of Jeevan Rao (son of Bheema Rao), took advantage of this fact and alienated the properties which came to the share of Krishnaji. These alienations are not binding on him, and therefore he is entitled to those properties as the properties of his adoptive father.

4. Defendant 1, his adoptive mother, died soon after the institution of his suit but after filing her written statement, and therefore her evidence is not available to the Court. Defendant 2 is the wife of Seetharam, but she has not contested the plaintiff's claim. Defendants 3 to 11 are all alienees from Seetharam either directly or having purchased the properties in court sales in execution of the decrees against him. The alienees are at present in possession of the suit properties.

5. The properties in suit, as stated in plaint para 2, are situate in four villages. At the hearing, the learned counsel for the appellant made it clear that he has no claim to properties situate in Ingalgip Bendigere and Belvalkop i.e. the properties described in clauses (b), (c) and (d) of plaint para 2. His case, as to the properties situate in Agadi village, which are six in number, is that three lands bearing R. S. Nos. 186, 200 and 225/2 fell to his adoptive father's share in the partition and therefore he is entitled to claim them wholly. The other three lands bearing R. S. Nos. 10/1, 10/2 and 11, which went to the share of Venkata Rao on partition, came back to the

family under the deed of relinquishment executed by his widow Jeevubai, and therefore, he is entitled to a half share in them. So, we are concerned with the six properties situate in the village Agadi.

6. Defendant 1, by her written statement, supported the plaintiff's claim. Defendant 2 remained ex parte.

7. The contentions of defendants 3 to 11, the alienees, relevant for the purpose of this appeal, are as follows:

They deny the plaintiff's adoption; they also deny that the properties belonged to Krishnaji. However, it is stated by defendant 6 in his written statement that in the partition between Krishnaji and the two sons of Bheema Rao, he got only three lands viz., R. S. Nos. 186, 200, and 225/2 situate in the village Agadi. Prior to his death, Krishnaji made an oral will by which he bequeathed these properties to Jeevan Rao, father of Seetharam, and further directed his wife to enjoy those properties during her lifetime. In pursuance of the said will of Krishnaji, his wife Krishnabai executed the document in the year 1904, Ext. 309, stating therein that in accordance with the desire expressed by her husband Krishnaji, she was executing that document in favour of Seetharam, since Jeevan Rao had died in the year 1903. They therefore state that the properties belonging to Krishnaji vested in the legatee after his death which took place in the year 1900 and, therefore, the plaintiff who is adopted in the year 1947, i.e., 47 years thereafter, is not entitled to claim the properties which have gone out of the family and vested in the legatee under the oral will made by Krishnaji, his adoptive father.

8. The other contentions are not relevant and, therefore, we do not propose to state them.

9. On these findings, the learned trial Judge raised several issues and found that the plaintiff has proved his adoption to defendant 1 as a son to her husband Krishnaji, that there was partition during the lifetime of Venkata Rao, between Venkata Rao on the one hand and Swami Rao and Bheema Rao on the other, and, in that partition Venkata Rao got the two Revision Survey Nos. 10 and 11 of Agadi village, as his share, and that these properties after Venkata Rao's death were relinquished in favour of Krishnaji and the two sons of Bheema Rao by Jeevubai, the widow of Venkata Rao under document Ext. 308, dated 28th March 1898. He has also found that there was a subsequent partition between the two branches of Krishnaji and Bheema Rao and that, in that partition Krishnaji got to his share

three lands viz., Revn. Survey Nos. 186, 200 and 225/2, and that Seetharam became the full owner of R. S. Nos. 10/1, 10/2 and 11 of Agadi village by partition. He has also found that the defendants have proved that Krishnaji Swami Rao had made an oral will in respect of the properties fallen to his share and that the plaintiff who was adopted subsequent to the will made by Krishnaji, and after his death, is not entitled to claim those properties. We do not think it necessary to state his findings on other issues. As a result of his findings he dismissed the plaintiff's suit in so far as it related to the recovery of the suit properties, and it is against the decree dismissing his suit that the present appeal has been filed by the plaintiff.

10. The finding that plaintiff has been duly adopted as a son to Krishnaji is not challenged in this appeal by the learned counsel for the respondents. Therefore the learned counsel for the appellants had made only two submissions. They are, firstly as to Revision Survey Nos. 10/1, 10/2 and 11. It is contended that Krishnaji, his adoptive father had one-half share in them and he is, therefore, entitled to claim that share; and secondly, as to the other three survey numbers, stated to be disposed of by Krishnaji by his oral will. It is submitted that the alleged oral will said to have been made by Krishnaji is not proved in accordance with law, and even assuming that the oral will is proved, the same is invalid and the disposition made by such an oral will cannot affect the plaintiff's right to claim the properties of his adoptive father.

11. The argument is that plaintiff, being the adopted son of Krishnaji must be deemed to be in existence as on the date of death of Krishnaji by virtue of the doctrine of 'relation back', and if he was in existence as on the date of death of Krishnaji, then any will made by Krishnaji becomes invalid, and the dispositions made by such will cannot take effect; the properties still remain the properties of Krishnaji. Therefore, Jeevan Rao the legatee or his son Seetharam would not get any title to the properties, and consequently the alienees from Seetharam also do not get any title thereto and, therefore, they are not entitled to remain in possession; the plaintiff is, therefore, entitled to recover possession of those properties from them. It is on these two contentions, submitted, that the decree made by the trial court cannot be sustained and must be set aside.

12. We will now proceed to examine those two submissions. We will first consider plaintiff's claim in relation to revision survey Nos. 10/1, 10/2 and 11 of the

Agadi village not covered by the will. Out of the three properties, two properties viz., revision survey Nos. 10/1 and 11 are now found to be in possession of defendant 3, and defendant 4 is in possession of the other revision survey No. 10/2.

13. It is the plaintiff's case that since these properties taken by Venkata Rao on partition came back to the family consisting of Krishnaji and the two sons of Bheema Rao, and since they are not disposed of by the will of Krishnaji, he is entitled to claim one-half share in them. The trial court accepted plaintiff's case and found that, in the earlier partition, Venkata Rao alone separated himself and took two Revn. S. Nos. 10 and 11 of Agadi village as his share in the family properties. This finding is not challenged before us. It is also not disputed before us that Jeevu Bai the widow of Venkata Rao, has relinquished by Ext. 308, the two revision survey numbers in favour of Krishnaji and the two sons of Bheema Rao and that it was a valid surrender. It is, therefore, contended for the plaintiff that since these two properties came back to the family consisting of two branches i.e., of Krishnaji and Bheema Rao. Krishnaji was entitled to one-half share, and the plaintiff claims that one-half share of the adoptive father Krishnaji. If there is nothing else, perhaps there would be some justification for plaintiff's claim to one-half share in these properties.

14. But it is to be remembered that after the properties were relinquished by Jeevubai in favour of Krishnaji and the two sons of Bheema Rao, there was a partition between Krishnaji and the two sons of Bheema Rao. This fact is not in controversy. Then we have to see what properties fall to the share of Krishnaji in that partition which, as we gather from Ext. 309, must have taken place in about the year 1900. Ext. 309 furnishes material evidence to show what were the properties which fell to the share of Krishnaji in the partition between Krishnaji and the two sons of Bheema Rao. This document mentions the number of properties which fell to the share of Krishnaji in several villages; it mentions only three revision survey Nos. viz. 186, 200 and 225 of Agadi village as having fallen to his share. Thus it is clear that the other three lands did not fall to his share. The omission to mention these survey numbers in which the plaintiff claims one-half share clearly leads to that conclusion. No evidence has been led by the plaintiff to show that Krishnaji had any interest in those properties. There is evidence to show that Seetharam has dealt with those properties as his own, and the revenue record also shows that those properties

were standing in his name. Therefore it is clear to us from Ext. 309 that Krishnaji had no interest in those properties. If so, how Seetharam got those properties and sold them, is not a material question that requires to be considered.

15. That being so, we hold agreeing with the conclusion reached by the trial court, that the plaintiff's claim to one-half share in these survey numbers must fail.

16. Now, we will consider the plaintiff's claim to other properties covered by Krishnaji's will. The first question to be considered is whether the oral will alleged to have been made by Krishnaji is proved. Relying on the decisions in Venkat Rao v. Namdeo, AIR 1931 PC 285, Mahabir Prasad v. Mustafa Hussain, AIR 1937 PC 174 and Mt. Izhar Fatma Bibi v. Mt. Ansar Fatma Bibi, AIR 1939 All 348, the learned counsel submits that the onus of establishing an oral will is always a very heavy one and that it must be proved with utmost precision and with every circumstance of time and place. It is, therefore, the duty of the court to see with the greatest care, whether, by the words used by the testator, he intended to create a will. He further states that the Court must not forget that where an oral will has been set up by any party, then it will be the duty of the person founding his claim on the oral will to prove the exact words used by the testator. The learned counsel, therefore, asks us to apply the principles stated by these decisions and see whether the alleged will said to have been made by Krishnaji is proved.

17. The defendants' case that Krishnaji made an oral will, is essentially based on the statement appearing in Ex. 309, a document executed by Krishnabai, widow of Krishnaji, in the year 1904. That document is executed in favour of Seetharam, son of Jeevan Rao, minor by his guardian, his mother Yamunabai. The document is executed in Kannada language, and we would like to extract the relevant portion in that document relating to the oral will: (After reproducing the extract in "Kannada" script his Lordship proceeded). The official translation of this portion is as follows:

"Before his death my said husband instructed that the below described property belonging to him should not be vested, that it should be given to your father Jeevan Rao for managing the same perpetually from generation to generation and that I should maintain myself with the said properties during my lifetime, and a few days thereafter he died... According to the desire of my husband and as instructed to me I

have hereby made you the owner of the below described property."

18. Relying on the words quoted above, it is contended by the learned counsel for the defendants that it is very clear from these words that Krishnaji did make an oral will bequeathing his properties to Jeevan Rao and further directing his wife to enjoy the properties during her lifetime. These words, according to him, clearly indicate the testamentary desire of Krishnaji to bequeath the properties to Jeevan Rao, and it is in accordance with his desire that Krishnabai executed this document. These words, it is submitted, are sufficiently clear to indicate that Krishnaji did intend to create a will.

19. The question therefore, is whether from the above recitals in Ex. 309 it can be held that Krishnaji made a will.

20. The expression 'will' has been defined in the Indian Succession Act, 1925, as a legal declaration of the intention of the testator with respect to his property which he desires to be carried out after his death.

21. Mr. V. Krishnamurthy, appearing for the respondents, while admitting the correctness of the propositions of law stated in the three decisions cited above submits, drawing our attention to the definition of 'will', stated above, that though we do not get the exact words used by the testator, yet the document clearly expresses the intention of Krishnaji to bequeath his properties to Jeevan Rao. He further submits that the words (After reproducing the words in Kannada script, his Lordship proceeded), are clear enough to suggest that Krishnaji did intend to create a will and that Krishnabai executed that document in accordance with the desire and command of her husband. The will, he says, is a simple one in that, all that Krishnaji intended was to bequeath his property to Jeevan Rao and that his wife Krishnabai should enjoy those properties till her death, there is no ambiguity in these words; and therefore the recitals in that document clearly indicate that Krishnaji did make a will.

22. There are two circumstances why we should come to the conclusion that Krishnaji made a will; the first is that after the death of Krishnaji, Krishnabai, his widow would inherit those properties which she was competent in case of necessity to alienate. Thus the estate which she would obtain on her husband's death would give her a larger interest in the properties, but by executing this document Ex. 309, she has curtailed her rights, accepting the position of having lesser and more limited right to enjoy

those properties under the will. There is no reason why she should have curtailed her rights unless her husband had really intended to create a will. It appears to us that she, as a faithful Hindu widow, has carried out her husband's desire by executing this document. The document is really against her pecuniary interest, and normally no person is expected to act against his or her interest; further we have not been shown any circumstances or any evidence on record to find that she was acting under the influence of somebody either within the family or outside. The only persons who constituted the original family, who were living then, were this lady Krishnabai, the only male member Seetharam, a minor, and his mother Yamunabai. Therefore in our view, Krishnabai, executed this document only in accordance with the testamentary desire of her husband Krishnaji intending to bequeath his properties to Jeevan Rao. Unfortunately, Krishnabai is dead and her evidence is not available to us.

23. Further, that the recitals in Ext. 309 are true is evidenced from some of the documents produced in the case such as Exhibits 15, 19 and 25 which indicate that there was a division of the family properties among the second and third branches of the family and the fact that there was such a division is stated in this document.

24. It is to be seen that in each of the cases referred to by the learned counsel for the appellant, the will relied upon was held not proved on the evidence in the case. In AIR 1931 P.C. 285, the will was a fairly complicated one and on the evidence their Lordships held that the testator lacked the testamentary capacity to create a will and therefore the will was held not proved. In AIR 1937 P.C. 174, it was found that there was complete absence of detailed instructions as to the provisions of the proposed wakf, and in view of the existence of other circumstances, their Lordships came to the conclusion that the oral will set up was not proved. In AIR 1939 All 348, their Lordships stated that they were not called upon to decide as to whether there was an oral will or not but stated that if they were to find as to whether on the evidence an oral will had been established, they, on the principle stated in AIR 1937 P.C. 174, would be compelled to come to the conclusion that an oral will of the entire estate had not been established. Therefore, it is obvious from a perusal of the three decisions, on which reliance has been placed by the learned counsel for the appellant that on the facts, their Lordships, while stating the law relating to the proof of an oral will, found that

in each of these cases the will set up was not proved.

25. Therefore, agreeing with the view taken by the trial court, we hold that Krishnaji did make an oral will whereby he bequeathed his properties to Jeewan Rao.

26. This then leads us to the consideration of the question as to what is the effect of the plaintiff's adoption on the disposition of the properties made by Krishnaji by his will. (Paras. 27, 28 and 29 were repetitions of the end portion of para. 24 and paras. 25 and 26 and since omitted — Ed.)

29-A. It is argued by the learned counsel for the appellant that the plaintiff, as the adopted son of Krishnaji gets all the rights of an "aurasa" son and, by virtue of the theory of relation back, he must be deemed to be in existence as on the date of the death of his adoptive father Krishnaji. If so, the will executed by Krishnaji becomes invalid and inoperative and the properties do not vest in the legatee; the properties still remain the properties of Krishnaji and the alienations of those properties made by Seetharam being invalid are not binding on him and, therefore, he is entitled to claim them as the properties of his adoptive father Krishnaji.

30. Now, it is true that if Krishnaji had no son born to him, he was entitled to adopt one to continue his line. But if he dies without taking a boy in adoption, then his widow may adopt a son to him. The law relating to the right of a widow to adopt a son, prevailing in the area from which this case comes, is that the widow has an absolute right to adopt a son to her husband without his authority or the consent of his sapindas. Krishnaji's widow adopted the plaintiff and his adoption is held proved. So he gets all the rights which Krishnaji's aurasa son would have got.

31. The position of an adopted son of a Hindu, as stated by Ameer Ali, J. in Pratapsingh Shivasingh v. Agarsinghji Raisinghji, ILR 43 Bom 778: (AIR 1918 PC 192) is:

"... it is an explicit principle of the Hindu Law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son. . . Again, it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has

a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line. In fact as Messrs. West and Buhler point out in their learned treatise on Hindu Law, the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without male issue until the death of the widow renders the continuation of the line by adoption impossible."

This has been accepted as a correct rule of Hindu law by courts in India, and the Supreme Court in Srinivas Krishnarao Kango v. Narayan Devji Kango, AIR 1954 SC 379, while considering the scope of the principle of relation back, quoted with approval the observation of Ameer Ali J. in Pratapsingh's case, ILR 43 Bom 778 : (AIR 1918 PC 192) and has subsequently reaffirmed it in Krishnamurthi Vasudeorao v. Dhruwaraj, AIR 1962 SC 59.

32. The plaintiff as an adopted son would be entitled to claim the properties of his adoptive father Krishnaji, cannot be disputed.

33. The extent and scope of the right of an adopted son to claim the properties of his adoptive father has been clearly stated in Srinivas Kango's case, AIR 1954 SC 379, as follows:

"...the scope of the principle of relation back is clear. It applies only when the claim made by the adopted son relates to the estate of his adoptive father. This estate may be definite and ascertained as when he is the sole and absolute owner of the properties, or it may be fluctuating as when he is a member of a joint Hindu family, in which the interest of the coparceners is liable to increase by death or decrease by birth. In either case, it is the interest of the adoptive father which the adopted son is declared entitled to take at the date of his death....."

This principle has been also restated in Krishnamurthi Vasudeorao's case, AIR 1962 SC 59. Therefore it is clear that what the plaintiff is entitled to claim is only the properties of his adoptive father or, as it is stated, the interest of his adoptive father in the properties as on the date of his death. In the instant case, Krishnaji died in the year 1900, and prior to it, he, by his will, bequeathed his properties to Jeewan Rao. The plaintiff is adopted in the year 1947 i.e., 47 years thereafter. Krishnaji, at the time of his death, was the sole surviving male member in the family consisting of himself and his wife and, as stated before, he prior to his death, disposed of his properties by an oral will which is held

proved. The question then arises whether Krishnaji was competent to dispose of his properties by will. That takes us to the consideration of the rights of a sole surviving coparcener to deal with the properties of the family.

34. Mayne, in his treatise on 'Hindu Law and Usage', eleventh edition, at page 264, para 207, observes:

"Where as adoption defeats the estate of a person who is lawfully in possession, such holder if a male has the ordinary powers of alienation of a Hindu proprietor. No doubt he is liable to be superseded; but, on the other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own, on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them."

Krishnajee, therefore, as the sole male member of the family was perfectly competent to deal with the family properties, being the sole and absolute owner of those properties. Now, it cannot be disputed that the rights of an adopted son spring into existence on the date of his adoption; but by the financial theory of relation back, he is considered to be in existence as on the date of the death of his adoptive father; and, as stated in Pratapsingh's case, ILR 43 Bom 778 : (AIR 1918 PC 192), the adoption, so far as the continuity of line is concerned, has a retrospective effect; whenever the adoption may be made, there is no hiatus in the continuity of the line. This fiction has been therefore introduced for the purpose of introducing a new heir into the succession. It is a well known principle that succession cannot remain in abeyance. Therefore, when the succession opens, the next heir will get it; but if the widow of the last male holder takes a boy in adoption, then he, as the adopted son, becomes the preferential heir and, as such, would be entitled to succeed his adoptive father displacing the widow and it is, in this respect alone, that an adoption has a retrospective effect, which enables the adopted son to continue the line of his adoptive father.

35. One of the consequences of the application of the theory of relation back is that the adopted son as a preferential heir to his adoptive father would be entitled to get the property of his adoptive father divesting the intermediate or

mean-holder. Thus he may get the property from the mean-holder immediately. This may happen if the adoption is made by the widow of the last maleholder soon after his death. But, suppose the adoption is delayed, and is made long after the death of the last maleholder, as in the instant case 47 years after his death, then what are the rights of the meanholder while in possession, to deal with the property? Ameer Ali J. in Pratapsingh's case, ILR 43 Bom 778 : (AIR 1918 PC 192), has answered that question by saying that "in such a case totally different considerations would arise." This is what he says:

"It may be that if the Hindu widow lies by for a considerable time and makes no adoption, and the property comes into the possession of some one who would take it in the absence of a son, natural or adopted, and such a person were to create rights in such property within his competence whilst in possession, in such a case totally different considerations would arise."

Thus it is clear that, even in such cases, the adopted son would not get the property divesting the person in possession immediately, without consideration of the rights created by the mean-holder. We are not concerned, in the instant case, with the consideration of the rights created by a mean-holder but with the question of the competence of the sole surviving coparcener or sole male member of a Hindu family as an absolute owner to dispose of the family property by will.

36. Can it be said that Krishnaji had no competence to deal with the family properties as the sole male member merely because there was a possibility of his widow adopting a son to him? In our view, Krishnaji's right to deal with his family properties as the sole male member was absolute and unimpaired and cannot be curtailed by the possibility of a son being adopted to him by his widow, which may or may not happen.

37. In Veeramma v. Savamma, AIR 1929 Mad 296: ILR 52 Mad 398, a similar question arose. The facts of that case are that a father, a son and his (son's) wife formed a joint Hindu family. The son died on the 29th September 1918 leaving behind him his widow, and authorising her to adopt a son to him. But, on the 3rd October 1918, the father disposed of the whole of the properties by a deed of settlement. On the 22nd November 1918, the son's widow adopted the plaintiff who instituted a suit claiming one-half share in the suit properties against his grand-father. The question, therefore, was whether the

plaintiff receives practically nothing i.e. he takes the properties subject to the settlement made on the 3rd October 1918, or whether his adoption can relate back to the date of his adoptive father's death viz., 29th September 1918 in order to defeat the grandfather's settlement. Their Lordships stated that

"the theory of relation back has only to do with establishing a line of succession to the adoptive father and in order to establish that line, it is necessary that certain intermediate holders should give way to the adopted son's superior claims as that of a natural born son of his adoptive father. He can, so to speak, insist on the property devolving in a direct line as far as possible, and it is in this connection and this alone that the doctrine of relation back is to be regarded."

Therefore, they held that the doctrine of relation back does not apply and that the plaintiff must take the property subject to the disposition by the grandfather.

38. What are the rights of a sole surviving coparcener to deal with the family properties, came for consideration before the Privy Council in *Anant Bhikappa v. Shankar Ramachandra*, AIR 1943 PC 196. In that case, Keshav was the sole owner, and the question was, what was his right to deal with the property, and their Lordships, approving the decision in *Veeranna's case*, AIR 1929 Mad 296 stated at page 199:

"Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption."

39. The decision in AIR 1943 PC 196 has been approved by the Supreme Court in *Srinivasa Kango's case*, AIR 1954 SC 379 with the observation that "we are of opinion that the decision in AIR 1943 PC 196 so far as it relates to properties inherited from collaterals is not sound...." This decision was reaffirmed by the Supreme Court in *Krishnamurthy's case*, AIR 1962 SC 59. Therefore, the principle stated in *Veeranna's case*, AIR 1929 Mad 296 that the disposition made is binding upon a son or grandson who was not in existence at the date of the disposition, is well established.

40. However, what is contended by the learned counsel for the appellant is that, in the instant case, Krishnaji sought to dispose of his properties by will, and a will, as is well known, speaks after the death of the testator. That means, the dispositions made by the will take effect only as at the death of the testator. But since the plaintiff must be deemed to be in existence as on the date of the death

of the adoptive father, the will becomes invalid and the dispositions made by such will cannot take effect. We may state here that we are not concerned in this case with the alienations as such, and, therefore, what is the effect of the observations of the Supreme Court in *Srinivasa Kango's case*, AIR 1954 SC 379 that

"When an adoption is made by a widow of either a coparcener or a separated member, then the right of the adopted son to claim properties as on the date of the death of the adoptive father by reason of the theory of relation back is subject to the limitation that alienations made prior to the date of adoption are binding on him, if they were for purposes binding on the estate" and whether these observations hold good even in cases of alienations made by a sole surviving coparcener, do not arise for consideration in this case and, therefore, we do not propose to examine that question. In this case, what we are concerned with is whether Krishnaji, as the sole male member of the family, was competent to dispose of the property by will. His competence, as the sole surviving male holder in a Hindu family, to deal with the family properties in any way he likes, cannot be disputed. The only question, is whether the plaintiff, as an adopted son, who is sometimes described as a posthumous son, or a son to be in the womb, and, therefore, to be in existence as on the date of death of his adoptive father, by virtue of the theory of relation back, is entitled to claim the properties disposed of by will by his adoptive father, treating the will as invalid, or whether he takes the properties subject to the dispositions made by his adoptive father by his will.

41. Such a question arose before the Judicial Committee of the Privy Council in *Krishnamurthi Ayyar v. Krishnamurthi Ayyar*, AIR 1927 PC 139, and Viscount Dunedin, who delivered the judgment, observed "that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based". However, his Lordship examined the matter on principle and stated—

"When a disposition is made inter vivos by one who has full powers over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. (In this case, the question of giving power to adopt does not arise.) For the will speaks as at the death of the testator, and the property is carried away before the

adoption takes place. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate and the disposition, if given effect to, is inconsistent with these rights and cannot of itself via propria affect them."

Thus it is quite clear from the decision that it is competent for a sole surviving coparcener to dispose of properties by will, and the subsequently adopted son has to take the estate subject to the dispositions made by will. But, in case the adoption is made before the dispositions take effect, i.e., before the death of the testator, then the adopted son's right comes into existence immediately on his adoption, and he being in existence, the dispositions made by will cannot take effect and the rights of the adopted son cannot be defeated because such vesting is inconsistent with the right of an adopted son who is entitled to claim the properties of his adoptive father. In the instant case, the testator died in the year 1900, and the adoption has been made 47 years thereafter. Thus, as on the date of death of Krishnaji, the adopted son was not in existence, but it is only by a fiction of law, he is considered to be in existence as on the date of death of his adoptive father, and that too, only for the purpose of the continuation of the line. Therefore the vesting which has become complete as on the date of Krishnaji's death in the year 1900, cannot be displaced by the plaintiff who has been adopted subsequent to his death.

42. Subsequent to the decision in Krishnamurthi Ayyar's case, AIR 1927 PC 139, such a question arose for consideration in several High Courts in India. The first case in which Krishnamurthi Ayyar's case came for consideration amongst the cases cited before us, is Erram Reddy v. Maram Reddy Lakshminarayana, AIR 1928 Mad 271. In that case also, the properties were disposed of by will prior to the defendant's adoption, and the question was whether the defendant, who is the adopted son, has, by that adoption, acquired a right to his adoptive father's estate. Srinivasa Aiyangar, J. in the course of his judgment, observed:

"But there can be no doubt whatever that on the principle of the thing it cannot be that a person who is the full and absolute owner at the moment of his death cannot validly dispose of his property by will merely because he has given permission to his widow to make an adoption. Their Lordships, in view of the theory of the adoption of a son by the widow to her deceased husband relating back to the time of death of the person to whom the adoption is made

being only a legal fiction and of the fact that such adoption is only a subsequent legal act, have in clear and indubitable terms laid it down that in such cases the will must take effect."

And the court, relying on the decision of the Privy Council in Krishnamurthi Ayyar's case, AIR 1927 PC 139, negatived the adopted son's claim holding that the disposition in favour of the appellant would not be displaced by the subsequent adoption of a son, for it became vested in her at the death of the testator.

43. Again, a similar question arose in the same High Court in Lalitha Kumari Devi v. Raja of Vijayanagar, AIR 1954 Mad 19. The contention was that on the adoption of Chittibabu by Alak Rajeswari, the will of Ananda Gajapathi became invalid by the application of the doctrine of relation back and, therefore, the only title which Chittibabu had was his title by virtue of the adoption. The learned Chief Justice Rajamanar described this contention as 'novel' being 'opposed to the principles laid down by the Privy Council' and, observing that 'much time need not be spent in disposing of this contention', dismissed the contention, quoting the observations of the Privy Council in Krishnamurthi Ayyar's case, AIR 1927 PC 139.

44. A similar question had arisen in other High Courts (vide Sashi Kantha v. Promode Chandra, AIR 1932 Cal 600 at p. 606; Udhao Sambh v. Bhaskar Jaikrishna, AIR 1946 Nag 203; Bhimaji Krishnarao v. Hanumantrao Vinayak Vithalbhai Gokalbhai v. Shivabhai Dhorbhai, and Narayan v. Padmanabh, AIR 1950 Bom 271, 289 and 319 respectively; and D. Lakshminarasimham v. Garimella Rajeswari, AIR 1955 Andhra 278, and in all of them such a contention was negatived relying upon the decision of the Privy Council in Krishnamurthi Ayyar's case, AIR 1927 PC 139).

45. Therefore, in our view, the contention of the learned counsel for the appellant that the will made by Krishnaji becomes invalid and the dispositions made by it cannot take effect, and the plaintiff, as the adopted son, by virtue of the theory of relation back, is entitled to claim the properties of his adoptive father, disposed of by will, cannot be accepted. We, therefore, hold that the dispositions made by Krishnaji by his will are valid and vest his properties in the legatee and the plaintiff takes the properties by his adoptive father Krishnaji subject to the dispositions made by him by his will.

46. Thus the two submissions made on behalf of the plaintiff-appellant fail. We, therefore, confirm the decree made

by the trial court and dismiss the appeal with costs.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 MYSORE 73 (V 56 C 16)

B. M. KALAGATE, J.

Shivadas Subrao & Co. and another, Petitioners v. V. D. Divekar and another, Respondents.

Civil Revn. Petn. No. 570 of 1967, D/-5-6-1968, against order of Civil J., Hubli, D/- 22-8-66.

(A) Civil P. C. (1908), O. 21, R. 94 — Grant of sale certificate — Property purchased in auction by deceased partner on behalf of firm — Certificate can be issued to legal representative of the deceased partner. AIR 1938 All 471, Diss. from.

What Rule 94 requires is that the court has to grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser. The Rule does not specify to whom the certificate is to be issued. It also does not say that the court must issue the certificate to any particular person. In other words, there is no prohibition to issue the certificate to a person other than the purchaser. AIR 1955 Mad 461 and AIR 1936 Bom 137 and (1899) ILR 24 Bom 120, Rel. on; AIR 1938 All 471, Dissented from.

(Para 8)

As there is nothing in Rule 94 to prevent the Court from granting a certificate to a legal representative of the auction purchaser or an assignee from him, it is competent for the Court to issue a certificate to the legal representative of the deceased partner of a firm in respect of property purchased by him in auction on behalf of the firm.

(Para 13)

(B) Civil P. C. (1908), S. 11 and O. 21 R. 94 — Proceedings under O. 21, R. 94 started by surviving partner in respect of property purchased by deceased partner in name of firm — Surviving partner agreeing under compromise decree between himself and widow of deceased partner to give up his right in such property and agreeing to the continuance of proceedings under O. 21, R. 94 by widow of deceased partner — His plea in such proceedings not to issue certificate to widow is not maintainable — Partner held estopped from raising such plea and further that such plea is barred by res judicata — (Evidence Act (1872), S. 115).

(Para 14)

(C) Registration Act (1908), S. 17 (2) (vi) — Proceedings under O. 21, R. 94, Civil P. C. for issue of sale certificate in

respect of property 'A' — Compromise decree passed in suit filed by surviving partner against widow of deceased partner in respect of firm's property — Surviving partner agreeing to give up right in respect of property 'A' — Suit in which compromise decree was passed must be held to have included property 'A' — Hence such decree is exempted from registration under S. 17 (2) (vi) and is admissible in evidence in proceedings under O. 21, R. 94. AIR 1960 Pat 179, Rel. on. (Para 15)

Cases Referred: Chronological Paras (1960) AIR 1960 Pat 179 (V 47) = 1959 BLJR 653, Ramdas v. Jagarnath Prasad 15 (1956) 1956-1 Mad LJ 493=69 Mad LW 542, Mohandas Vasudev v. Ramamoorthy 12 (1955) AIR 1955 Mad 461 (V 42)= 1955-2 Mad LJ 232, Sreenivasulu v. Nataraja 10, 12, 13 (1946) AIR 1946 All 438 (V 33)= ILR (1946) All 788, Pokhpal Singh v. Kanhaiya Lal 10, 13 (1938) AIR 1938 All 471 (V 25)= 1938 All LJ 625, Makhan Lal v. Baldeo Prasad 9, 10, 12, 13 (1936) AIR 1936 Bom 137 (V 23)= 38 Bom LR 104, Ganapati v. Subraya 10, 11, 12, 13 (1899) ILR 24 Bom 120 = 1 Bom LR 645, Vinayak Narayan, In re 11, 13

K. Vittal Rao, for Petitioners; K. S. Savanur, for Respondents.

ORDER: The question that arises for consideration in this revision petition is when a sale in execution has become absolute, whether the court can grant a certificate under Order XXI Rule 94 of the Code of Civil Procedure, to the representative of the deceased purchaser? The facts leading to this question may briefly be stated as follows:

Shivadas Subrao & Company, a registered firm consisted of two partners, R. C. Parekh, since deceased and Shivas Subrao Matibetkar. Opponent No. 1 V. D. Divekar, was a debtor to the firm. The firm instituted a suit against him and obtained a decree for a sum of Rupees 2,798-10-0 and in execution of that decree, bought his house bearing CTS. No. 445/2B in the City Survey Ward No. 1 of Hubli City for sale. R. G. Parekh the deceased partner purchased the house on 2-12-1952 on behalf of the firm. The Judgment-debtor applied to have the sale set aside; but that application was dismissed and the sale became absolute on 9-12-1958. In the meanwhile on 26-12-54 R. G. Parekh died. On 13-11-1961, Shivdas Subrao, for himself and on behalf of the firm made an application under Order XXI, R. 94 C.P.C. praying for the issue of a sale certifi-

cate in the name of the decree-holders, the firm himself and Malati Bai (Opponent No. 2) wife of deceased partner R. G. Parekh and if such a certificate cannot be granted, then it should be granted in the name of the firm and himself being a surviving partner.

2. It is necessary to mention a few more facts in this context. Shivdas Subrao instituted Civil Suit No. 44 of 1962 against Malati Bai and others for an injunction restraining them from disturbing his possession and enjoyment of the property block No. 36 described as Mundgol property which was one of the properties belonging to the firm. It also appears from the record that opponent No. 2 Malati Bai had filed Civil Suit No. 89/64, (obviously, the year of the suit must be wrong) in respect of Mundgol property against Shivdas Subrao. The parties arrived at a compromise in Civil Suit No. 44/1962 and a compromise decree was made on 18-7-1963 which is marked as Exhibit 30 in the case. It was inter alia stated in the said compromise decree that the plaintiff Shivdas Subrao and the defendant, namely opponent No. 2 Malati Bai had compromised about Mundgol property and that the plaintiff Shivdas Subrao had given up his claim in respect of the present suit property, namely, CTS No. 455/2B in City Survey Ward No. 1 of Hubli City, and Malati Bai was stated to have become the absolute owner thereof and that she alone was entitled to continue this proceeding. It was also stated that Malati Bai was directed to withdraw Civil Suit No. 89/64. It also appears from the record that in respect of the partnership business between Shivdas Subrao and Malati Bai's husband R. G. Parekh, nothing was due to either parties. Thus it would appear from the terms of the compromise decree that the parties had once for all settled their disputes in relation to the partnership property.

3. To the application made by Shivdas Subrao under O. XXI, R. 94 C.P.C. praying for the issue of a sale certificate, objections were filed on behalf of both the opponents, namely, V. D. Divekar whose property was brought to sale and Malati Bai, widow of the deceased partner R. G. Parekh. One of the contentions raised by Malati Bai, opponent No. 2, was that the sale certificate should be issued in her name alone as Shivdas Subrao had agreed under the compromise decree in C. S. 44/62 that the diary proceedings under the provisions of O. 21, Rule 94, Civil Procedure Code should be continued by her alone in view of the fact that Shivdas Subrao had given up his right in respect of the suit property.

4. In view of the terms in the compromise decree, the trial court took the view that Shivdas Subrao was not entitl-

ed to continue the diary proceedings and ask for a sale certificate in the name of the firm himself and Malati Bai, widow of the deceased partner R. G. Parekh. The court held that Malati Bai alone was entitled to the issue of a sale certificate in her favour, that the plea of Shivdas Subrao that Malati Bai was not entitled to have the sale certificate in her name was barred by the principles of res judicata and estoppel. The court, therefore, directed that the sale certificate be issued in favour of Malati Bai, opponent No. 2. It is the correctness of this order that is challenged in this revision petition by Mr K. Vittal Rao, learned counsel for the petitioners.

5. It was contended by Mr. Vittal Rao that since the property in dispute had been purchased by one of the partners of the firm on behalf of the firm, it becomes the property of the firm, and therefore, the sale certificate should be issued in the name of the firm and its partners under Rule 94 of Order XXI of the Code of Civil Procedure. He contended that the Court below was, therefore, wrong in directing the issue of the sale certificate to Malati Bai and states that the said order is liable to be set aside.

6. I shall now proceed to examine the submissions made by Mr. Vittal Rao, learned counsel for the petitioner.

7. The relevant provision relating to the issue of a sale certificate is rule 94 of Order XXI of the Code of Civil Procedure which reads as follows :—

94. Certificate to purchaser —

Where sale of immoveable property has become absolute the court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date, the day on which the sale became absolute.

Mr. Vittal Rao contends that the provisions of Order 21, Rule 94, are mandatory and that the court is under a statutory obligation to grant a certificate to the purchaser of the property.

8. What Rule 94 requires is that the court has to grant a certificate specifying the property sold and the name of the person who at the time of the sale is declared to be the purchaser. The Rule does not specify to whom the certificate is to be issued. It also does not say that the court must issue the certificate to any particular person. In other words, there is no prohibition to issue the certificate to a person other than the purchaser.

9. However, Mr. Vittal Rao, in support of his contention, strongly relied on the decision in Makhan Lal v. Baldeo Prasad, AIR 1938 All 471. The court, there, on the facts, held that having regard to the provisions of Order 21, Rule 94, the

certificate should be issued only in the name of the auction-purchaser or if he dies in the name of his legal representative; but that the court is incompetent to recognise any transfer or arrangements made by the auction purchaser with a third person. This decision, to a certain extent, supports Mr. Vittal Rao's submission. But, when the provisions of Rule 94 are carefully analysed, one would not find any support for this statement. The rule does not direct the court to issue a sale certificate to a particular person. All that is required under the Rule is that the court has to specify the property and the person who is declared to be the purchaser. The rule also does not specifically state that the certificate should be issued in the name of the legal representative of the deceased purchaser. But, when the High Court states that the certificate could be issued in the name of the legal representative in the event of the death of the purchaser, perhaps, I imagine, the court had in its mind the provisions of Section 146 of the Code of Civil Procedure.

10. The above decision came up for consideration by the High Court of Madras in Sreenivasulu v. Nataraja, AIR 1955 Mad 461. The question in that case was whether the sale certificate issued in the name of the auction purchaser was a valid certificate. One Balakrishna Iyer purchased the property. He stated that he purchased it on behalf of his wife Rajammal. The contention urged was that since the actual bidder was Balakrishna Iyer and not his wife, and, since no power of attorney or vakalath has been filed by Balakrishna Iyer on behalf of his wife, it should be taken that the bidder was really Balakrishna Iyer in his own capacity and not as his wife's agent, and, therefore, the sale certificate should be issued in the name of Balakrishna Iyer. The High Court negatived these contentions and held that Balakrishna Iyer was really the agent of his wife, Rajammal, and, therefore, the issue of the certificate in her favour was legal. Their Lordships, during the course of the Judgment, referred to the decision in Makhan Lal's case, AIR 1938 All 471 and also to the decision of the High Court of Bombay in Ganapati v. Subraya, AIR 1936 Bom 137, where it was held that when Order 21, Rule 94, C. P. C. does not state that the person who at the time of the sale is declared to be the purchaser should alone be granted the sale certificate, it can be issued to a representative of the purchaser in accordance with the provisions of S. 146, C. P. C. It also stated that there is nothing whatever in the rule to prevent an assignee from the auction-purchaser applying for the issue of the certificate nor to prevent the court granting it to him.

The High Court of Madras on a consideration of the two decisions said that the more acceptable view was that of Broomfield J. in Ganapati's case, AIR 1936 Bom 137. Their Lordships further pointed out that the view taken in Makhan Lal's case, AIR 1938 All 471 had not been accepted by the very same court in its later decision in Pokhpal Singh v. Kanhaiya Lal, AIR 1946 All 438, where the High Court, after setting out the facts, considered the contention of the learned counsel for the appellants that the court was bound by the provisions of R. 94 of O. 21 read with R. 84 to issue the certificate in the name of the person declared to be the purchaser at the time of sale. The High Court did not accept that contention and pointed out that it may be that the order of the sales officer was irregular but as Kanhaiyalal is the person in whose name a certificate has been issued his right to maintain the present application cannot be questioned.

11. In the case in Re: Vinayak Narayan, (1899) ILR 24 Bom 120, the High Court of Bombay considered the provisions of Section 316, C. P. C. of the year 1882 which correspond to R. 94 of O. 21 C. P. C. and held that when a sale in execution has become absolute, the Court can, under Section 316, C. P. C., grant the sale certificate to the representative of a deceased purchaser. Referring to Section 316, C. P. C., Jenkins C. J. observed during the course of the judgment—

"...the section itself creates no difficulty; it is, so far as we can see, callous as to whether the purchaser is alive or dead; it wants him neither as applicant nor recipient. . . .

Reading, then, the section in its strictest sense, we find in it nothing to forbid or to prevent the grant of a certificate under the circumstances of this case. . . ."

As I have pointed out earlier, in Ganapati's case, AIR 1936 Bom 137 Broomfield, J. after considering the provisions of O. 21, R. 94 CPC took the view that there was nothing whatever to prevent an assignee from the auction purchaser applying for the sale certificate, nor to prevent the court granting it to him.

12. I may here also refer to a subsequent decision of the High Court of Madras in Mohandas Vasudev v. Ramamoorthy, 1956-1 Mad LJ 493 where the learned Judge, while considering the scope of Order 21, Rule 94 CPC considered the decision of the High Court of Allahabad in AIR 1938 All 471 and the earlier decision of the said court in AIR 1955 Mad 461 and observed that it may be that in certain cases where the Court has issued the sale certificate in the name of a transferee,

it may be only an irregularity and not an illegality, but that no court is bound to commit an irregularity at the request of the party, even by consent. His Lordship in that case did not agree with the view taken by Broomfield J. in AIR 1936 Bom 137 and held that the sale certificate cannot be issued to a subsequent transferee from the auction-purchaser.

13. In my view, the decisions in (1899) ILR 24 Bom 120; AIR 1936 Bom 137, AIR 1955 Mad 461 and in Pokpal Singh's case, AIR 1946 All 438 are clearly in accord with the provisions of R. 94 where there is nothing to prevent the court from granting a certificate to a legal representative of the auction-purchaser or an assignee from him, however, the view taken in these decisions, is, with respect, more preferable being less technical, than the view taken by the decision in Makhan Lal's case, AIR 1938 All 471. I, therefore, with respect, agree with the view taken in these decisions in preference to the view taken in Makhan Lal's case, AIR 1938 All 471. I therefore hold that it is competent for a court under the provisions of Rule 94 of Order XXI of the Code of Civil Procedure to issue a certificate to the legal representative of the deceased partner of the firm — in this case to Malati Bai, the widow of the deceased partner of the firm, R. G. Parekh.

14. The next question to be considered is whether Shivdas Subrao who was the second partner of the firm is also entitled to have the certificate in his name. Normally, if there was nothing else, he along with Malati Bai would have been able to get a certificate. But in view of the compromise decree (Exhibit 30) made in C. S. 44/1962 wherein all the disputes relating to the firm's property between him and Malati Bai, widow of the deceased partner R. G. Parekh were settled and Shivdas Subrao had given up his right in respect of the suit property and agreed that Malati Bai should continue the proceedings started by him under Rule 94 of Order 21 it is not open to Shivdas to raise the plea that the sale certificate should not be issued to Malati Bai but should be issued to him. He, under the circumstances, must be held to be estopped from raising any such plea which is also barred by the principles of res judicata.

15. It was next urged by Mr. Vittal Rao for the petitioner that Exhibit 30 which is the compromise decree is inadmissible in evidence since it relates to the properties other than the suit property which is of the value of more than rupees one hundred and hence, it is required to be registered under Section 17 (1) (b) of the Registration Act and since

it is not so registered, the court cannot give effect to it. The court below has taken the view — and in my opinion very rightly — that in the compromise decree in Shivdas's suit, he and the widow of the deceased partner Malati Bai had settled once for all the disputes relating to the partnership property, that Malati Bai had agreed to withdraw her suit which she had filed in relation to the very property of the firm and Shivdas had agreed in his suit to give up his rights in respect of the present suit property. Under such circumstances it must be held that all the properties of the firm, including the suit property were by consent, treated to be the properties in Shivdas's suit in which a compromise decree was made and therefore, such a decree does not require to be registered as it falls under Section 17 (2) (vi) of the Indian Registration Act. In somewhat similar circumstances, the High Court of Patna in Ramdas v. Jagarnath Prasad, AIR 1960 Pat 179 has held that such a decree is not required to be registered since it clearly falls under S. 17 (2) (vi) of the Indian Registration Act. Therefore this plea of the learned counsel for the petitioners has to be rejected.

16. In the result, for the reasons stated above, I confirm the order made by the court below and dismiss this revision petition with costs.

BNP/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 76 (V 56 C 17)

A. R. SOMNATH IYER J.

M. Ramachandra Rao, Petitioner v.
M. S. Kowsalya, Respondent.

Civil Revn. Petn. No. 18 of 1968, D/-
10-4-1968, against order of Addl. Civil J.,
Bangalore, D/- 12-12-1967.

Hindu Marriage Act (1955), Ss. 24, 9—Application by husband for restitution of conjugal rights under S. 9 — Husband directed to pay maintenance — Maintenance falling in arrears — Court can stop further proceedings under S. 9 to enforce obedience to order of maintenance in its inherent power — Civil P. C. (1908), S. 151, AIR 1961 Punj 42 & AIR 1962 Cal 88 and AIR 1963 M. P. 259, Rel. on. (Para 2)

Cases Referred: Chronological Paras
(1963) AIR 1963 Madh. Pra 259
(V 50) = 1963 Jab LJ 474,
Bhuneshwar Prasad v. Dropta
Bai 2
(1962) AIR 1962 Cal 88 (V 49) =
65 Cal WN 786, Anita v. Birendra
Chandra 2

(1961) AIR 1961 Punj 42 (V 48)=
 ILR (1960) 2 Punj 566, Malkan
 Rani v. Krishnan Kumar 2
 Yoga Narasimha, for Petitioner; B. L.
 Ramnathan, for Respondent.

ORDER: This revision petition is presented by a husband whose application for restitution of conjugal rights under section 9 of the Hindu Marriage Act was estopped by the Civil Judge when the husband committed default in the payment of arrears of maintenance of Rs. 1,000/- payable to the wife under the order of the Court.

2. Mr. Yoga Narasimha appearing for the husband contended that if the husband neglected to pay the arrears of maintenance all that was possible was the recovery of payment in execution proceedings and that the Civil Judge had no power to stop further proceedings in the matter relating to the application for restitution of conjugal rights. I do not agree. When the Civil Judge made a direction that the husband shall pay the arrears of maintenance, it was his highest duty to insist upon obedience to that direction. If there was disobedience he had inherent power to stop further proceedings which were commenced by the husband. That was the view taken in *Malkan Rani v. Krishnan Kumar*, AIR 1961 Punj 42, *Anita v. Birendra Chandra*, AIR 1962 Cal 88 and *Bhuneswar Prasad v. Dropta Bai*, AIR 1963 Madh Pra 259, and with the enunciation made in these decisions I respectfully agree.

3. So, I dismiss this revision petition with costs.

BDB/D.V.C.

Revision dismissed.

AIR 1969 MYSORE 77 (V 56 C 18)

A. NARAYANA PAI, J.

D. V. Shindagi, Petitioner v. Saraswatibai and others, Respondents.

Civil Revn. Petn. No. 502 of 1967, (with I. A. II for restoration), D/- 30-7-68, against order of Munsiff, Haveri, D/- 3-12-1965.

Civil P. C. (1908), S. 115 — Nature of order made in Revision — Extent of Court's powers. AIR 1945 Mad 103, Dissented.

The exercise of the power of revision under section 115 of the Code of Civil Procedure is intended to subserve principles of justice and should a Court of justice, specially High Court exercising the power under said section, feel that interests of justice do require that a matter disposed of for default should be reheard, then fetters cannot be placed on court's power larger than those ex-

pressly mentioned in the section itself: AIR 1945 Mad 103, Dissent. from.

(Para 3)

Cases Referred: Chronological Paras (1945) AIR 1945 Mad 103 (V 32)=
 (1945) 1 Mad LJ 4, A. Ramamurthy Iyer v. Meenakshi Sundarammal 2

H. B. Datar, for Petitioner; R. P. Hiremath, for Respondents.

ORDER: When I disposed of the Civil Revision Petition by my order dated 20th June 1968 whereby I set aside the order of the lower Court, Mr. Hiremath, the learned counsel for the respondents, was not present. He has made the above application explaining the circumstances of his absence and praying that he may be given a hearing after restoring the revision petition.

2. Though it was initially contended that I should apply the principles stated by Byers, J. in the case reported in *A. Ramamurthy Iyer v. Meenakshisundarammal*, AIR 1945 Mad 103 which are said to have been applied by another learned Judge of this Court in some other matters and hold that I have no power to restore a revision petition disposed of for default or in the absence of counsel, the objection was not seriously pressed. I am also of the opinion that the statement about the absence (extent?) of the court's power stated in such wide terms by Byers, J. cannot be accepted. If in spite of the fact that Section 115 contains no express power for dismissal of a revision petition for default, Byers, J. could come to the conclusion that that such power is included in the power to make such order as the Court may deem fit, the logical conclusion from the same premise should be or should have been that the said expression is wide enough to confer upon the Court the power to restore a dismissed matter or permit a rehearing.

3. Apart from these technical considerations, the exercise of the power of revision under Section 115 of the Code of Civil Procedure is intended to subserve principles of justice and should a Court of justice, specially High Court exercising the power under said section, feel that interests of justice do require that a matter disposed of for default should be reheard, I do not think fetters can be placed on court's power larger than those expressly mentioned in the section itself.

4. I have heard Mr. Hiremath on the merits of the revision petition. He frankly stated that so far as the recasting of issue No. 3 by the lower Court is concerned, its opinion is not sustainable. Only one matter in which he wanted me to take a different view than I had done on the last occasion is that the document mentioned in the 2nd

issue was in the nature of a promissory note and that, therefore, shifting of the burden to the defendant on the ground that he had admitted the execution thereof was correct and that, therefore, I should not have interfered with that part of the order of the Munsif.

5. After analysing the language employed in the pleadings which Mr. Hiremath read in extenso before me. I could not find sufficient material to support the statement that the plaintiff had made out or stated in categorical terms that the document referred to in the 2nd issue was indubitably a promissory note.

6. I do not, therefore, find sufficient reason to take a different view than the view already taken by me in my order dated 20th June 1968.

7. I, therefore, leave the said order as it is and dismiss the L.A. II.
RSK/D.V.C. Order accordingly.

AIR 1969 MYSORE 78 (V 56 C 19)

A. R. SOMNATH IYER
AND AHMED ALI KHAN, JJ.

V. Panchaksharappa, Petitioner v. Returning Officer-cum-Tahsildar, Respondent.

Writ Petn. No. 1833/1968. D/- 26-6-1968.

(A) Municipalities — Mysore Municipalities Act (22 of 1964), S. 17 (2) — Election of Councillors — Fresh election can be held before vacancy occurs.

Section 17 (2) does not forbid an election under the provisions of the Municipalities Act to a vacancy which is likely to arise by efflux of time in the office of the councillors, before a vacancy arises. It would have been odd if it did. For, in that event, the term of office of the new councillors could not commence immediately after the expiry of the term of office of the outgoing councillors, although section 18 (1) says it can. The normal feature of an election to a local authority or any other body is that it is conducted on the eve of the expiry of the term of the sitting members and at a reasonably antecedent point of time so that there is no hiatus in municipal or other administration. The acceptance of the argument that the election of the new councillors should wait until the old councillors cease to be members would lead to the incongruous situation that when the old councillors vacate office, no new councillors who could take the place of the old councillors would have been elected.

(Paras 23 and 19)

(B) Municipalities — Mysore Municipalities (Election of Councillors) Rules 1965, Rule 8 — Elections — Return-

ing Officer issuing election calendar — Mistake in calendar rendering the election illegal — New election calendar published — Held, it was competent for Returning Officer to issue fresh election calendar.

(Para 37)

Cases Referred: Chronological Paras (1957) AIR 1957 SC 304 (V 44)= 1957 SCR 68, Chief Commr., Ajmer v. Radhay Shyam

Kadidal Manjappa, for Petitioner; V.S. Malimath, Advocate-General, for Respondent.

JUDGMENT: There is in the town of Haveri in the district of Dharwar, a municipal council which was established under the provisions of the Bombay District Municipal Act, 1901, but is now governed by the Mysore Municipalities Act, 1964 after it came into force on May 7, 1964. But when the term of office of the sitting councillors of this municipal council was about to expire, by the Mysore Local Authorities (Postponement of Elections and Continuance of Administrators) Act, 1965 (Mysore Act XXIV of 1965) which came into force on November 18, 1965, the election of new councillors to the municipal council stood postponed during the period of the emergency. This Act under which there was a postponement of elections, and which will be referred to as the Postponement Act, was repealed by the Mysore Local Authorities (Postponement of Elections and Continuance of Administrators) (Repealing) Act, 1967 which will be referred to as the Repealing Act in the course of this judgment and which came into force on January 3, 1968. Clause (a) of the proviso to section 3 of the Repealing Act empowered Government to appoint by notification in respect of the concerned local authority, a date not later than one year from the date of the commencement of the Repealing Act as the date on which the term of office of the councillors of that local authority which stood extended by section 3 of the Postponement Act shall expire.

2. By a notification made by Government under section 3 of the Repealing Act published on April 29, 1968, June 30, 1968 was the date prescribed for the expiry of the term of office of the municipal councillors of the Haveri town municipal council.

3. After the publication of that notification the Tahsildar of Haveri who was also the Returning Officer concerned, issued a notice under Rule 8 of the Mysore Municipalities (Election of Councillors) Rules, 1965, made under Ss. 38 and 323 of the Mysore Municipalities Act, 1964. Through that notice he published a calendar in respect of the election of new councillors to the Haveri municipal council in the vacancies which

would arise on the expiry of the term of the sitting councillors on June 30, 1968. That calendar of events announced the particulars referred to in clauses (a) and (c) of R. 8 (1) of those rules. Clause (c) of that rule required the Returning Officer to specify the last date for making nominations. That clause provides that that last date for making nominations shall be the seventh day after the date of publication of the notice, or calendar as it is called. It further provides that if that day is a public holiday the next succeeding day which is not a public holiday should be specified as the last date for making nominations.

4. That election calendar was issued by the Returning Officer on May 9, 1968 and it was published in the gazette on May 13, 1968. Although clause (c) of rule 8 (1) does not say that an election calendar should be published in the gazette, it nevertheless refers to the date of publication from which the seventh day shall be the last date for making nominations. It is not disputed that the only publication of the election calendar under the provisions of this clause was the publication made in the gazette bearing the date May 13, 1968.

5. So the seventh day after the date of the publication of the election calendar, which is also referred to as the notice, under Rule 8 (1) (c) was May 20, 1968. But, by a mistake committed by the Returning Officer, May 21, 1968 was specified as the last date for making nominations. The election calendar also announced the various dates for the scrutiny of the nominations, for their withdrawal and the polling date. With these details we are not concerned in this writ petition. It is enough to state that June 17, 1968 was the date fixed for the poll.

6. In the counter-affidavit produced on behalf of the Returning Officer of which the deponent is the Returning Officer himself, he states that on May 22, 1968, quite a long time before the date on which the polling had to take place, the concerned Deputy Commissioner pointed out to him that he had committed a mistake in the specification of the last date for nominations in the election calendar which he had prepared. He also states that on the discovery of this mistake he prepared another election calendar on May 22, 1968 which was published in the gazette on May 25, 1968. This election calendar correctly specified June 1, 1968 as the last date for making nominations; that day was the seventh day after the date of the publication of the second calendar in the gazette. June 3, 1968 was the date fixed for scrutiny of nomination and June 5 was the date fixed for with-

drawal and June 27, 1968 was the date on which the poll had to take place.

7. It should be mentioned here that under rule 27 the Returning Officer fixed when he prepared the first election calendar the hours during which poll shall be conducted, and this fixation is made on May 10, 1968. On May 23, 1968 the Returning Officer cancelled this notification for the obvious reason that that notification in his opinion had no longer any efficacy after the preparation of the second election calendar by which a different date was fixed for the poll.

8. The petitioner before us challenges the validity of the second election calendar prepared by the Returning Officer as one prepared without competence. He asks for a mandamus to the Returning Officer that the election should be conducted in conformity with the first election calendar, and not under the second.

9. Mr. Manjappa on behalf of the petitioner and Mr. Jagannatha Shetty appearing for the petitioner in the companion writ petition W. P. 1726 of 1968 in which a similar challenge is made to the second election calendar prepared by the Returning Officer, advanced the argument that there is more than one reason for which we should say that the second election calendar was prepared without competence. The first submission was that no election to the municipal council of Haveri could be conducted before the expiry of the term of office of the sitting councillors which expires only on June 30, 1968. It was pointed out to us that the language of the relevant statutory provisions of the Mysore Municipalities Act, 1964 does not authorise an election to a municipal council until the term of the sitting councillors expires. It was therefore urged that the election now proposed to be held by the Returning Officer on June 27, 1968 even before the expiry of the term of the sitting councillors, was not in accordance with law.

10. The second submission was that the Returning Officer had no competence to publish another election calendar in supersession of the first election calendar which he had prepared, and that such supersession of the old calendar was possible only in the exercise of the power vested by rule 71 in the Commissioner or in the exercise of power created in Government by section 383 of the Municipalities Act. It was also contended that the preparation of the second election calendar was actuated by a desire to assist certain persons who had not produced their nominations within the time fixed by the old calendar, and that those persons who were intended to be helped in that way were those who

had changed their camp on the eve of the proposed election.

11. The argument that there is an element of prematurity in the proposed election was constructed on the language of section 17 of the Municipalities Act, 1964 which reads—

"17. General election of councillors—

1) A general election of councillors shall be held for the purpose of constituting a municipal council for the first time or after the period for which an Administrator is appointed under section 315 or after the period of supersession under section 316.

2) A general election shall also be held for the purpose of filling the vacancies arising by the efflux of time in the office of the councillors."

12. Sub-section (2) is the statutory provision under which the election now proposed to be held is authorised, and it was maintained on behalf of the petitioner that the general election authorised by that sub-section cannot be held unless a vacancy arises by efflux of time in the office of the sitting councillors. It was submitted that under the Postponement Act the term of office of the sitting councillors stood extended indefinitely during the period of the emergency and that the term so extended came to an end only on the date fixed by Government in the notification which they promulgated under clause (a) of the proviso to section 3 of the Repealing Act which reads:

"(a) the term of office of the councillors or members extended by section 3 of the Act now repealed and of the Administrators appointed or continued under section 4 or 5 of the said Act, shall expire on such date as the State Government may by notification in the official Gazette appoint in respect of each local authority concerned which shall not be a date later than one year from the date of commencement of this Act; but the councillors or members or, as the case may be, the Administrators shall continue in office until the first meeting of the local authority duly reconstituted under the relevant Act, at which a quorum is present."

13. Section 3 (1) (a) of the Postponement Act which the Repealing Act repealed reads:

"3 (1) On the commencement of this Act and during the continuance of the operation of the Proclamation of Emergency, notwithstanding any judgment, decree or order of any court or other authority or anything contained in any enactment by or under which any local authority is constituted or established, or continued—

(a) no general election to, or election to fill any casual vacancy, in, any local

authority shall be held, or if any such election has commenced, but the poll has not taken place, the election shall not be completed;

14. Clause (b) of this sub-section which extended the term of sitting councillors of such local authorities reads—

"the term or extended term of office of the councillors or members of the local authorities, who are in office on the date of commencement of this Act (and whose term or extended term will expire during the period of operation of the Proclamation of Emergency), shall be deemed to be extended up to and inclusive of the last day on which the Proclamation of Emergency remains in operation.

Provided that after the expiry of the term of the said councillors or members of the local authorities as so extended by this section they shall continue in office until the first meeting of the constituted local authority at which a quorum is present.

15. When the Postponement Act stood repealed by the enactment of the Repealing Act, Government became invested with the power to issue a notification specifying the date on which such term of office which stood extended under section 3 of the Postponement Act, shall expire. And it was in the exercise of this power that June 30, 1968 was specified as the date on which the term of sitting councillors of the Haveri municipal council shall expire.

16. It would be observed that cl. (a) of the proviso to S. 3 of the Repealing Act also provides that even after the expiry of the term of office on June 30, 1968 in that way, the sitting councillors shall continue in office until the first meeting of the municipal council duly reconstituted at which a quorum is present.

17. The postulate constructed on the basis of the statutory provisions was that the vacancy to which section 17 (2) of the Municipal Act refers arises only on June 30, 1968, and that until there is a vacancy arising in that way by efflux of time no election to the municipal council was possible.

18. We do not agree. Sub-section (2) of section 17 of the Municipalities Act says no more than that a general election shall be held for the purpose of filling vacancies "arising by efflux of time in the office of the councillors." It does not say that an election should not be held until after the efflux of time in the office of the councillors. What it does is to specify the purpose for which the general election shall be held, and that purpose is the filling of a vacancy arising by efflux of time in the office of the councillors. It speaks only of the

purpose and does not prescribe the point of time at which election should be conducted.

19. The normal feature of an election to a local authority or any other body is that it is conducted on the eve of the expiry of the term of the sitting members and at a reasonably antecedent point of time so that there is no hiatus in municipal or other administration. The acceptance of the argument that the election of the new councillors should wait until the old councillors cease to be members would lead to the incongruous situation that when the old councillors vacate office, no new councillors who could take the place of the old councillors would have been elected.

20. We should not understand S. 17 (2) of the Municipalities Act in such a way which would lead to an anomalous situation of that description. The scheme with respect to the election of new councillors in place of the old, such as is disclosed by the provisions of the Act makes it abundantly plain that the election of the new councillors should be so conducted that the newly elected councillors step into the vacancies created in the offices of the old councillors when their term of office comes to an end.

21. We should not accede to the argument that there should be a postponement of the poll with respect to the election of the new councillors until after the old councillors vacate their office. That argument, in our opinion, cannot be sound. There is something in section 18 of the Mysore Municipalities Act which reinforces the view which we have taken. Sub-section (1) of that section reads—

"save as provided in sub-section (2), the term of office of a councillor elected at a general election and appointed under section 12 shall be four years, and shall commence on the date of publication of their names under section 20 or immediately after the expiry of the term of office of the outgoing councillors or the period of appointment of an administrator under section 315 of the period of supersession under section 317, whichever is later;"

22. Under the provisions of this sub-section, one of the points of time from which the term of a councillor commences is the date on which the term of office of the outgoing councillors expires. If that date is later than any of the other dates to which this sub-section refers, and if we accept the argument that till the vacancies arise with the outgoing councillors vacating their office, there could be no election until they so vacate their office, the term of office of the new councillors who would not

have been elected, could not commence immediately after the expiry of the term of office of the outgoing councillors, and, to that extent one part of section 18 (1) would become unmeaning and have no efficacy.

23. Section 17 (2) does not forbid, an election under the provisions of the Municipalities Act to a vacancy which is likely to arise by efflux of time in the office of the councillors, before a vacancy arises. It would have been odd if it did. For, in that event, the term of office of the new councillors could not commence immediately after the expiry of the term of office of the outgoing councillors, although section 18 (1) says it can.

24. The infirmity in the argument to the contrary is also displayed by the provisions of clause (a) of the proviso to section 3 of the Repealing Act. It will be remembered that that clause consists of two parts. The first part authorises Government by a notification to specify the date on which the term of office of the outgoing councillors will expire. By the second part it authorises the outgoing councillors whose term has so expired to continue in office until the first meeting of the reconstituted municipal council at which there is quorum.

25. Section 17 (2) upon which the petitioner placed dependence says that a general election shall be held for the purpose of filling the vacancies arising by efflux of time in the office of the councillors. The words "in the office of the councillors" with which this sub-section concludes demonstrate that the vacancy to which a general election may be conducted is a vacancy arising by efflux of time in the office of the sitting councillors.

26. But under Section 3 of the Repealing Act the office of the sitting councillors does not come to an end until there is a meeting of the reconstituted council. So it becomes clear that on the interpretation pressed on us by Mr. Manjappa and Mr. Jagannatha Setty the election of the new councillors cannot be held until the office of the sitting councillors comes to an end, and, the office of a sitting councillor does not come to an end unless there is an election and thereafter a meeting of the reconstituted municipal council. The alarming consequences which so ensue are that the office of the sitting councillors never comes to an end, and so there can be no election of the new councillors in their place. A construction productive of such strange consequence is plainly unacceptable. So we dismiss the argument that the proposed election has any element of prematurity.

27. At one stage it was suggested by Messrs. Jagannath Shetty and Manjappa and by Mr. Santosh Hegde who presented

his argument as an intervener that the efflux of time to which Section 17 (2) of the Municipalities Act refers is the efflux of time which comes into being after the expiry of the term, and that it does not refer to the efflux which comes into being on the discontinuance of office when the first meeting of the reconstituted body is conducted.

28. We have already observed that this argument does not receive any support from the language of Section 17 (2) which, as we have already observed, refers to the "efflux of time in the office of the councillors." It does not refer to the efflux of time on the expiry of the term which was extended by Section 3 of the Postponement Act which would be delimited by a notification made by Government under Section 3 of the Postponement Act. The distinction made on behalf of the petitioners between expiry of the term of office and the discontinuance of office when the first meeting of the reconstituted body is held is, in our opinion, groundless.

29. The next point to which we should address ourselves is whether the Returning Officer had the competence to publish a new election calendar in place of the old. It was said that the Returning Officer was a statutory authority who was bound to proceed with the election once he prepared his election calendar under Rule 8, and that the only process by which an election calendar to be prepared could be rescinded or displaced was that indicated by Section 383 of the Municipalities Act or Rule 28 or 71 of the Rules.

30. Mr. Advocate General on the contrary suggested to us that the power to make a new calendar in supersession of the old, sprang from Rule 4 (3) and from Section 21 of the General Clauses Act read with Rule 2 (3).

31. We do not think that R. 28 or 71 or S. 383 of the Municipalities Act has any application to a case like the one before us. Rule 28 empowers the adjournment of a poll in an emergency, and, this is not a case in which there was any such emergency. Rule 71 authorises the Commissioner to exercise powers of superintendence and control over elections for ensuring proper conduct of elections and to make such orders as he may deem fit for that purpose.

32. Mr. Advocate General presented the argument that even if this Rule had any application, there was an order made by the Divisional Commissioner under this rule so that the election might be held according to law, and in support of this submission he depended upon an allegation in the affidavit of which the Returning Officer is the deponent, in

which it is stated that he was told by the Deputy Commissioner that the Divisional Commissioner had asked him to point out to him the mistake committed with respect to the specification of the last date for nominations.

33. It is not necessary for us in this case to spend any time over the consideration of the question whether Rule 71 has any application for reasons to be presently stated. But before we do so we should observe that Section 383 of the Municipalities Act to which there was an appeal by Mr. Manjappa during the course of his argument is really of no assistance to him. Clauses (a) and (c) of sub-section (1) of that section on which Mr. Manjappa depended, respectively authorise Government to make an order for bringing the provisions of the Act into effective operation and for removal of difficulties arising in connection with the "transition to the provisions of the Act." We do not think that there was any occasion for the exercise of any such power by Government in the present case. It was not necessary for Government to make any order for bringing the provisions of the Municipalities Act into effective operation under clause (a) or for the removal of a difficulty in connection with the transition to the provisions of the new Act under clause (c).

34. The Municipalities Act, in respect of the matter with which we are concerned had effectively come into operation and there was no difficulty in connection with the transition. The real difficulty was that which emanated from the mistake committed by the Returning Officer who prepared a calendar of events in contravention of rule 8 (1) (c) of the rules. That contravention consisted of the fact that he specified a wrong date as the last date on which nominations should be made. Instead of specifying May 20, 1968 as the last date on which nomination should be made, he specified May 21, 1968.

35. Although at one stage it was suggested to us that the mistake committed by the Tahsildar was no more than a mere irregularity which did not lead to the nullification of the election calendar prepared by the Tahsildar, we do not think that we can accept that contention. Rule 8 (1) (c) which was made for that purpose contains an imperative direction that the seventh day from the date of the publication of the election calendar shall be the last day to be specified in it within which nominations should be made, and, that was not what the calendar did. The Tahsildar specified the eighth day and not the seventh day, and it is admitted that the seventh day was not a public holiday. And so, the election calendar prepared by the Tah-

sildar was without the authority of law, since it was made in plain disobedience to the provisions of the rule.

36. If that mistake was pointed out to him by the Deputy Commissioner as stated by him in his affidavit and that discovery was made in that way before the polling date, it was, in our opinion, the clear duty of the Tahsildar to prepare a new calendar of events in supersession of the old which transgressed R. 8 (1) (c), and so, had no efficacy. The power to so arrest the consequences of his earlier mistake springs from the statutory duty to prepare a calendar in conformity with the rule which remains to be performed until one such is prepared. The suggestion that in that situation the election should proceed only in adherence to the calendar which contravened the rule cannot have the support of reason.

37. We are of the opinion that the Returning Officer in a situation like the one which is presented by this case, had clearly the power to supersede a calendar which is not in accordance with law and to substitute for it another which is.

38. In the view that we take it is not necessary for us to consider the argument constructed on section 21 of the General Clauses Act or on Rules 2 (3) and 4 (3) of the rules.

39. Before concluding we should point out that the prayer for a mandamus that the Returning Officer should conduct the election under the old calendar and not under the new, does not fit into the argument advanced on behalf of the petitioner, as rightly pointed out by Mr. Advocate General, that no election to the council could be conducted until after the expiry of the term of the existing councillors. Under the old calendar the date fixed for the poll was June 17, 1968, and under the notification issued by Government under section 3 (a) of the Repealing Act the term of the existing councillors, even according to the argument advanced before us, was to expire on June 30, 1968. That being so, the prayer for a mandamus that the election should be conducted on June 17, 1968 is no longer possible since that date has expired and since the prayer is in plain contradiction of the argument as to the impermissibility of the election until after June 30, 1968.

40. At one stage Mr. Venkataranga Iyengar appearing as an intervener presented an argument that the proposed election was not possible for another reason. Depending upon the pronouncement made by the Supreme Court in Chief Commissioner, Ajmer v. Radhey Shyam, AIR 1957 SC 304, it was asserted that the proposed election should be preceded by the preparation of an elec-

toral roll, and that in respect of the election now proposed to be conducted there was no such preparation. This was not an argument advanced by Mr. Manjappa or Mr. Jagannatha Shetty who are concerned with the particular election to which this writ petition and Writ Petition No. 1726 of 1968 relate, and the person for whom Mr. Venkataranga Iyengar appears in his own writ petition is not concerned with the election to the Haveri municipal council and his writ petition relates to an election to a Village Panchayat.

41. At this stage Mr. Manjappa appearing for the petitioner in this writ petition and Mr. Jagannatha Shetty appearing for the petitioner in W. P. No. 1726 of 1968 ask us to desist from making any pronouncement on this aspect of the matter and intimate us that they do not press the argument based on the non-preparation of the electoral roll at this stage, and so, we refrain from investigating this matter further.

42. What remains to be considered is the argument of mala fides. The affidavit of the petitioner which makes the allegation of mala fides is as obscure as it could be, and the only charge made by him is that the new election calendar was inspired by a desire to help certain persons who were supporting the opposition to the municipal council but who had now changed their convictions and who had not filed nominations before the date fixed under the old calendar but could now find it possible to do so under the new. In the counter-affidavit produced on behalf of the Tahsildar this charge is repudiated and there is no material on which we can reach the conclusion that there is any truth in this charge, and so, we repeal this argument of mala fides.

43. Before concluding we wish to notice an argument which was advanced at one stage by Mr. Santhosh Hegde as an intervener. His argument was that the case in which he appeared presents problems other than those which are presented by the case which we have now disposed of by this judgment. His submission was that the election in his case was conducted even before the publication of the notification by Government under section 3 of the Repealing Act, and that an election conducted in that way was null and void. On that question it is not necessary for us to express any opinion in this case since that question does not arise in this writ petition and in W. P. 1726 of 1968.

44. What has been said so far ensures the failure of this writ petition, and so, we dismiss it. But we make no order as to costs.

VGW/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 84 (V 56 C 20)

B. M. KALAGATE, J.

Pandharinath Gyanoba Rao, and others, Petitioners v. Manikrao Shamrao and others, Respondents.

Election Petns. Nos. 17, 19 and 23 of 1967, D/- 17-7-1968.

(A) Constitution of India, Art. 329 (b) — Representation of the People Act (1951), S. 100 (1) (d) (iv) — Representation of the People Act (1950), S. 30 — Electoral rolls — Correctness of — Cannot be challenged in election petition under Art. 329 (b) — Jurisdiction of High Court to try such issue is barred under S. 30.

As the electoral rolls are prepared under the provisions of R. P. Act of 1950, it is obvious that the preparation of electoral rolls is not one of the stages of election as contemplated by R. P. Act of 1951. Therefore, it is not open to challenge the legality or the correctness of the electoral rolls in the election petition presented under Article 329 (b) of the Constitution of India and that cannot constitute a ground to declare the election void under section 100 (1) (d) (iv) of the R. P. Act of 1951.

(Para 26)

Moreover the petitioner, in view of section 30 of the 1950 Act, is barred from challenging the election of the respondent as void on the ground that the electoral rolls are incorrectly or invalidly prepared.

(Para 30)

(B) Representation of the People Act (1951), Ss. 62 (1), 100 (1) (d) (iii) — Right to vote under S. 62 (1) — Improper refusal of right — Is not a sufficient ground under S. 100 (1) (d) (iii) to declare election void — Further proof that election is materially affected thereby is necessary.

Under section 62 (1), every person who is entered in the electoral roll of any constituency shall be entitled to vote in that constituency. In other words, it confers a right on every person whose name is entered in the electoral roll of a particular constituency to vote in that constituency. But, in a case where there has been improper refusal of vote, it cannot be said that there has been an infraction of any provision of the Act which by itself would be a ground for declaring the election to be void. It is incumbent on the petitioner who claims for declaration of the election of the respondents to be void on the ground that there has been an improper refusal of votes, to prove further that the result of the election has been materially affected and unless he so proves by adducing proper evidence, he must fail. AIR 1954 S. C. 520, Distinguished Case law discussed.

(Paras 55, 56)

Cases Referred:	Chronological Paras
(1968) AIR 1968 Orissa 75 (V 55)= 34 Cut LT 255, Kolaka Nilakanthan v. Ananta Ram Maji	47
(1966) AIR 1966 SC 824 (V 53)= (1966) 2 SCR 564, Mahadeo v. Babu Udal Pratap Singh	49, 60
(1965) 1965 (1) Mya LJ 676=ILR (1964) Mys 781, K. Seeramulu v. K. Deviah	9, 23
(1964) AIR 1964 SC 1200 (V 51)= (1964) 6 SCR 54, Jabbar Singh v. Genda Lal	57
(1963) AIR 1963 SC 458 (V 50)= (1963) 3 SCR 479, B. M. Rama-swamy v. B. M. Krishna Murthy	9,
	14, 28, 29
(1960) AIR 1960 SC 368 (V 47)= 1960 (2) SCR 289, S. M. Banerjee v. Sri Krishna Aggarwal	62
(1957) AIR 1957 SC 242 (V 44)= 1957 SCR 179, Surendra Nath Khosla v. S. Dalip Singh	59
(1954) AIR 1954 SC 520 (V 41)= 1955 SCR 267, Durga Shankar Mehta v. Raghuraj Singh	49, 50, 55, 58, 63
(1952) AIR 1952 SC 64 (V 39)= 1952 SCR 218, N. P. Ponnuswamy v. Returning Officer Namakkal Constituency	20, 23

B. S. Patil, V. N. Patil, R. U. Goulay, F. B. S. Hiremath, A. Lakshmisagar and C. K. Balakrishna, for Petitioners; A. V. Albal, for Respondents.

KALAGATE, J.: The common issues raised in all the three petitions, namely, E. P. 17, E. P. 19, and E. P. 23 of 1967 and which were tried together are issues IV (a), (b) and (c) in E. P. 17 of 1967 and issues Nos. II (a), (b) and (c) in E. P. 19 and 23 of 1967 respectively. Issue No. IV (a), (b) and (c) read as follows:

IV. (a) Does the petitioner prove that it was necessary under law to prepare a translation of the Electoral Roll into Marathi Language?

(b) Does he further prove that the Marathi Roll so prepared suffered from the following two defects or either of them:

(i) That the serial numbers in the Marathi Roll did not tally with the serial numbers in the Kannada Roll; and

(ii) that several names contained in the Kannada Roll were omitted to be copied in the Marathi Roll?

(c) Does he further prove that in consequence of the above, the result of the election so far as the respondent is concerned had been materially affected?"

2. This issue was raised on the following allegations.

"The Election Commission of India has enjoined that the Electoral rolls for the Aurad Assembly Constituency should be both in the Kannada and the Marathi

languages. The Electoral Registration Officer, Aurad Constituency, has published the electoral rolls in the two languages in such a way that the serial numbers of the electors in either list differed from the other and that some names of electors in the Marathi Roll were altogether dropped. The result was that thousands of the Marathi voters who had been supplied with the aid slips with their serial numbers as printed in the Marathi Roll were not given ballot papers. The number of electors to whom ballot papers were not issued on this ground is at least 10,000."

This, it is stated has materially affected the result of the election of the respondent.

3. Issues Nos. II (a), (b), (c) in E. P. Nos. 19 and 23 of 1967 are similar and therefore, it is not necessary to state them. Nor is it necessary to state the allegations in E. P. Nos. 19 and 23 of 1967 since they are also similar.

4. On June 11, 1968, an additional issue was raised by common consent, and it is numbered as issue IV-A in E. P. 17 and II-A in E. P. 19 and 23 of 1967. The said issue reads:

"IV.A. Whether the grievance of the petitioner relating to the legality or correctness of the Marathi Electoral Rolls can be the basis of the election petition under Section 100 (1) (d) (iv) of the Representation of the People Act 1951, and whether it is not barred under S. 30 of the Representation of the People Act, 1950?"

5. Therefore, broadly speaking the issues fall into two categories, viz., (1) issues as framed originally, and (2) the additional issue.

6. Evidence on these common issues was adduced both for the petitioners and the respondents in all the three petitions.

7. The additional issue was raised at the instance of the learned counsel for the respondents as, according to him, the grievance of the petitioners relating to the legality or the correctness of the Marathi Electoral Rolls cannot be the basis or ground of the election petition to have the election of the respondents declared void, under section 100 (1) (d) (iv) of the Representation of the People Act, 1951, which will hereinafter be referred to as the R. P. Act, 1951. This issue falls into two parts, one falling under the provisions of the R. P. Act of 1951 and the other, under the provisions of the R. P. Act of 1950, since such a contention, it is stated, is barred under Section 30 of the said Act.

8. Mr. Albal, the learned counsel for the respondents contends that the legality or the correctness of the Marathi Electoral Rolls cannot be gone into by this Court since such an investigation is

barred under section 30 of the R. P. Act of 1950. It provides that:

30. No Civil Court shall have jurisdiction—

(a) to entertain or adjudicate upon any question whether any person is or is not entitled to be registered in an electoral roll for a Constituency; or

(b) to question the legality of any action taken by or under the authority of an electoral registration Officer, or of any decision given by any authority appointed under this Act for the revision of any such roll."

9. And this Court, according to the learned counsel, being a Civil court, its jurisdiction to adjudicate upon the legality or correctness of the electoral roll is barred. In support of that contention, Mr. Albal relied upon two decisions viz. (1) B. M. Ramaswamy v. B. M. Krishna Murthy, AIR 1963 SC 458, and (2) K. Sreeramulu v. K. Deviah, (1965) 1 Mys LJ 676.

10. In the case of B. M. Ramaswamy the dispute was in respect of an election to the Panchayat of Byyappanahalli from its first Constituency in the State of Mysore. The appellant and the second respondent were duly elected to the Panchayat. Respondent 1, therefore, filed an election petition under section 13 of the Mysore Village Panchayat and Local Boards Act, 1959, in the Court of the Second Munsiff, Bangalore, for a declaration that the appellant was not duly elected and for a further declaration that the first respondent was duly elected. The case of the first respondent as is relevant to the question under consideration was, that on the date fixed for the filing of nomination papers, the appellant's name was not in the authenticated list of voters published under Rule 3 clause (5) of the Mysore Village Panchayats and Taluk Boards Election Rules, 1959, and therefore, he was not entitled to file his nomination. The Second Munsiff held that the appellant's name was not included in the authenticated list of voters of the said Panchayat and on that finding, he set aside the election of the appellant and declared the first respondent to have been fully elected in his place.

11. The High Court, on appeal, agreed with the conclusion of the learned Second Munsiff, but on its own reasons. It held that though the name of the appellant was included in the electoral roll of the Legislative Constituency under Section 23 of the R. P. Act of 1950, it was so included in violation of Rule 26 of the R. P. Rules, 1956, and, therefore, the said inclusion was void.

12. The matter was taken to the Supreme Court by special leave. Their Lordships of the Supreme Court set aside the Order of the High Court. They

held that the non-compliance with the procedure prescribed for the inclusion of the appellant's name does not affect the jurisdiction of the Electoral Registration Officer, though such an inclusion may render his action illegal. Such non-compliance cannot make the officer's act honest, though his order may be liable to be set aside in appeal or by resorting to any other appropriate remedy. They, while stating that the inclusion of the name of the appellant in the electoral roll was clearly illegal, observed:

"Under Section 30 of the Representation of the People Act 1950 no civil Court shall have jurisdiction to question the legality of any action taken by, or under the authority of, the electoral registration officer. The terms of the section are clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil Court, but it could be rectified only in the manner prescribed by law, i.e. by preferring an appeal under R. 24 of the Rules or by resorting to any other appropriate remedy."

It was on this observation that reliance is placed by Mr. Albal for the respondents to contend that though the Second Munsiff was empowered to try the election case under Section 13 of the Mysore Village Panchayat and Local Boards Act, 1959, he was really trying the case as a Tribunal since Section 13 of the said Act authorises the Munsiff to exercise all or any of the powers of the Civil Court. Therefore, though the Munsiff was trying the election case as a tribunal, was to exercise the powers of a Civil Court, yet, the Supreme Court observed that the Munsiff has no jurisdiction to question the legality of the action taken by the electoral registration officer. This decision, according to the learned counsel for the respondents, is an authority for the proposition that the Munsiff who was trying the election case was an Election Tribunal which was stated to have no jurisdiction to question the legality of the action taken by the electoral registration officer. On the analogy, the learned counsel submits that this Court, though is an authority under the Constitution, trying the election petition, its jurisdiction is equally barred under Section 30 of the R. P. Act, 1950 to determine the legality or the correctness of the action taken by the electoral registration officer, in respect of electoral rolls.

13. The decision was followed by this Court in the second case stated above viz., K. Sriramulu 1965-1 Mys LJ 676. In that case, this Court was dealing in an appeal from the decision of the Election Tribunal. The dispute related to the election of a mem-

ber to the Mysore Legislative Assembly. The petitioner challenged the validity of the election on various grounds.

14. In the appeal, one of the contentions was that the election is void as the same was held on the basis of defective electoral roll in so far as that roll did not include in it 465 votes of voters residing in the Pit Colony which is a part of the Malleswaram constituency. Thus, the contention was that the election was void as the electoral roll was defective. This court held that in an election petition the correctness of the electoral roll cannot be gone into. It observed that the right to challenge the validity of an election is a statutory right and not a common law right or a right in equity. That right being a conferred right, its scope is limited by the contents of the relevant statutory provision. The petitioner relied on Section 100 (1) (d) (iv) of the R. P. Act of 1951 in support of the contention that the election held was void. It was pointed out that there was no complaint that any of the provisions of the Constitution have been contravened. It was also not said either that any of the provisions of the R. P. Act of 1951 or any rule or order made under that Act have been contravened. It may be remembered that the R. P. Act of 1951 does not deal with the preparation of electoral rolls. The electoral roll was prepared under the provisions of the Representation of the People Act, 1950 to be herein-after referred to as the 1950 Act. The grievance of the petitioner is that certain provisions of 1950 Act and several of the Rules framed thereunder have been contravened. Assuming without deciding that this grievance is genuine, even then, that grievance cannot be made the basis of an election petition under Section 100 (1) (d) (iv) of the 1951 Act. Support to this view is found from the decision of the Supreme Court in AIR 1963 SC 458.

15. Thus, it is stated that this Court relying on the decision of the Supreme Court in Ramaswami's case, AIR 1963 SC 458 took the view that the legality or the correctness of the electoral roll cannot be the ground to declare the election void. Mr. Albal therefore, submits that these two decisions clearly support the view that Section 30 of the R. P. Act of 1950 bars the jurisdiction of this Court to consider the legality or otherwise of the electoral rolls.

16. Then as to the first part of the issue, it is submitted by Mr. Albal that the petitioner's grievance relating to the legality of the electoral rolls cannot be the basis of the election petition to have the election declared void under Section 100 (1) (d) (iv) of the R. P. Act of 1951 which reads as follows:

"100 (1) (d): that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act."

17. He points out that it is not the petitioners' grievance in relation to the electoral rolls that there has been non-compliance with the provisions of the Constitution, nor there has been any non-compliance with the provisions of this Act, i.e., R. P. Act of 1951, or of any rules or orders made thereunder. Therefore, it is submitted that the petitioners cannot make the legality of the electoral rolls as a ground for declaration of the elections to be void. Section 100 was amended by Act XXVII of 1956 and the provisions of sub-section (1) (d) (iv) are not the same as they were prior to the amendment. Section 100 (1) (d) (iv) as it stood prior to the amendment reads:

"that the result of the election has been affected by the improper reception or refusal of a vote or by the reception of any vote which is void, or by any non-compliance with the provisions of the Constitution or of this Act or of any Rules or orders made under this Act or of any other Act or Rules relating to the election."

18. It could thus be seen that there has been a material difference between the two provisions. The words 'any other Act or rules relating to election' have been omitted by the amending Act from Section 100 (1) (d) (iv). It is the contention of Mr. Albal that the electoral rolls are prepared under the provisions of the R. P. Act of 1950 and therefore, the provision of Sec. 100 (1) (d) (iv) of the R. P. Act of 1951 as it stands now does not entitle the petitioners to make a grievance as to the legality of the electoral rolls as a ground for declaring the election void and this Court in its decision, to which a reference has already been made, viz., Sreeramulu's case, 1965-1 Mys LJ 676 has pointed out that the legality of the electoral rolls cannot be a legitimate ground under Section 100 (1) (d) (iv) of the R. P. Act of 1951 to render the election void.

19. However, Mr. Patil for the petitioners submits that the contention of the respondents that the petitioners cannot make a grievance as to the legality of the electoral rolls in the election petition under section 100 (1) (d) (iv) cannot be accepted. According to him, the submission of the respondents proceeds on the misconception of the word 'election' found in Article 329 (b) of the Constitution. He states that Part XV of the Constitution of India deals with elections.

It is a self-contained Code relating to the elections; and under Article 329 (b) of the Constitution, an election can be challenged or called in question by an election petition presented to such authority as is provided for by or under any law made by the appropriate Legislature. The word 'election', he submits is used to embrace the whole procedure of election, that is, from the commencement of the election till the final result is declared. The preparation of electoral rolls is one of the steps which is necessary to hold the elections, and therefore, he is entitled to challenge the legality of the electoral rolls to have the election of the respondents declared void under Section 100 (1) (d) (iv) of the R. P. Act of 1951 before this Authority.

20. In support of his contention, Mr. Patil has placed very strong reliance on the decision in N. P. Ponnuswamy v. Returning Officer, Namakkal Constituency, AIR 1952 SC 64 where the meaning to be given to the word 'election' as it appears in Part XV of the Constitution came up for consideration. The appellant therein was one of the persons who had filed nomination papers for election to the Madras Legislative Assembly from the Namakkal Constituency in Salem District. The Returning Officer for that Constituency rejected the appellant's nomination paper. The appellant, thereupon, moved the High Court under Article 226 of the Constitution praying for a writ of certiorari to quash the order of the Returning Officer rejecting his nomination paper and to direct the returning Officer to include his name in the list of valid nomination papers to be published. The High Court dismissed the appellant's application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329 (b) of the Constitution. On appeal to the Supreme Court, the appellant contended that the view expressed by the High Court is not correct, that the jurisdiction of the High Court is not affected by Article 329 (b) of the Constitution and that he was entitled to a writ of certiorari in the circumstances.

21. The most important question that arose for determination before the Supreme Court was the meaning to be given to the word 'election' occurring in Article 329 (b) of the Constitution and after discussing how a long usage in connection with the process of selection of proper representatives in a democratic institution, the word 'election' acquires both a wide and narrow meaning stated that

"The word 'election' can be, and has been, appropriately used with reference to the entire process which consists

of several stages and embraces many steps, some of which may have an important bearing on the result of the process."

Therefore, on the authority of this statement, Mr. Patil urges that since the word 'election' embraces the entire process consisting of several stages and many steps and as the electoral roll is prepared in the process of election, it is one of the stages in the election and, therefore, he is entitled to question the legality of the electoral rolls in this petition.

22. It is pointed out by Mr. Patil that Article 329 (b) of the Constitution of India states that no election can be called in question except before the election authority appointed for the trial of the election petition and therefore, he has every right to challenge the legality of the electoral rolls before this Authority. In other words, he states that he cannot challenge the legality of the electoral rolls before any other authority and to contend that he cannot challenge the legality even before this authority is to hold that the legality of the electoral roll can never be challenged and such a situation is not contemplated either by the Constitution or by any provision of any other Act, and, an interpretation which leads to such a result cannot be accepted by this Court. Therefore, what I have got to determine is whether the preparation of electoral rolls is one of the steps or stages contemplated by the R. P. Act of 1951.

23. It cannot be disputed that all electoral rolls are prepared under the provisions of R. P. Act of 1950 and as pointed out in PonnuSwami's case, AIR 1952 SC 64 the Representation of the People Act, 1951, which was passed by Parliament under Article 327 of the Constitution makes a detailed provision in regard to all matters and all stages connected with the election to the various Legislatures in this country. That Act is divided into 11 parts, and it is interesting to see the wide variety of subjects they deal with. Part II deals with 'the qualifications and disqualifications for membership'. Part III deals with the notification of general elections. Part IV provides for the administrative machinery for the conduct of elections, and Part V makes provisions for the actual conduct of elections and deals with such matters as presentation of nomination papers, requirements of a valid nomination, scrutiny of nominations, etc., and procedure for polling and counting of votes. Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the

various corrupt and illegal practices which may affect the elections and electoral offences. Obviously the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the Rules made thereunder.

24. It is obvious from this observation that the Supreme Court while stating that the word 'election' has been properly used with reference to the entire process which consists of several stages and embraces many steps. What is the process and what are the several stages has been made clear in para 11 of the judgment which has been just quoted by me. Such process and several stages must be the process and stages as contemplated by the R. P. Act, 1951.

25. But as I pointed out, the electoral rolls are prepared under the provisions of R. P. Act of 1950. If that is so it is obvious that the preparation of electoral rolls is not one of the stages contemplated by R. P. Act of 1951. That being so, it is difficult to accept the contention of Mr. Patil that the legality of the electoral rolls can properly be challenged in a petition filed under Article 329 (b) of the Constitution. There is neither any substance in the submission that if this Court cannot consider the legality of the electoral rolls and the jurisdiction of the Civil Court having been barred under Section 30 of the R. P. Act of 1950 to consider the legality of the electoral rolls, the petitioners have no remedy and such a situation cannot be brought about by the interpretation of the relevant provisions of the Act. This submission ignores the relevant provisions made for the preparation of the electoral rolls and the corrections therein in the R. P. Act of 1950.

26. Part III of the R. P. Act of 1950 deals with the preparation of electoral rolls for the Assembly Constituencies and the relevant sections are Sections 21 to 24 of the said Act. Section 21 deals with the preparation and revision of electoral rolls. Section 22 deals with the correction of entries in the electoral rolls. S. 23 deals with the inclusion of names in electoral rolls and S. 24 provides for appeals. Thus, every provision has been made to question the legality of the preparation of electoral rolls under the Act providing for final appeal to the Election Commission. Therefore, it cannot be said that the petitioners are left without any remedy if the electoral rolls are prepared illegally. They have every right to challenge the correctness or the legality of electoral rolls in the manner provided by Part III of R. P. Act of 1950.

Therefore, I have to hold that it is not open to challenge the legality or the correctness of the electoral rolls in the election petition presented under Article 329 (b) of the Constitution of India and that cannot constitute a ground to declare the election void under S. 100 (1) (d) (iv) of the R. P. Act of 1951.

27. Mr. Patil next submitted that the respondents cannot invoke the provisions of section 30 of the R. P. Act of 1950 to contend that this Court has no jurisdiction to consider the legality or correctness of the electoral rolls. What Section 30 provides is the bar of jurisdiction of civil courts. He contends that an election petition is not to be equated with an election at law or equity. The right to challenge an election is a statutory right and not a common law right or a right in equity. It may be conceded in favour of the petitioners that an election right is not a civil right but is a creature of the statute or a special law. Therefore, the right being a conferred right, its scope is limited by the contents of the relevant statutory provisions and under Article 329 of the Constitution of India, this Court is trying the election petition as an authority under the Constitution.

28. Article 329 of the Constitution states that no election shall be called in question except by an election petition presented to such authority as may be provided for by, or under, any law made by the appropriate legislature. Parliament by enacting R. P. Act of 1951 has made provision for the presentation of election petitions. Section 80A provides for the trial of election petitions by High Court having jurisdiction to try the election petition and such a jurisdiction has to be exercised ordinarily by a single Judge of the High Court and the Chief Justice is to assign one or more Judges for that purpose. Therefore, a Judge of this Court is an authority as contemplated by Article 329 (b) of the Constitution and hence it is submitted that the High Court being a special authority under the Constitution created by the R. P. Act of 1951 is not a Civil Court and that S. 30 of the R. P. Act of 1950 cannot be invoked by the respondents to contend that the jurisdiction of this authority is barred. But that question to my mind, need not be gone into by this Court since the Supreme Court in Ramaswamy's case, AIR 1963 SC 458, to which a reference has already been made, has taken the view that the Munsiff who was trying an election petition and who was to exercise all or any of the powers of the Civil Court was stated to have no jurisdiction to question the legality of the decision taken by the Returning Officer in connection with the electoral rolls. That decision suggests that the jurisdiction of

the Munsiff was barred under Section 30 of the R. P. Act of 1950 and that is how it was understood by this Court in K. Sriramulu's case, 1965-1 Mys LJ 676 to which, a reference has already been made.

29. A Division Bench of this Court has taken the view relying on the decision of Ramaswamy's case, AIR 1963 SC 458 that the correctness or the legality of the electoral rolls cannot be gone into by this Court. It observes:

"The petitioner is disputing the correctness as well as the legality of the electoral rolls prepared. This, he cannot do in view of Section 30 of the 1950 Act. That much appears to be obvious. That conclusion of ours is put beyond controversy by the decision of the Supreme Court in Ramaswamy's case, AIR 1963 SC 458."

30. That being the position, I have to hold that the petitioners' contention as to the correctness or the legality of the electoral rolls is equally barred under Section 30 of the R. P. Act of 1950.

31. I will now proceed to consider the common issues as originally framed, viz., issues IV (a), (b) and (c) in E. P. 17 of 1967 and issues II (a), (b) and (c) in E. P. 19 and E. P. 23 of 1967 respectively.

32. The dispute in E. P. 17 of 1967 relates to the election from Aurad Constituency, whereas in E. P. 19 and 23 of 1967, it relates to Hulsur and Bhalki Constituencies respectively. I have already stated the allegations made in E. P. 17 of 1967 on which Issue Nos. IV (a), (b) and (c) have been raised. I have also stated that it is not necessary to state the allegations made in E. P. 19 and 23 of 1967 on which Issue Nos. II (a), (b) and (c) are raised since they are similar.

33. Now, Issue No. IV (a) requires the petitioner to prove that it was necessary under law to prepare a translation (Transliteration) of the electoral rolls into Marathi language and they seek to prove that it was so necessary, relying on both oral and documentary evidence.

34. The documentary evidence relied on by the petitioners are Exhibits R. 3, R. 5 and P. 6.

35. The witnesses for the petitioners merely stated that there were two electoral rolls, one in Marathi and the other in Kannada. But Mr. Patil for the petitioners, to prove this issue essentially relies upon the documentary evidence which I have just stated. Exhibit R. 3 is a telegram dated November 21, 1966, issued under the signature of the Under Secretary, Election Commission, India addressed to (1) the Assistant Commissioner, Bidar (2) the Deputy Commissioner, Bidar, and (3) Nirvachan, Bangalore, (Mysore State). It reads as follows:

"No. 23/MY/55. Reference DYCOM Bidar letter KLN 7/113/65. 66, dt. Fifteen

November and Nirvachan, Bangalore Rolls for Aurad and Hulsoor Assembly Constituencies published finally in Kannada on June Thirtieth are under law Rolls of these constituencies their republications during same year as communicated in DYCOM above letter illegal and consequently null and void.

"No action could therefore be taken on claims and objections that may be filed as a result of republication. As regards Bhalki Assembly Constituency Kannada Rolls which were due to be published finally on October Thirtieth should be published immediately. Draft Rolls of this Constituency published on Fifteenth November in Kannada and Marathi without Commission's approval should be cancelled being irregular. Letter follows."

36. This telegram states that electoral rolls of Hulsur and Aurad Constituencies published finally on 30th June are under law Rolls for these constituencies and therefore, their republication was treated as illegal. It also makes clear that Kannada Rolls for the Bhalki Constituency which were due to be published on October 30 were directed to be published immediately and the draft rolls of Bhalki constituency published on November 15 in Kannada and Marathi were irregular and, therefore, to be cancelled. It is thus clear that the Kannada electoral rolls for the Aurad, Hulsur and Bhalki constituencies were declared to be in law electoral rolls, and Article 325 of the Constitution states that 'there shall be one general electoral roll for every territorial constituency for election to either House or either House of the Legislature of a State . . .'. Therefore, the direction in the telegram from the Election Commission is in conformity with the provisions of Art. 325.

37. Further, in this telegram there is nothing to suggest that the electoral rolls of these constituencies were published both in Kannada and Marathi but clearly stated that Kannada Electoral rolls were the only rolls for these constituencies. However, Mr. Patil relying on Exhibit P. 5 dated 24-11-1966 submits that the electoral rolls for these constituencies were published in two languages. Exhibit P. 5 a letter signed by the Under Secretary and issued from the Election Commission of India and addressed to (1) the Assistant Commissioner (Electoral Registration Officer) for Aurad, Hulsur and Bhalki Assembly constituencies, Bidar Sub-Division, Bidar (2) the Chief Electoral Officer, Mysore, Bangalore, on the subject 'Electoral' Rolls, Aurad, Hulsur and Bhalki Assembly Constituencies. It reads:

"In continuation of the Commissioner's telegram No. 23/MY/66/384-86 dated the 21st November, 1968, on the subject cited, I am directed to State that as mentioned therein, the electoral rolls

of Aurad and Hulsur Assembly Constituencies published finally in Kannada on 30th June 1966, are under law the final and operative rolls of these constituencies and that their republication on 15-11-1966 is illegal and consequently null and void and as such no action could be taken on any claim or objection filed on the basis of republication. Since the Kannada rolls of Aurad and Hulsur Constituencies published on the 30th June, 1966 are final rolls and since the rolls in respect of these constituencies in Marathi could not be prepared by the State Government so as to publish simultaneously, the Commission took the view that it would meet the needs of the Marathi speaking population if a page to page transliteration of Kannada rolls already published is prepared in Marathi vide Para. (ii) of its letter No. 23/MY/66/27685 dated 3-11-1966. I am accordingly to refer to that direction and to request that the transliteration of the rolls of these Assembly constituencies in Marathi Language may be prepared and wide publicity given to the fact of such preparation in Marathi.

2. As regards Bhalki Assembly Constituency, it now appears from the letter from the Chief Electoral Officer, Mysore No. LAW. 34 BRA 66; dated the 18th November that the Kannada rolls which were due to be published finally on 30th October, 1966 have not been published so far. As already directed in the Commission's abovementioned telegram, I am to request that the rolls of this constituency which were prepared in Kannada and were due to be published immediately, I am also to request that immediate steps may kindly be taken to prepare page to page transliteration of these rolls and wide publicity given to the fact of such preparation in Marathi. The draft rolls of this constituency published on 15-11-1966 in Kannada and Marathi without the Commission's approval should be cancelled as being irregular.

3. I am further to request that since it is open to any candidate to refer to the rolls in either language for purpose of nomination and at the time of voting it may be ensured that the transliterated rolls referred to in Paras. (1) and (2) above are accurate and from this point of view they should be compared thoroughly.

The receipt of this letter may kindly be acknowledged."

38. This letter was a sequel to the telegram Exhibit R. 3. It is clear from the contents of Exhibit P. 5 that while confirming the contents of Exhibit R. 3, it states that it would meet the needs of Marathi speaking population if a page to page transliteration of Kannada rolls already published is prepared in Marathi and requested the addressees to prepare

a transliteration of the rolls of these assembly constituencies and to give wide publicity to the fact of such preparation in Marathi. It means that the Kannada Voters' list was the final list and a word to word transliteration of the same was to be made to facilitate Marathi speaking population of those areas.

39. Exhibit R. 6 is a letter dated February 13, 1967 from the Chief Electoral Officer for Mysore, Bangalore, to the Assistant Commissioner, Bidar Sub-Division Bidar on the subject of the electoral rolls of Aurad, Bhalki and Hulsur Constituencies—printing of additions to, and corrections of, Kannada and Marathi Rolls. It reads as follows:

"Please refer to your letter mentioned above. In the light of the findings of my Under Secretary in regard to the discrepancies obtaining in Kannada and Marathi rolls of Aurad, Bhalki and Hulsur constituencies, your proposal made in the abovementioned letter regarding the use of Marathi rolls side by side with Kannada rolls for reference in establishing the proper identity of voters in respect of the above constituencies is approved. It is hoped that the Presiding Officers have already been suitably appraised of the position obtaining with regard to the rolls of above constituencies and instructed in detail as to the correct way of correlating Kannada and Marathi rolls."

40. It is clear from this letter that the request of the Assistant Commissioner, Bidar, regarding the use of Marathi Rolls side by side with Kannada Rolls for reference in establishing the proper identity of voters in respect of the above constituencies was approved and the Chief Electoral Officer expressed the hope that the Presiding Officers have been suitably instructed in that regard. This letter was addressed on the 13th and the polling was to take place on 15th February, 1967 that is, two days earlier.

41. Thus the effect of Exhibits P. 5 and R. 6 is that the transliteration of Kannada rolls was to be made in the Marathi language and the use of such transliteration was permitted. But there is no evidence on record whether in fact such a transliteration was made. It is also clear from Exhibit R. 6 that the Marathi voters' lists published prior to June 30 and October 30, were cancelled. The complaint of the petitioners in all the three petitions is that the majority of the Marathi voters were not permitted to vote on the ground that their names did not appear in Kannada Voters' list against the serial number mentioned in the aid chits supplied to them. The evidence of the petitioners' witnesses is that such voters

who went with aid chits having serial numbers and names in accordance with the Marathi Voters' list were refused ballot papers with the result, they returned without casting their votes. But if the aid chits supplied to the Marathi voters were not in accordance with the Kannada Electoral Rolls and were in accordance with the Marathi Voters' lists which were already published and which were declared to be cancelled by the Election Commission, the petitioners must thank themselves for such a lapse.

42. Exhibit R. 3 makes it clear that the Kannada Voters' list alone was a valid list for these constituencies and no provision of law has been brought to my notice under which it was necessary to prepare a transliteration of the electoral rolls into Marathi language. The Election Commission explained that to facilitate the Marathi speaking people to exercise their right of voting that a transliteration of the electoral rolls in Kannada should be made into Marathi language. In such circumstances, I am unable to hold that the petitioner has proved that it was necessary under law to prepare a transliteration of Kannada Electoral rolls into Marathi language.

43. Issue No. IV (b) requires the petitioners further to prove that the Marathi Rolls so prepared suffers from two defects, namely (1) that the serial numbers in the Marathi Rolls did not tally with the serial numbers in the Kannada roll and (2) that the several names contained in the Kannada Roll were omitted to be copied in the Marathi Roll. Since there is no evidence on record, as I stated earlier, that a transliteration of Kannada Voters' list into Marathi was prepared or published, the consideration of this issue does not arise. However, the evidence, as I stated earlier, adduced by the petitioners is to the effect that some of the Marathi voters who went to cast their votes having aid chits in accordance with the Marathi electoral rolls were not permitted to cast their votes on the ground that their names did not appear in Kannada Voters' list against the serial numbers mentioned in the aid chits carried by them. It may be taken from the evidence of the witnesses, both for the petitioners and the respondents that there is a variation between the Kannada voters' list and the Marathi Voters' list which the petitioners have alleged, but, as I have stated, these Marathi Rolls might be the rolls which were cancelled by the Election Commission by its telegram dated November 21, 1966. If the Marathi Electoral rolls referred to by the petitioners' witnesses were in fact the transliteration of the Kannada Voters' list, then it is impossible that there should be any such discrepancy as alleged by the petitioners and stated by their witnesses. But, since the petitioners

have failed to establish that either under law the transliteration of Kannada Voters' list into Marathi was necessary or that they were, in fact, so prepared, the complaint regarding the variation between the electoral rolls does not assume much importance.

44. Issue No. IV (c) requires the petitioners to prove further that in consequence of the above, the result of the election so far as the respondents are concerned had been materially affected.

45. As I read the issue, it appears to me, that the two defects referred to in Issue IV (b) are, that the serial numbers in Marathi roll did not tally with the serial number in the Kannada Roll and several names contained in Kannada Rolls were omitted to be copied in the Marathi Roll. Therefore, Issue IV (c) was raised. That means whether as a consequence of the above two defects, the result of the election of the respondents has been materially affected. It is clear that since the petitioners have failed to establish their allegations as covered by Issue IV (b), it is obvious that the petitioners have also failed to establish that as a consequence of these two defects the result of the election of the respondents is materially affected.

46. However, it is contended by Mr. Patil, the learned Counsel for the petitioners, that what is really complained of is that there was an improper refusal of the votes of Marathi voters and as a result of such improper refusal, the election so far as the returned candidate is concerned has been materially affected. This complaint, he says, falls under Clause (iii) of Section 100 (1) (d) of the R. P. Act of 1951, but to that effect he has claimed no issue. However, since the complaint of the petitioners is that large number of votes of Marathi voters were refused on the ground that their names did not appear in Kannada Voters' list and the number of such votes is at least 10,000 and since evidence has also been let in both by the petitioners and the respondents, the petitioners are permitted to argue on that aspect of the case, viz. whether the petitioners prove that there has been improper refusal of Marathi votes to the extent of 10,000 and as a result of that, the election of the respondents has been materially affected.

47. We may assume as Mr. Patil contends that there were two electoral rolls, one in Kannada and the other in Marathi and that there was an improper refusal of votes of Marathi voters whose names appeared in the Marathi voters' list. He then relying on the decision in *Kolaka Nilakanthan v. Ananta Ram Maji*, AIR 1968 Orissa 75 where it is observed:

"Where electoral rolls are published in two different languages under the authority of the Election Commission, both the

electoral rolls must be identical. There should be no discrepancy. The electors whose names are registered in the electoral roll prepared in one language cannot be refused to cast their votes merely because their names did not occur in the corresponding electoral roll in the other language"

submits that if in the circumstances there was an improper refusal of votes, then the election of the respondents must be declared void. Accepting that the petitioners have established that there was an improper refusal of some of the Marathi votes, the question still remains whether by merely establishing that there was an improper refusal of some votes, Mr. Patil can succeed in getting the election of respondents declared void.

48. The Orissa decision on which reliance has been placed by Mr. Patil does not help him in contending that a mere establishment of the improper refusal of votes by itself would entitle him to succeed in the election petitions and to claim that the result of the election has been materially affected, there must be definite proof that the result of the election has been materially affected by Improper refusal of votes in order to set aside the election as being void.

49. However, it is submitted by Mr. Patil that it is not necessary for him to establish by adducing evidence that as a result of refusal of Marathi votes the election has been materially affected. He contends that a voter has a right to vote. That right has been given to him under Section 62 (1) of the R. P. Act of 1951 which provides that every person, who is for the time being entered in the electoral roll of any constituency, shall be entitled to vote in that constituency, and if a voter is entitled to vote, the improper refusal of such a vote by the Polling Officer by itself amounts to non-compliance with the provisions of the R. P. Act of 1951 and this ground by itself is sufficient to declare the election void. He need not, he submits, prove in such circumstances that by improper refusal of votes the result of the election has been materially affected, and in support of his submission, he relies on the decisions in *Durga Shankar Mehta v. Raghubaj Singh*, AIR 1954 SC 520 and *Mahadeo v. Babu Udai Pratap Singh*, AIR 1966 SC 824.

50. The facts in Durga Shankar's case, AIR 1954 S. C. 520 as appear from the judgment are:

51. Raghubaj Singh respondent 1 filed an election petition against the appellant and the other respondent Vasantha Rao challenging the election of the appellant and respondent 2 who were declared elected to the General and Reserve seats respectively. The substantial ground on which respondent 1 assailed the validity of the election

was that respondent 2 Vasantha Rao who was declared duly elected to the reserve seat in the said Constituency was at all material times below 25 years of age and consequently, not qualified to be chosen to fill a seat in the Legislative Assembly of a State under Article 173 of the Constitution. This allegation was found to be true by the majority of the Tribunals which came to the conclusion that the act of the Returning Officer in accepting the nomination paper of Vasantha Rao who was disqualified to be elected as a member of the State Legislature under the Constitution amounted to improper acceptance of the nomination within the meaning of S. 100 (1) (c) of the Act and the result of the election was materially affected thereby. They, therefore, pronounced the whole election to be void and the propriety of this decision was challenged before the Supreme Court. The Supreme Court referred to Section 100 as it stood then which provided for the grounds for declaring an election to be void.

52. It was conceded before their Lordships by the learned counsel for the appellant that he could not challenge the propriety of the finding arrived at by the majority of the Tribunals that respondent Vasantha Rao was below 25 years of age at all material times. He, however, stated that there has been no improper acceptance of nomination in the present case as has been held by the Tribunals and consequently, the provisions of Section 100 (1) (c) would not be attracted and the entire election could not be declared void. The learned counsel conceded that on the finding of the Tribunal there has been a violation of, or non-compliance with, the provisions of Section 173 of the Constitution as Respondent 2 suffers from a constitutional disability by reason of his under-age and is not qualified to be chosen to fill a seat in the Legislative Assembly of a State, his election can undoubtedly be declared void under Section 100 (2) (c) of the Act, but there was no justification for pronouncing the whole election, including that of the appellant as void. Thus, the whole controversy centred round as to whether on the facts admitted and proved, the case fell within the purview of sub-section (1) (c) of S. 100 of the Act or under sub-s. (2) (c) of the same Section.

53. Their Lordships quoted the relevant portions of those two sub-sections of S. 100 in para 7 of their Judgment. They held that under the circumstances of the case, it cannot be said that there has been any improper acceptance of the nomination on the part of the Returning Officer which S. 100 (1) (c) of the Act contemplates. They observed that: "The acceptance by the Returning Officer of the nomination paper is not final and the election tribunal may, on evidence placed before it, come to a finding that candidate

was not qualified at all. But the election should be held to be void on ground of the constitutional disqualification of the candidate and not on the ground that his nomination was improperly accepted by the Returning Officer. In our opinion, Mr. Sen is right that a case of this description comes under sub-section (2) (c) of Section 100 and not under sub-section (1) (c) of the section as it really amounts to holding an election without complying with the provisions of the Constitution, and that is one of the grounds specified in clause (c) of sub-section (2). The expression 'non-compliance with the provisions of the Constitution' is in our opinion sufficiently wide to cover such cases where the question is not one of improper acceptance or rejection of the nomination by the Returning Officer, but there is a fundamental disability in the candidate to stand for election at all".

They further observed:

"There is no material difference between 'Non-compliance' and 'non-observance' or 'breach' and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portion of this clause."

54. It is on the interpretation of the expression 'non-compliance with the provisions of the Constitution' that Mr. Patil very strongly relies to contend that infraction of any provision of the Act by itself is sufficient to declare the election void, as observed in the said decision. According to Mr. Patil the infraction of the provisions of the R. P. Act of 1951 is of S. 62 (1) read with clause (iii) of S. 100 (1) (d) and therefore, his case falls fairly and squarely within the decision of this case. Hence he asks to sustain his contention that the election of the respondent is void. I am unable to accede to his contention.

55. In Durga Shankar's case, AIR 1954 SC 520, the finding was that Vasantha Rao was a candidate who was constitutionally incapable of being returned as a member of the Legislative Assembly and therefore, there has been a non-compliance with the provisions of the Constitution. But in the instant case, it is difficult to hold that there has been any non-compliance of the provisions of the R. P. Act of 1951. Under Section 62(1) of the R. P. Act of 1951 every person who is entered in the electoral roll of any constituency shall be entitled to vote in that constituency. In other words, it confers a right on every person whose name is entered in the electoral roll of a particular constituency to vote in that constituency.

56. But in a case where there has been improper refusal of vote, it cannot

be said that there has been an infraction of any provision of the Act which by itself would be a ground for declaring the election to be void. In my opinion it is incumbent on the petitioner who claims for declaration of the election of the respondents to be void on the ground that there has been an improper refusal of votes, to prove further that the result of the election has been materially affected and unless he so proves by adducing proper evidence, he must fail. Hence Mr. Patil's contention that this is a composite case where there has been an infraction of the provisions of Section 62 (1) read with clause (iii) of Sec. 100(1)(d) of the R. P. Act of 1951 and that by itself is sufficient to declare the election void, cannot be accepted.

57. In *Jabbar Singh v. Genda Lal*, AIR 1964 SC 1200, the Supreme Court has considered the scope of an enquiry in a case falling under Section 100 (1) (d) (iii). It has observed:

"Scope of the enquiry in a case falling under S. 100 (1) (d) (iii) is to determine whether any votes have been improperly cast in favour of the returned candidate or any votes have been improperly refused or rejected in regard to any other candidate. These are the only two matters which would be relevant in deciding whether the election of the returned candidate has been materially affected or not. At this enquiry, the onus is on the petitioner to show that by reason of the infirmities specified in S. 100(1)(d)(iii), the result of the returned candidate's election has been materially affected, and that, incidentally, helps to determine the scope of the enquiry".

58. The petitioners in this case have led no evidence to prove that the result of the election of the respondents has been materially affected and Mr. Patil concedes that he has not led such evidence since he essentially relies in support of his submission on the decision of *Durga Shankar's case*, AIR 1954 SC 520. In that case, again it is necessary to point out that Sec. 100 as it stood before the amendment came up for consideration. Section 100 has been amended by Amending Act XXVII of 1956. The Supreme Court has pointed out in more than one decision the difference between the old and the new sections and the effect of the amendment.

59. In *Surendra Nath Khosla v. S. Dalip Singh*, AIR 1957 SC 242 the Supreme Court has pointed out the difference between the amended and the unamended Section 100 of the R. P. Act of 1951. It was observed in the said case that:

"Though the words of Section 100 as it stood before the Amending Act 27 of 1956, are in general terms with equal application to the case of improper accep-

tance as also of improper rejection of nomination paper case law has made a distinction between the two classes of cases. There is a presumption in the case of improper rejection of a nomination paper that it has materially affected the result of the election. Apart from the practical difficulty, almost the impossibility, of demonstrating that the electors would have cast their votes in a particular way, that is to say, that a "substantial number of them would have cast their votes in favour of the rejected candidate, the fact that one of the several candidates for an election had been kept out of the arena is by itself a very material consideration. Cases can easily be imagined where the most desirable candidate from the point of view of other candidate may have been wrongly kept out from seeking election. On the other hand, in the case of an improper acceptance of a nomination paper, proof may easily be forthcoming to demonstrate that the coming into the arena of an additional candidate has not had any effect on the election of the best candidate in the field. The conjecture therefore is permissible that the legislature realising the difference between the two classes of cases has given legislative sanction to the view by amending Section 100 by the Representation of the People (Second Amendment) Act, 27 of 1956, and by going to the length of providing that an improper rejection of any nomination paper is conclusive proof of the election being void."

60. This case has been referred to again by the Supreme Court in its decision in AIR 1966 SC 624 where he has pointed out that:

"The amending Act of 1956 has separated the case of improper rejection of nomination papers from those where nomination papers have been improperly accepted. Both these cases had been grouped together under Section 100 (1) (c) of the unamended Act. Now, the cases of improper rejection have been taken under Section 100 (1) (d) (iv). Where it is alleged that a nomination paper has been improperly accepted, it obviously means that the acceptance is the result of non-compliance with the provisions of the Constitution or of the Act or of any rule or order made under the Act and in such cases the Courts must enquire whether it has been shown by the election petitioner that by reasons of that infirmity the result of the election has been materially affected."

61. It is, therefore, clear from this decision that in the instant case, when the petitioners complain that there has been an improper refusal of votes, they have got to demonstrate by evidence that as a consequence of the non-compliance of clause (iii) of Section 100 (1) (d) of

the R. P. Act 1951, the result of the election has been materially affected.

62. The difference between the old and new Section 100 of R. P. Act of 1951, has been again pointed out by the Supreme Court in S. M. Banerjee v. Sri Krishna Aggarwal, AIR 1960 SC 368.

63. Thus it is seen that Durga Shankar's case, AIR 1954 SC 520 was decided under the provisions of the unamended Section 100 of R. P. Act 1951 which materially differs from the amended section. Therefore, the petitioners cannot rely on the ratio of that decision to sustain their contention that improper rejection of votes under the provisions of Section 100 (1) (d) (iii) read with Section 62 (1) by itself amounts to infraction of the provisions of the R. P. Act of 1951. In such a case, the petitioners have to establish that by improper refusal, the result of the election of the respondents has been materially affected, and since there is no evidence in this case to demonstrate that the election of the respondents has been affected, I hold that the petitioners have failed to prove issue IV (c) also.

64. Thus, for the foregoing reasons, I find that the petitioners have failed to prove issue Nos. IV (a), (b) and (c) in E. P. 17 of 1967 which also means the petitioners have failed to prove issue Nos. II (a), (b) and (c) in E. P. 19 and 23 of 1967 respectively.

65. In view of my finding on the common issues and in view of the order made by me yesterday, I proceed to make the following order in each of the petitions.

E. P. 17 of 1967 dismissed with costs.

E. P. 19 of 1967 dismissed with costs.

E. P. 23 of 1967 dismissed with costs.

66. I quantify the Advocate's fee for each of the respondents at Rs. 500/-.

67. A copy of the judgment will be kept in each of the three petitions.

BNP/D.V.C. Petitions dismissed.

AIR 1969 MYSORE 95 (V 56 C 21)

K. BHIMIAH, J.

Jagadguru Sachidananda Shankara-bharati Swami of Sri Kudli Sringeri Mutt, Petitioner v. State of Mysore, Respondent.

Criminal Revn. Petn. No. 302 of 1967 D/- 3-4-1968 against order of City Magistrate, Bangalore, D/- 30-8-1967.

(A) Criminal P. C. (1898), Ss. 205, 540-A — Exemption of accused from appearance — When can be refused.

The prosecution witnesses cannot without difficulty identify the accused by

name. If the question of identification of an accused arises in any case, the proper method for counsel is merely to ask the witness "Do you see the person in court" and leave the witness to identify the accused. If the prosecution were to ask the witness to identify the person of the accused by mentioning the name, such a testimony does not carry much weight and it is an unsatisfactory way of getting the identification of an accused in a criminal case.

(Para 9)

(B) Criminal P. C. (1898), Ss. 288 and 353 — Evidence recorded in absence of accused — Whether can be used as substantive evidence under S. 288 — S. 288 must be strictly complied with.

If the intention of the legislature was to admit as substantive evidence under S. 288, the evidence of a witness duly recorded in the presence of the pleader when the personal attendance of the accused has been dispensed with, then the legislature would have added the same words which are found in S. 353, namely "taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader" in S. 288. The evidence tendered under S. 288 would be used as substantive evidence of the guilt or innocence of the accused and therefore the provisions of that Section must be strictly complied with. It is an exception to S. 353. (1895) I. L. R. 23 Cal. 361, Foll.

(Para 11)

(C) Criminal Procedure Code (1898), Ss. 205 and 540-A — Exemption of accused from personal appearance when refused — Status of accused when disregarded.

Where the offences alleged against the accused are of a serious nature involving moral turpitude and punishable with imprisonment for some length of time if the allegations are established by the prosecution, the question of status of accused while granting exemption cannot be considered. 1961 (1) Cr. LJ 819 (MP), Dist.

(Para 13)

(D) Criminal P. C. (1898), Ss. 205, 540A, and 288 — Exemption from appearance granted to accused till stage of recording of evidence — Does not last till duration of enquiry when evidence is to be used under S. 288.

The exemption from appearance before the Court granted to petitioner till the stage of recording of evidence does not suggest that it was granted for the entire duration of the enquiry because of the legal position that the evidence recorded in the absence of the accused cannot be treated as substantive evidence of his guilt or innocence under S. 288.

(Para 14)

Cases Referred: Chronological Paras
(1963) AIR 1963 Pat 371 (V 50)=
1963 (2) Cri LJ 385, Deolakhan v.
State of Bihar

(1962) AIR 1962 Cal 203 (V 49) -	
1962 (1) Cri LJ 565 (FB), Sm.	10
Prova Debi v. Mrs. Fernandes	
(1961) 1961 (1) Cri LJ 819 (MP).	13
Sushila Devi v. Sharada Devi	
(1951) AIR 1951 All 864 (V 38) -	
1952 Cri LJ 66 (FB), Sultan Singh	11
v. The State	
(1895) ILR 23 Cal 361, Alimuddin	
v. Queen Empress	11

B. Ramachandra Rao, for Petitioner;
G. Shankar Chetty, State Public Prosecutor, for Respondent.

ORDER: The above revision petition is directed against the order passed by the City Magistrate, Bangalore, on 30-8-1967 refusing to extend exemption to appear before the Court till the disposal of the case.

2. The petitioner is the 4th accused in a fake note case pending on the file of the City Magistrate, Bangalore. The allegation against him is that he purchased 4508 counterfeit currency notes of 10 rupee denomination valued at Rupees 45,080/- from A-2 and A-3 between 8-4-1965 and 13-8-1965 which constituted an offence punishable under Sec. 489-B, I. P. C. Further the act of A-4 in allowing and giving facilities to A-2 and A-3 in his press at Bangalore to cut the said counterfeit currency notes into sizes which constitutes a part of the process of counterfeiting currency notes and thereby abetted the cutting of the said counterfeit notes in his press at Bangalore by A-2 and A-3 between 10-8-1965 and 13-8-1965 which constitutes an offence under S. 489-A read with S. 109, I. P. C. Further the allegation is that he was in possession of the abovesaid counterfeit currency notes in his Mutt bungalow at Bangalore between 13-8-1965 and 22-2-1966 knowing them to be counterfeit and intended to use them as genuine or that the same may be used as genuine which constitutes an offence punishable under Section 489-C, I. P. C.

3. After the charge sheet was filed before the Court, the court issued summons to A-4 to appear before the court in person or through his pleader. After the service of summons, the accused appeared through his pleader on 19-9-1966 and was exempted from his appearance for that day. Again on 3-10-1966 the accused was present in the court and he was bound over with a surety.

4. On 17-10-66 A-4 was exempted from his appearance from the Court till the stage of recording the evidence. Exemption continued till 3-4-67 on which date the counsel for A-4 was absent and the court ordered non-bailable warrant to A-4. Later on the same day A-4's counsel appeared and filed an application for recalling the warrant. The Court ordered not to issue warrant against A-4.

Till 30-8-67 A-4 was exempted from his appearance before the Court; on that day an application was filed on behalf of A-4 to extend the exemption till the disposal of the case. The Court while disposing of the said application was of the opinion that in a case of this nature while recording evidence it is absolutely necessary that the accused should be present. Further, the Court was also of the opinion that under Section 288, Cr. P. C. evidence recorded under Chapter 18 can be read as evidence by the trial court if the evidence is recorded in the presence of the accused. In this view of the matter the court did not grant the request made on behalf of A-4 to exempt him from appearance for that day and adjourned the case to 19-9-1967. A-4 being aggrieved by the order dated 30-8-67 refusing to extend exemption till the disposal of the case, has filed the above revision petition.

5. Mr. B. Ramachandra Rao, learned Advocate for the petitioner has firstly contended that there is no difficulty for the prosecution witnesses to identify the accused as they identify him by name and not by his person. Secondly he contended that the evidence recorded by the Committal Magistrate in the mode prescribed under Section 353, Cr. P. C. can be treated as evidence under Section 288, Cr. P. C. Thirdly he contended that provisions of Sections 205, 353 and 540-A, Cr. P. C. must be liberally construed as they are intended to safeguard the interest of the accused. He added that when once an exemption is granted either under Section 205 or under Section 540-A, Cr. P. C. it must subsist throughout the duration of the enquiry. Fourthly he contended that having regard to the petitioner's position as the head of the Mutt having responsibility of performing poojas according to the shastras throughout the day, his personal attendance must be dispensed with. He further contended that the learned Magistrate has not considered the grounds mentioned in the application while rejecting the application for extension of exemption till the disposal of the case. In support of his contentions, Mr. Ramachandra Rao relied upon the various sections of the Code of Criminal Procedure and also number of decisions of various High Courts.

6. The learned Public Prosecutor appearing for the State contended that A-4 was exempted by an order passed by the Magistrate on 17-10-1966 till the stage of recording the evidence and that, therefore, he urged that the order granting exemption cannot be construed to mean that it was granted for the duration of the enquiry. Secondly, he contended that provisions of Section 288, Cr. P. C. must be strictly complied with before evidence contemplated under Section 288 is used

as substantive evidence. Thirdly, he contended that the reasons given by the learned Magistrate in exercise of his discretion are neither incorrect nor perverse in refusing to grant extension of exemption till the disposal of the case. Therefore, he submits that the order in question does not call for interference by this Court.

7. The short question for decision is whether the learned Magistrate has properly exercised his discretion in refusing to grant further extension of exemption from appearance before the Court to the petitioner.

8. The learned Magistrate has refused to extend the exemption to the petitioner from his appearance before the Court in the disposal of the case on the ground that in cases of this nature while recording the evidence, the presence of the accused is absolutely necessary. Another reason given by the learned Magistrate is that under Section 288 Cr. P. C. evidence recorded under Chapter 18 can be read as evidence by the trial court if the evidence is recorded in the presence of the accused. The question for determination is whether the reasons given by the learned Magistrate in refusing to extend the exemption from appearance before the Court are valid in law.

9. The first contention of Mr. Ramachandra Rao is that there is no difficulty for the prosecution witnesses to identify the accused as they identify him by name and not by his person. Mr. Ramachandra Rao urged that the witnesses who identify the petitioner were his erstwhile employees and that there is no difficulty for them to identify the petitioner by his name. I am unable to agree with this contention. If the question of identification of an accused arises in any case, the proper method for counsel is merely to ask the witness "Do you see the person in Court" and leave the witness to identify the accused. If the prosecution were to ask the witness to identify the person of the accused by mentioning the name, such a testimony does not carry much weight and it is an unsatisfactory way of getting the identification of an accused in a criminal case. Therefore, there is no merit in the first contention.

10. The contentions of Mr. Ramachandra Rao are that Sections 205, 353 and 540-A of the Criminal Procedure Code must be liberally construed as they are intended to safeguard the interest of the accused and that once an exemption is granted either under Section 205 or under Section 540-A Cr. P. C. it must subsist throughout the duration of the enquiry or trial. He nextly urged that the evidence recorded before the committed Magistrate in the mode prescribed

under Section 353 Cr. P. C. can be treated as evidence under Section 288 Cr. P. C. In support of his contentions Mr. Ramachandra Rao relied upon a number of decisions of various High Courts in India. Mainly, reliance was placed on a Full Bench decision of the Calcutta High Court in *Sm. Prova Debi v. Mrs. Fernandes*, AIR 1962 Cal 203. Per Majority it is held in the above decision that "where a Magistrate has permitted an accused to be represented by a pleader under Section 205 (i) or S. 540-A (1) he is not bound to compel the appearance of the accused for examination under Section 342 of the Code of Criminal Procedure; he may exercise his discretion in the matter, and examine the pleader of the accused on his behalf".

11. It is clear from the above that the principle of law laid down by the Full Bench of the Calcutta High Court refers to the examination of the pleader on behalf of the accused under Sec. 342, Cr. P. C. when the Magistrate has permitted the accused to be represented by his pleader. This decision does not lay down the law that all witnesses' evidence recorded by a committed Magistrate in the absence of the accused in the course of the enquiry can be treated as independent evidence of the guilt or innocence of the accused under Sec. 288 Cr. P. C. The other decision relied upon by Mr. Ramachandra Rao is the Full Bench decision of the Allahabad High Court in *Sultan Singh Jain v. The State*, AIR 1951 All 864. This decision does not help the Court to decide the question whether the evidence recorded in the absence of the accused can be put in as substantive evidence at the time of trial. The Full Bench of the Allahabad High Court was called upon to decide in the above decision whether the presence of an accused at a place where the trial was held would be detrimental to work, would make the accused incapable of remaining before the Court. Their Lordships have answered this question in the negative. The next question that was decided by Their Lordships was the maintainability of an application to the High Court under S. 561-A, Cr. P. C. when an application under S. 540-A, Cr. P. C. for exemption had been refused. Their Lordships have held that such an application under Section 561-A Cr. P. C. is misconceived. Mr. Ramachandra Rao relied upon several decisions, the latest of them is the decision in *Deolakhan v. State of Bihar*, AIR 1963 Pat 371 which lays down the law as follows:

"The word "the accused" appearing in Sections 242 and 342 includes his pleader representing him at his own request and on his behalf and a pleader representing an accused either under an order passed under Section 205 or under an order

passed under Section 540-A can be examined under Section 242 or 342 instead of the accused.

Where after the accused, on his asking, has been exempted from personal attendance in Court and allowed to be represented by a lawyer up to the stage of his examination under Section 342 or for the matter of that, under Section 242 and the pleader is examined under either of the above sections in place of the accused the non-examination of the accused himself in person does not constitute an illegality so as to vitiate the trial or even an irregularity curable under Section 537."

It is clear from the above decision that when an accused is exempted from personal attendance and was allowed to be represented by a pleader, that examination of the pleader under Section 242 or 342 Cr. P. C. in the place of the accused is neither an illegality nor an irregularity. What the learned Advocate for the petitioner contends is that the word "accused" appearing in Sections 242 and 342 Cr. P. C. includes the pleader representing him. Therefore, he urges that the same principle of law should be extended to the word "accused" found in Section 288 Cr. P. C. Mr. Ramachandra Rao also relied upon the provisions of Section 353 Cr. P. C. which prescribes the mode of taking and recording evidence in inquiries and trials and urged that the evidence can be recorded either in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader. Therefore, he urges that the evidence recorded in the absence of the accused can be used as substantive evidence under Section 288, Cr. P. C. in a trial. Section 353 Cr. P. C. reads as under:

"Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or when his personal attendance is dispensed with, in presence of his pleader". If the intention of the Legislature was to admit as substantive evidence under Section 288 Cr. P. C. the evidence of a witness duly recorded in the presence of the pleader when the personal attendance of the accused has been dispensed with, then the Legislature would have added the same words which are found in Sec. 353 Cr. P. C. viz., "taken in the presence of the accused or when his personal attendance is dispensed with, in presence of his pleader" in Section 288, Cr. P. C. The learned State Public Prosecutor contended that Section 288, Cr. P. C. is an exception to Section 353, Cr. P. C. He urged that there will be no effective examination in the absence of the accused when he is represented by a pleader. He relied upon Section 80 of

the Evidence Act, which deals with the presumptions attached to the Judicial documents, viz., deposition of witnesses in a judicial proceeding or before any officer authorised by law to take such evidence or statements or confessions by any accused person taken in accordance with law. Therefore, he urged that the evidence tendered under Section 288, Cr. P. C. would be used as substantive evidence and therefore the provisions of that section must be strictly complied with. There is force in these contentions. He relied upon the decision in *Alimuddin v Queen Empress*, (1895) ILR 23 Cal 361 wherein it is held as follows:—

"Although previous statements made by witnesses may be used, under Section 145 of the Evidence Act, for the purpose of contradicting statements made by them subsequently at the trial of an accused person, they cannot, if they have been made in the absence of the accused, be treated as independent evidence of his guilt or innocence; Section 288 of the Criminal Procedure Code will not avail anything for this purpose."

Their Lordships of the Calcutta High Court, in the course of the judgment, have observed as follows:

"The success of the prosecution in this case rests mainly upon the statements of Ayesha and Latifa Banu made in the case of Habibull before the Committing Officer, and upon the evidence of Yasin and Bunde Ali.

As regards the statements of Ayesha and Latifa Banu it seems to us that, though no doubt they could be used for the purpose of contradicting the statements made by them in the present trial, they could not be treated as independent evidence of the guilt or innocence of the accused, for the simple reason that they were not made in the presence of the accused. Mr. Donogh, however, on behalf of the prosecution has contended, referring to S. 288 of Code of Criminal Procedure, that inasmuch as the statements of these two women made upon the former occasion were put to them and referred to in the course of the evidence that they gave before the Committing Officer in the present case, therefore no statements themselves could properly go in and be used as evidence establishing guilt or innocence of the accused. We are unable to accept this contention as correct. Section 288, provides as follows:

"The evidence of a witness, duly taken in the presence of the accused before the Committing Magistrate, may, in the discretion of the Presiding Judge if such witness is produced and examined be treated as evidence in the case."

Now in the first place, the statements in question were not made in the presence of the accused; and in the second

place, it seems to us that the arguments assume that the said statements were evidence against the accused; for if they were not, they could not be made evidence against him, merely because they were put to the two women in the course of their evidence in this case".

12. I am in respectful agreement with the principle of law laid down in the above decision. The Evidence recorded in the absence of the accused cannot be treated as substantive evidence of his guilt or innocence under Section 288 Cr. P. C. in cases where the accused has been exempted from personal appearance and permitted to be represented by his pleader under the provisions of Section 205 or 540-A, Cr. P. C. Therefore, the contentions of Mr. Ramachandra Rao that the evidence recorded before a committal Magistrate in the mode prescribed under Section 353 Cr. P. C. can be treated as evidence under Section 288 Cr. P. C. is untenable and therefore it fails. In this view of the matter, while refusing extension of exemption, the reason assigned by the learned Magistrate, that the evidence recorded under Chapter XVIII can be read as evidence by the trial court under Section 288 Cr. P. C. if the evidence is recorded in the presence of the accused, is in accordance with law.

13. On the question of status of the accused, the learned State Public Prosecutor invited my attention to a decision in Sushila Devi v. Sharada Devi 1961 (1) Cr. L. J. 819 (MP) wherein it is held as follows:

"Courts should be generous in exempting accused persons from personal appearance. Personal appearance is the Rule in criminal cases of a serious nature, involving moral turpitude and punishable with imprisonment for some length of time. On the other hand, where the offence is punishable with fine only, and involves no moral turpitude, the exemption should be the rule unless, of course, it is to the interest of the accused himself, in view of the question of identification, to appear in person. Whenever personal appearance is insisted upon, there is some harassment to the accused; the courts have to see that this harassment is not out of proportion to the seriousness of the allegations, the severity of the possible punishment on conviction; and the very nature of the allegations themselves as they stand out in the prima facie case. While no hard and fast rule can be laid down, courts are expected to exercise their discretion in this regard after seeing the full picture. Certain general criteria can also be indicated. For example other conditions being the same a pardanashin woman should, if possible, be spared the inconvenience and embarrassment of compulsory personal appearance. The next test will

be a question of status; highly placed public functionaries, or very busy captains of industry and the like should not, unless the *prima facie* case is serious, be compelled to attend". I am in respectful agreement with the ratio of this decision. In the instant case, there is no doubt that the offences alleged against the petitioner are of a serious nature involving moral turpitude and punishable with imprisonment for some length of time if the allegations are established by the prosecution. Therefore, the question of status of the accused while granting exemption cannot be considered. The learned Magistrate has rightly observed that in a case of this nature while recording evidence the presence of the accused is necessary. Therefore, the contention of Mr. Ramachandra Rao that having regard to the position of the petitioner who is head of a Mutt having responsibility of performing poojas according to shastras throughout the day has no merit in it.

14. As regards the contention that the exemption from appearance before the Court had been granted to the petitioner for the duration of the inquiry has no merit in it in view of the order passed by the learned Magistrate on 17-10-1966 exempting the petitioner from his appearance before the Court till the stage of recording evidence. This order does not suggest that the exemption was granted for the entire duration of the inquiry. The contention of Mr. Ramachandra Rao that the learned Magistrate has not considered the grounds mentioned in the application while rejecting the application for extension of exemption till the disposal of the case does not survive in view of the legal position that the evidence recorded in the absence of the accused cannot be treated as substantive evidence of his guilt or innocence under Section 288 Cr. P. C. in cases where the accused has been exempted from personal appearance and permitted to be represented by the pleader under the provisions of Sections 205 and 540-A Cr. P. C.

15. For the reasons stated above, the learned Magistrate has properly exercised his discretion in refusing to grant the petitioner extension of exemption from appearance before the Court. The order passed by the learned Magistrate does not call for interference.

The Revision Petition fails and is dismissed.

DGB/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 100 (V 56 C 22)

SOMNATH IYER, J.

Lilly Stella Rodrigues, Petitioner v.
Girija Bai and others, Respondents.Civil Revn. Petn. No. 437 of 1966, D/-
20-12-1967.

Houses and Rents — Mysore Rent Control Act (22 of 1961) S. 21 (f) — Madras Buildings (Lease and Rent Control) Act (25 of 1949), S. 7 (2) (ii) (a) — Expression "contrary to any provision of law," meaning of — Application for eviction on ground that sub-lease was without concurrence of landlord — Sub-lease created before commencement of operation of part V of Mysore Act — Second clause of S. 21 (f) and not the first would apply and hence case would be governed by Madras Act — In view of S. 7 of Madras Act and S. 108 (j) of T. P. Act, the sub-lease cannot be said to be inconsistent with provision of law then in force — Transfer of Property Act (1882), S. 108 (j) — Civil P. C. (1908), Pre — Interpretation of Statutes.

In a case of sub-lease created before the commencement of the operation of Part V of the Mysore Act (22 of 1961) to which clause (f) of Section 21 refers, the second part of that clause and not the first applies. The order of eviction on the ground that the sub-lease was without the concurrence of the landlord can be sought only if it falls within the second part of that clause. In such a case it should be established by the landlord that the sub-lease was made contrary to any provision of law then in force viz., the Madras Act (25 of 1949).

(Para 6)

The expression, 'contrary to any provision of law' occurring in clause (f) in Section 21 of the Mysore Act, should be understood as having reference to an act which is made in opposition to law. Between the act done and the law which regulates that act, there must be an element of contrariety. That element of contrariety exists when the law prohibits the Act.

(Para 13)

The expression, 'contrary to any provision of law' is an expression of wide import and the meaning to be given to that expression depends upon the context in which it occurs and the scheme of the statute in which it appears. In the context in which it appears in clause (f) of Section 21 of the Mysore Act, it has a reference to a sub-lease which is expressly forbidden by any general or special law or a sub-lease which is inconsistent with any law then in force. (1909) 2 KB 423, Fell.

(Paras 13, 16)

Section 7 of the Madras Act does not expressly prohibit a sub-lease. In the

absence of an express provision in the Madras Act prohibiting the creation of a sub-lease, the lessee has the power to make a sub-lease under Section 108 (j) of the T. P. Act, although the creation of that sub-lease, when exception is taken to it by the landlord, exposes the lessee to the risk of eviction under the provisions of the Madras Act. But if the landlord abstains from exercising his right to seek an order for eviction in that way, it cannot be contended that the sub-lease is either unenforceable or is unlawful so long as there is no eviction at the instance of the landlord. The sub-lease is a good sub-lease and between the sub-lessee and the lessee, there is the relationship of landlord and tenant. It cannot be said that the creation of the sub-lease is inconsistent with the provisions of that Act.

(Paras 14, 18, 21)

Cases Referred: Chronological Paras (1956) 1956-2 Mad LJ 54=69 Mad LW 282, Aiyannah Chetty v. Muddukrishnayya and Co. Madras 22 (1909) 1909-2 KB 423=78 LJKB 812, Mercantile Steamship Co. v. Hall

B. P. Holla, for Petitioner; P. Ganapathy Bhat, for Respondents.

ORDER: The petitioner is a landlord who sought eviction under Clauses (a) and (f) of Section 21 of the Mysore Rent Control Act, 1961. The original lessee was a certain Appaji Rao and when the application for eviction was made, he was dead. Respondents 5 to 11 in this revision petition are all his legal representatives. Respondents 1 to 4 were impleaded as parties to the proceedings in the Court below on the ground that there was an impermissible sub-lease to those four persons by Appaji Rao in the year 1962. The eviction was sought firstly, on the ground that the lessee was in arrears and secondly, on the ground that there was a sub-lease without the landlord's concurrence. The application was resisted by the sub-lessees who asserted that they were the lessees and that Appaji Rao was only a benamidar for them. Neither of the two Courts below accepted the contention that the lease was a benami transaction. But while the Munsif gave the landlord the order sought by him on both the grounds, that order was reversed by the District Judge who came to the conclusion that there were no arrears and that the sub-lease did not entail eviction.

2. Now, that there was a sub-lease in favour of respondents 1 to 4 is no longer disputed. But Mr. Holla appearing for the landlord maintained that that sub-lease did entail eviction under Clause (f) of Section 21 of the Mysore Rent Control Act, 1961 since that sub-lease which was made before that Act came into force, was created contrary to the provisions of

the Madras Buildings (Lease and Rent Control) Act, 1949. I shall refer to this Act in the course of this order as the Madras Act and to the Mysore Rent Control Act as the Mysore Act.

3. Before proceeding to discuss the argument based on the sub-lease, I should notice the submission made by Mr. Holla in criticism of the finding of the District Judge that there were no arrears. Mr. Holla did not dispute that the arrears were deposited within the time allowed. But, according to him, that deposit which was made by the sub-lessees and not by the legal representatives of the principal lessee was no deposit in the eye of law and so, did not entitle the sub-lessees to resist the application for eviction. I do not accede to this contention.

4. If the sub-lease in favour of respondents 1 to 4 is such as would entail their eviction, the deposit made by them becomes inconsequential. If not, it is a good deposit and the application founded on Clause (a) of Section 21 of the Mysore Act, becomes impossible. So, the real question is whether the sub-lease entails eviction.

5. Clause (f) of Section 21 of the Mysore Act which entitles a landlord to seek an order of eviction when there is a sub-lease, reads:

"21. Protection of tenants against eviction — (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or other authority in favour of the landlord against the tenant:

Provided that the Court may on an application made to it, make an order for the recovery of possession of a premises on one or more of the following grounds only, namely:—

xx xx xx xx

(f) that the tenant has unlawfully sub-let the whole or part of the premises or assigned or transferred in any other manner his interest therein and where the sub-letting, assignment or transfer has been made before the coming into operation of this Part (except in respect of sub-letting, assignment or transfer to which the provisions of Section 61 are applicable), such sub-letting, assignment or transfer has been made contrary to any provision of law then in force; or..."

6. The finding of the Munsiff that the sub-lease was made in the year 1962 stands superseded by the finding of fact recorded by the District Judge that it was made in the year 1954. Since the sub-lease was created before the commencement of the operation of Part V of the Mysore Act to which Clause (f) refers, the second part of that clause and not the first applies. Whereas under the

first part of that clause an unlawful sub-lease entitles the landlord to seek an order of eviction if that sub-lease was made after Part V commenced to operate, in the case of an earlier sub-lease the order for eviction can be sought only if it falls within the second part of that clause. So what should be established by the landlord in the present case is that the sub-lease was made 'contrary to any provision of law then in force.'

7. Section 23 of the Mysore Act declares that a sub-lease, after Part V of the Mysore Act came into force, shall not be lawful unless there is a contract to the contrary. So, it is clear that that sub-lease in the absence of a contract to the contrary is unlawful and that unlawful sub-lease entitles a landlord to seek an order for eviction under the first part of Clause (f) of Section 21 of the Mysore Act if that sub-lease was made after Part V of that Act commenced to operate. But in the present case where the sub-lease was made before the commencement of that part, I am not concerned with the first part of Clause (f) and so the question is not whether the sub-lease in favour of respondents 1 to 4 was unlawful, but whether the sub-lease in their favour was contrary to any provision of law in force when it was made.

8. It was argued before the District Judge that the sub-lease in favour of respondents was contrary to the provisions of Section 7 of the Madras Act, which reads:

"7. Eviction of tenants—(1) A tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section

xx xx xx xx

(2) A landlord who seeks to evict his tenant shall apply to the controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application, is satisfied

(a) transferred his right under the lease or sub-let the entire building or any part thereof if the lease does not confer on him any right to do so—

the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

9. The District Judge who did not properly understand the provisions of Clause (f) of S. 21 of the Mysore Act, made the mistake of thinking that what the landlord had to establish was that the sub-lease was unlawful. But what he had really to investigate was whether the sub-lease was contrary to any provision of law which was operating at the time of the sub-lease. It is plain that the

District Judge overlooked the distinction between a sub-lease created before Part V of the Mysore Act commenced to operate and a sub-lease which was created after the commencement of that part.

10. I should exclude from consideration the finding recorded by the District Judge which was influenced by the miscomprehension of the relevant statutory provision. I should therefore, address myself to the question whether the sub-lease was contrary to the provisions of any law then in force.

11. Mr. Holla appearing for the landlord contended that since it was possible for a landlord to seek an order for eviction under Section 7 (2) (a) of the Madras Act, in a case where the lessee made a sub-lease without his having a right to make it under the terms of the lease,—and there was none in the present case—the sub-lease in favour of respondents 1 to 4 was contrary to the provisions of that Act.

12. Mr. Ganapathy Bhat maintained that under the provisions of Section 108 (j) of the Transfer of Property Act, the lessee had the right to make a sub-lease, unless there was a contract to the contrary and that since the Madras Act does not prohibit any such sub-lease, the sub-lease by Appaji Rao to respondents 1 to 4 was not contrary to law but was permissible.

13. Now, Section 7 (2) (a) of the Madras Act, does not prohibit a sub-lease. What it provides is that if there is a sub-lease and that sub-lease is not authorised by the terms of the lease, the landlord may make an application for the eviction of the tenant and that on proof that there was such sub-lease there shall be an order of eviction. It is one thing to say that a sub-lease is contrary to law and quite another to say that a sub-lease which is not authorised by the lease deed entails eviction. The expression, 'contrary to any provision of law' occurring in Clause (f) in Section 21 of the Mysore Act, should be understood as having reference to an act which is made in opposition to law. Between the act done and the law which regulates that act, there must be an element of contrariety. That element of contrariety exists when the law prohibits the act.

14. But, Section 7 of the Madras Act, does not prohibit a sub-lease. On the contrary, sub-section (2) of that section makes it clear that if the lease authorises a sub-lease, that sub-lease is within the power of the lessee. The restricted provision which that section incorporates is a provision creating a right in the landlord to seek an order for eviction when a sub-lease which is not authorised by the terms of the lease is made by the lessee. In the absence of an

express provision in the Madras Act, prohibiting the creation of a sub-lease, the lessee has the power to make a sub-lease under Section 108 (j) of the Transfer of Property Act, although the creation of that sub-lease, when exception is taken to it by the landlord, exposes the lessee to the risk of eviction under the provisions of the Madras Act. But if the landlord abstains from exercising his right to seek an order for eviction in that way, it cannot be contended that the sub-lease is either unenforceable or is unlawful so long as there is no eviction at the instance of the landlord. The sub-lease is a good sub-lease and between the sub-lessor and the lessee, there is the relationship of landlord and tenant.

15. I should make a distinction between a sub-lease which creates a right in the landlord to seek eviction and a sub-lease which is contrary to law in the sense that it is statutorily prohibited. In the one case the creation of the right in the landlord has no other efficacy than to clothe him with the right to seek eviction if he elects to do so, but on the sub-lessee that right has no other impact. So long as it subsists, it is a good and valid sub-lease.

16. The expression 'contrary to a provision of law' is an expression of wide import and the meaning to be given to that expression depends upon the context in which it occurs and the scheme of the statute in which it appears. In the context in which it appears in clause (f) of Section 21 of the Mysore Act, I understand it as having reference to a sub-lease which is expressly forbidden by any general or special law or a sub-lease which is inconsistent with any law then in force.

17. That view which I take, receives support from the decision in Mercantile Steamship Co. v. Hall, 1909-2 KB 423 in which Pickford J. said this:

"..... I reserved my judgment because I wished to see if I could get from any of the authorities any guidance as to what was the exact meaning that had been attached by the Courts to the wide words 'contrary to law'. I have not got any great assistance from the cases, because I do not think any of them turned on facts and considerations such as those which arise in this case. Of course a stipulation may be contrary to law in a great many ways. It may be contrary to the general law, but it is not suggested that the stipulation is so here. Or it may be contrary to certain express provisions of that Act prohibiting stipulations of this description; therefore I have to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law within the meaning of Section 114 if they are inconsistent with the provisions of the Act. I am of opinion that

they are, and the question therefore narrows itself

18. The only statutory provision on which dependence was placed on behalf of the landlord in support of the postulate that the sub-lease was contrary to law was Section 7 of the Madras Act. But that law does not expressly prohibit a sub-lease and it cannot be said that the creation of the sub-lease was inconsistent with the provisions of that Act.

19. But Mr. Holla asked attention to the expression 'unlawfully' occurring in the first part of clause (f) of Section 21 of the Mysore Act and asked me to contrast that expression with the expression, 'contrary to any provision of law' occurring in that Section. His argument was that the two expressions cannot have the same meaning since the first part of the clause refers to an unlawful sub-lease whereas the second part refers to a sub-lease contrary to law.

20. It is obvious that the expression 'unlawfully' was used in the first part of the clause since Section 23 of the Mysore Act which governed sub-leases used the expression 'shall not be lawful'. Since a sub-lease in the absence of a contract to the contrary after Part V of the Mysore Act came into force is not lawful, the Legislature employed the expression 'unlawfully' when it referred to sub-leases created after the commencement of that Part. The employment of that expression for that reason is quite intelligible. But, since more than one law imposing restrictions on the landlord's right to seek eviction was operating in the five different areas which became the new States of Mysore under the States Reorganisation Act, and, their provisions were not uniform and not all those laws expressly prohibited a sub-lease as Section 23 of the Mysore Act does, no one should feel surprised with the selection of the expression 'contrary to any provision of law' by the Legislature when it referred to a sub-lease created before the commencement of Part V of the Mysore Act.

21. However that may be, I am concerned in this case with the meaning of the words, 'contrary to any provision of law' and I have no doubt in my mind that those words have reference to a sub-lease expressly prohibited by a law then in force. The sub-lease in the present case was not.

22. The decision of the High Court of Madras in Aiyannah Chetty v. Muddukrishnayya & Co., (1956-2 Mad LJ 54) on which Mr. Holla depended in support of the argument to the contrary, cannot be of much assistance to him since that was a case in which a tenant whose eviction was sought under Section 7 (2) (ii) (a) of the Madras Act appealed to the provisions

of Section 108 (j) of the Transfer of Property Act and the plea was negatived. The observation in that case that the right created in favour of the landlord by the Madras Act has to be understood in the context in which it was made and when so understood, that observation only means that the right of the tenant created by the provisions of the Transfer of Property Act must yield to the right of the landlord created by the Madras Act.

23. I dismiss this revision petition; but in the circumstances of the case, I make no order as to costs.

24. Mr. Holla says that the petitioner should be permitted to withdraw the amount deposited by the sub-lessee. Mr. Ganapathy Bhat does not object and so it will be paid to the landlord.

LGC/D.V.C.

Petition dismissed.

AIR 1969 MYSORE 103 (V 56 C 23)

B. M. KALAGATE, J.

Amir Bi and others, Appellants v. Committee of Management of Nilasandra Mosque, Bangalore and another, Respondents.

Second Appeal No. 151 of 1964, D-12-8-1968 against judgment and decree of Addl. Civil J., Bangalore, D- 8-1-1964.

(A) Civil P. C. (1908), Ss. 100-101 — New point — Deed of Wakf — Proof of execution — Execution of document not specifically disputed and no issue raised in lower Courts and consequently no decision — Question of proof of execution of the document held could not be raised for the first time in second appeal.

(Para 11)

(B) Registration Act (1908), Ss. 60, 58, 59 — Registration of document — Proof of execution.

The execution of a document cannot be held to be proved by the fact of the registration of the document itself. What Section 60 (2) provides is that the registration certificate is proof that the document was duly registered and not that it was duly executed.

Though it is true that the Court is not bound to treat the Registrar's endorsement as conclusive proof of the fact of its execution, yet, if the executant admits the execution and signs it before the Registrar and the Registrar affixes his signature endorsing the signature of the executant stating that the executant has admitted execution and certifies the document, then, such an endorsement and the certificate read with the evidence in that matter is sufficient to hold that the document is proved to have been signed

and executed by the executant. Case law discussed.
(Para 16)

M. N. Farukhi, for Appellants; Sadiq Suhael for, Respondents.

(C) Evidence Act (1872), Ss. 66 and 65 — Deed of Wakf — Plaintiff-mosque claiming possession of property as trustee — Defendant claiming the property as her own and knowledge of execution of wakfnama by her deceased husband denied — Defendant giving in evidence that she might be in possession of the deed though she was not sure of it — Held, that the case fell under S. 62 (2) and no notice was required to be given and the certified copy of the deed was admissible in evidence. (Para 19)

(D) Musselman Wakf Validating Act (1913), S. 3—Wakf by Hanafi Musselman in favour of Mosque — No possession given — Reservation made for executant during his lifetime — Wakf is valid. AIR 1927 All 255, Diss.

A wakf created by a Hanafi Musselman even in favour of a mosque making reservation for himself during his life time without delivering possession, is perfectly valid wakf and is in accordance with the tenets of the Muhammadan Law relating to a wakf created by a Hanafi Musselman. The Legislature does not make any difference between a wakf for a mosque or a wakf for any other religious, charitable or pious purposes. AIR 1927 All 255, Diss. (Paras 34, 36)

(E) Civil P. C. (1908), S. 92 — Property dedicated to Mosque — Property in possession of wife of deceased executant of wakf — Wife has no right to occupy the property and she is only a stranger — Suit by plaintiff-mosque to recover possession — S. 92 has no application and consequently consent of Advocate-General for filing of suit not necessary. AIR 1941 P. C. I, Foll. (Para 39)

Cases Referred: Chronological Paras (1961) 39 Mys LJ 794=ILR (1960)

Mys 584 Narayananchar v. Venkatanathan 16

(1960) AIR 1960 Mys 234 (V 47)=

37 Mys LJ 920, Balappa Tippanna v. Asangappa Mallappa

(1958) 36 Mys LJ 476=ILR (1958)

Mys 263, Narayanaappa v. Latchamakka

(1948) AIR 1948 PC 168 (V 35)=

1948 All LJ 422, Beli Ram and Bros. v. Mohd Afzal

(1947) AIR 1947 All 201 (V 34)=

1947 All LJ 85, Mohd Yasin v. Rahamat Ilahi

(1941) AIR 1941 PC 1 (V 28)=67 Ind App 448, O. Rm. O. M. Sp. Firm v. Nagappa

(1927) AIR 1927 All 255 (V 14)=

ILR 49 All 391, Mohd. Shafi v. Md. Abdul Aziz

(1838) 1238 Fulton's Rep. 345, Deo Dem Jan Bibee v. Abdoolah

Barber

JUDGMENT: This appeal is presented by the Legal Representatives of defendant 1 Amir Bi and four others against the decree dated January 8, 1964 made by the Additional Civil Judge Bangalore, in R. A. 348 of 1960 decreeing the suit which was dismissed by the trial court.

2. The first respondent, which has been described as the Committee of Management of the Neelasandra Mosque by its President Shaik Abdul Jaleel brought O. S. 153 of 1957 on August 3, 1957 against the defendants claiming possession of the suit schedule property, and present and future mesne profits.

3. The suit property described in the schedule to the plaint consists of items bearing Municipal Door Nos. 247 and 248 situate in Bazaar Street, Neelasandra, Civil Station, Bangalore, together with shops and other buildings now standing thereon. This property, according to the plaintiff, belonged to one Abdul Hussain alias Jani Saheb who executed a Wakfnama in favour of the mosque on April 23, 1948 conveying his right, title and interest in the suit property absolutely constituting himself as the Muthuvalli and continued to be in possession of the property enjoying the income thereof till his death, which occurred on May 12, 1951.

4. Amir Bi, defendant 1, since deceased was the wife of Abdulla Hussain and the other defendants are the tenants in occupation of the premises. Since the wakf was created for the benefit of the mosque and the said Abdulla Hussain was to enjoy the property during his life time and thereafter, as per the terms of the wakfnama the income from the suit property was to be utilised in full for the benefit of the plaintiff-mosque, the first defendant has no right to continue in possession of the suit property. The other defendants deny the plaintiff's title and therefore are in wrongful possession of the suit property. The plaintiff therefore, on 29th June 1956 issued a notice to the defendants calling upon them to surrender possession of the suit property and pay up the rents due. The defendants did not comply with the notice and therefore, the present suit has been filed on behalf of the mosque against them to recover possession of the suit property.

5. The defendants contested the plaintiff's claim to recover possession. Defendants 1 and 3 to 6 filed a joint written statement in which they inter alia contended that the plaintiff has no locus standi to institute the suit since the Muthuvalli of the Neelasandra Mosque alone had the power to institute the same. They also contested the validity

of the wakf and stated that no wakf as such was created. It was also contended that Abdul Hussain had no intention to create a wakf since he did not divest himself of the ownership of the property comprised in the wakfi. The first defendant it was stated, was in possession of the property as the owner and prior to that, her husband was in possession and that possession was never handed over to any representative of the mosque. On these grounds the defendants contended that the plaintiff's suit should be dismissed.

6. The trial court on these pleadings raised several issues but for the purpose of this appeal, the issues that are material are issues 1, 4 and 6. They are as follows:

"1. Did late Abdulla Hussain alias Jani Saheb create a valid wakf on 23-4-1948 in favour of the plaintiff Mosque?

2. Is the suit maintainable in the form in which it is brought?

3. Is the suit wakf illusory and fictitious and created only as a shield and hence unenforceable?"

7. On the first issue the trial court found that there is no valid wakf created. On issue No. 6 it held that it does not survive in view of the finding on issue No. 1 and issue No. 4 was answered in the affirmative. In the result, it dismissed the suit.

8. The plaintiff presented an appeal in the court of the Civil Judge, Bangalore, against the decree dismissing the suit. The learned Civil Judge disagreeing with the conclusion reached by the trial court allowed the appeal and decreed the plaintiff's suit. It is the correctness and legality of this decree that is being challenged in this appeal by the appellants.

9. Mr. Farukhi, learned counsel for the appellants has submitted four points in support of his appeal. They are:

1. The execution of the wakfnama is not proved and that a certified copy, the original not having been proved to have been lost or destroyed is not admissible in evidence;

2. That the wakf, even if it is created, is not valid in law;

3. That the wakf was not acted upon; and

4. The suit is not maintainable since the consent of the Advocate General was not obtained prior to the filing of the suit as required by Section 92 of the Code of Civil Procedure.

10. The first question is whether the execution of the document is proved.

11. It is stated in para 2 of the plaint that Abdulla Hussain has executed the document on 23-2-1940. The defendants in their written statement have merely denied the allegations made in para. 2 of the plaint. There is no specific denial of the execution of the document by

Abdulla Hussein. The trial court has not raised any issue relating to the proof of the execution of the document. It is therefore clear that the execution of the document, not having been specifically disputed, no issue is raised and there is no decision by the Courts below. Therefore, it is not open to the learned counsel for the appellants to raise the question of proof of the execution of the document in this Court for the first time. Even otherwise, in my opinion, the evidence on record is sufficient to hold that the plaintiffs have proved the execution of the document.

12. Section 67 of the Indian Evidence Act provides that if a document is alleged to have been signed by any person, then the signature of that person to that document must be proved. In this case, P. W. 4, Shaik Hyder, who has identified the executant Abdulla Hussein before the Sub-Registrar states that Abdulla Hussein signed the document in his presence before the Sub-Registrar. P. W. 2, a clerk in the Sub-Registrar's office has produced the thumb impression register which is marked Exhibit P-1 and states that the entry relating to the document dated 23-4-1948 is Exhibit P-1 (a). However, P. W. 4 when shown Exhibit P-1, pointed out Exhibit P-1 (b) as the signature of the executant Abdulla Hussein. This is obviously incorrect. It is not known whether this witness is a literate or illiterate. The signature in Exhibit P-1 is in Urdu and if this witness was a literate, surely, he could not have committed the mistake of pointing out the signature of Abdulla Hussein as Exhibit P-1 (b) instead of Exhibit P-1 (a). The Register shows that the document has been registered on 23-4-1948 and it bears the thumb impression of the executant who has also signed it in Urdu. P. W. 5 is an attestor of the document. His evidence is that the executant signed the document before the Sub-Registrar and also in the lawyer's office where the document was executed. Further, the executant himself presented the document for registration and having admitted its execution, signed it in Hindustani. He has also put his left thumb mark on it. It also shows that he was identified by Shaik Hyder P. W. 4.

13. Section 58 of the Indian Registration Act requires that every document admitted to registration shall bear the endorsement of the particulars such as the signature of the person admitting execution of the document. Under Section 60 (1) of the Act, the registering Officer has to endorse a certificate containing the word 'registered' thereon and under sub-section (2) of that section, such certificate shall be signed, sealed and dated by the registering officer and shall then be admissible for the purpose of proving that the document has been duly

registered in the manner provided by the Act and that the facts mentioned in the endorsements referred to in Section 59 of the Act have occurred as stated therein. One of such facts falling within Section 59 is the signature of the executant of the document. Further, P. Ws. 4 and 5 have spoken about the signature of Abdulla Hussein. This evidence to my mind, is sufficient to hold that the document bears the signature of Abdulla Hussein and the same is proved. The lower appellate court has also, believing the evidence of P. Ws. 4 and 5 held that Abdulla Hussein has signed the document.

14. It is however contended by Mr. Farukhi that mere proof of the signature by itself is not sufficient to hold that the execution of the document is proved and in support of that proposition, he relied upon a decision of this court in Narayappa v. Latchmakka (1958) 36 Mys LJ 479, wherein it has been observed that mere proof of signature of party to a document is not the same thing as proving the due execution of the document. That observation came to be made in respect of a document alleged to have been executed by an illiterate lady; the courts below in the case had come to the conclusion that she did not know the real character of the document when she signed it and it was in that context this court observed that mere proof of signature of the party is not the same thing as proving the due execution of the document. It is obvious that if a person signs a document not knowing the nature of that document, it is as good as his not having executed the document and therefore, the observation made in that context can have no relevance to the facts of the present case.

15. Next, Mr. Farukhi relied upon the decision in Balappa Tippanna v. Asangappa Mallappa, (1959) 37 Mys. LJ 920 = (AIR 1960 Mys. 234). In that decision, the effect of the proviso to Section 68 of the Indian Evidence Act was considered since the document was to be proved as required by that Section since it was required to be attested and the proof of such a document had to be given in accordance with the provisions of that Section. That decision again, has no relevance to the facts of this case.

16. Mr. Farukhi then relied on the decision in Narayananchar v. Venkatathan, (1961) 39 Mys L J 794 in support of his submission that the certificate by the Registrar under Section 60 (2) of the Indian Registration Act is not sufficient to hold that the document has been executed. It is true that this court has stated that the execution of the document cannot be held to be proved by the fact of the registration of the document itself. What Section 60 (2) provides is that the

registration certificate is proof that the document was duly registered and not that it was duly executed. It would however appear that the document was presented for registration not by the executant himself but by a person who held the power of attorney from the executant and it was in that context that the observation was made. But the plaintiffs in the instant case do not merely rely upon the certificate under Section 60 (2) of the Registration Act. They have also examined two witnesses—P. Ws. 4 and 5—to prove the signature of Abdulla Hussein.

Though it is true that Court is not bound to treat the Registrar's endorsement as conclusive proof of the fact of its execution yet, if the executant admits the execution and signs it before the Registrar and the Registrar affixes his signature endorsing the signature of the executant stating that the executant has admitted execution and certifies the document, then, such an endorsement and the certificate read with the evidence of P. Ws. 4 and 5 is sufficient to hold that the document is proved to have been signed and executed by the executant namely, Abdulla Hussein. Therefore, these decisions on which reliance has been placed by the learned counsel for the appellants do not help them in maintaining that the execution of the document is not proved.

17. The other part of the argument is that the plaintiff has produced the certified copy of the document and such a certified copy is not admissible in evidence unless it was shown that the original was either lost or destroyed. The evidence discloses and it is also found by the lower appellate Court that the executant Abdulla Hussein was in possession of the document till his death. It is in evidence as stated by his wife that her husband died in her house. She has further stated that she might be in possession of the document of Abdulla Hussein but that she is not sure of it.

18. Under Section 65 (a) of the Indian Evidence Act, when the original is shown or appears to be in possession of the person against whom the document is sought to be proved, then, secondary evidence may be given of the existence and condition of the document. But Section 66 of the Act provides that secondary evidence of the contents of the document referred to in Section 65 (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession the document is, a notice to produce it; provided that such notice shall not be required in order to render secondary evidence admissible in a case when, from the nature of the case, the adverse party must know that he will be required to produce it.

19. In this case it is clear that the plaintiff-mosque claims possession of the property as a trustee whereas defendant 1 claims it as her own, and denied any knowledge of the execution of the wakf-nama by her deceased husband. Therefore, in such circumstances it is obvious that the defendant must be held to know that she will be required to produce the document especially in view of her evidence that she might be in possession of the document of her husband, but that she was not quite sure. Therefore, it is clear that the present case falls under sub-clause (2) of Section 66 of the Evidence Act and therefore, no notice is required to be given as required under that Section. In my opinion, the appellate court was right in holding that the certified copy was admissible in evidence. The trial court's view that the document was not admissible in evidence as the existence or loss of the original was not proved is not correct. Therefore, I hold that the certified copy produced by the plaintiff is admissible in evidence.

20. Then, the next question which is of importance relates to the validity of the wakf created by the deceased Abdulla Hussein. From the written statement of the defendants it could be gathered that the validity of the document was challenged on two grounds, firstly, that the executant did not intend to divest himself of the ownership of the wakf property and secondly, that he did not intend to create a wakf in respect thereof. The first issue raised by the trial Court is whether the deceased Abdulla Hussein created valid wakf on 23-2-1948 in favour of the plaintiff-mosque; it answered that issue in the negative stating that since the certified copy was not admissible in evidence and when once it goes out of evidence, then there is nothing on record to show that Abdulla Hussein created a wakf of the property in question in favour of that mosque.

The appellate court took a contrary view and held that the wakf was valid being in accordance with the tenets of Muhammadan law. Mr. Farukhi for the appellants has challenged the correctness of this finding stating that the deceased Abdulla Hussein was a Hanafi Mussalman and the validity of the wakf created by him must be considered in accordance with the rules that govern wakfs created by a Hanafi Mussalman. He contends that the wakf must not reserve any interest in the property in respect of which a wakf is created. He also contends that unless a delivery of such property is made, the wakf is not complete especially when the wakf is in favour of a mosque and since the wakf is in favour of a mosque and since the wakif has reserved the benefit to himself under the wakf and did not deliver possession of

the property, the wakf must be held to be void. On the contrary, Mr. Sadiq for the plaintiff-respondent maintains that the wakf created by Abdulla Hussein is valid and in accordance with the principles of Muhammadan Law governing the wakfs created by a Hanafi Mussalman. Therefore, I have to see which of the two rival views is correct in accordance with the principles governing the wakf created by a Hanafi Mussalman. However, before I proceed to consider the said question, I would like to set out here the relevant portion of the wakf-nama:

"...Whereas the wakif being a Hanafi Muslim desires to create a waki in respect of the schedule property in favour of the Musjid at Neelasandra Civil Station Bangalore subject to the condition that the income therefrom shall be utilised for the maintenance and support of the wakif during his lifetime and immediately after his death the income from the schedule property to be utilised in full for the benefit of the Musjid at Neelasandra Civil Station Bangalore whereas the wakif is the present Mutawalli of the Musjid at Neelasandra Civil Station Bangalore he in his capacity as such Mutawalli will be in possession and control of the schedule property and shall fulfil the object of this wakf. As the wakif is possessed of other properties and as his heirs will get their specified shares in the said properties the wakif with the object of getting benefit after his death has created this wakf..."

21. 'The validity of wakfs' is founded on the rule laid down by the Prophet himself when Omer sought his counsel, to make the most pious use of his property. The Prophet declared,

'tie up the property and devote the usufruct to human being and it is not to be sold or made the subject of gift or inheritance; devote its produce to your children, your kindred, and the poor in the way of God.'

(Vide Chap. VII P. 192 Mohammedan Law by Ameer Ali, Vol. I).

The learned author then states what wakf literally means and observed (P. 194).

"Technically or as the Arabian jurists put it, in the language of the law, it signifies the dedication or consecration of property, either in express terms or by implication, for any charitable or religious object, or to secure any benefit to human beings....a dedication to any good purpose. (Wujuh-ul-khair. Wa'l bin of the Hanafis) is a wakf. The terms Birr and Khair include all good and pious acts and objects. To make a provision for one's self is regarded by Hanafi Lawyers as an act of khair, for the Prophet declared a man giving subsistence to himself as giving charity, and settlements upon one's family are ap-

proved of and regarded as lawful by all the schools."

This is also what is stated by Baillie in Digest of Moohummudan Law:

"When a man has made an appropriation of land or something else, with a condition that the whole or a part of it shall be for himself while he lives and after him for the poor, the appropriation is valid, according to Aboo Yoosuf..." (P. 595)

22. Aboo Yoosuf and Mohammed, the two most distinguished disciples have expounded the law relating to wakfs created by a Hanafi Mussalman. Mohammed considers the appropriation or the use of the property during life illegal. He also considers delivery of possession of the property essential to the validity of an appropriation. On both these points, he is at variance with Aboo Yoostuf and it is this difference of opinion among the disciples that has given rise to the question whether the wakf in question is a valid one and is in accordance with the principles of Muslim tenets.

"In order that a wakf should become operative or binding, it is not necessary under the Hanafi Law that the property should be actually delivered by the wakif to a trustee. Delivery of seisin is not necessary in wakf as it is in hiba. The mere declaration of the wakif is sufficient to constitute the property wakf, and the wakif from that time forth is a mere trustee. He may be a trustee for himself, that is, he may reserve during his lifetime the income of the property for his own benefit; but whilst the law allows him, in case he makes a condition to that effect, to use the income of the property in whole or in part during his lifetime, the property is nevertheless a trust-property in his hands. He can neither sell it, nor mortgage it, nor burden it, nor deteriorate it in any way and if he does so the beneficiaries and reververs would be entitled to have the property taken out of his hands and consigned to a mutwalli, to realise the rents and profits and to make over the balance to the wakif after deducting expenses.

"Though, according to Mohammed, consignment of the dedicated property and separation of it from the other properties of the wakif are necessary to the completion of a wakf, according to Abu Yusuf, the wakf becomes absolute and binding, like emancipation, on the mere declaration of the wakif, and his right therein becomes extinguished at once..." (vide P. 237 Mohammedian Law by Amerer Ali Vol I).

23. In the case of *Deo Dem. Jan. Elbee v. Abdoolah Barber*, 1838 Fulton's Rep. 345, decided by the Supreme Court

of Calcutta, the question was which of two opinions is to prevail. The learned Judges referred the questions to the Moulavies for their opinion. The first question was whether, according to Mohammedan Law, an endowment to charitable uses is valid, when qualified by a reservation of rents and profits to the donor himself during his life and the second was whether delivery of the property is essential to render an endowment valid, according to the rule which governs other gifts? The Moulavies answered the questions as follows:

(1) There is a difference of opinion between Abu Yusuf and Mohammed touching the wakf or consecration of lands with a reservation, and setting apart of any portion of the profits and produce thereof for the support of the wakif or consecrator. Abu Yusuf considers the act legal, and Mohammed deems it illegal. The legal opinions of most of the learned uphold the opinion of Abu Yusuf, which is to be found in Chulpee or commentary of the Shurh Vkyah...

(2) Abu Yusuf does not consider the consignment and delivery of consecrated real property to the Mootuwilee as necessary to render the wakf of consecration legal. In this opinion Mohammed differs but the practice is in accordance with the opinion of Abu Yusuf, as written in the Mooneeah..(P. 241)"

24. Thus the opinion of the Moulavies based on the authorities was that the opinion of Abu Yusuf was to prevail.

25. But Mr. Farukhi submits that even if it is held that for the completion of a wakf delivery is not necessary and it is open for the wakif to make a reservation for himself during his lifetime, yet if the wakf is for a mosque, then, he must deliver possession, and unless possession is delivered, the wakf is not complete. In support of this proposition, he relied on the observation by Tyabji in his book Muhammedian Law Third Edn.) as follows:

"515. The wakif cannot validly reserve any benefit to himself under a dedication for a mosque. A wakf with any such reservation is void." (P. 646). He also relies on a similar observation appearing in Verma's Mohammedian Law (4th Edn. 1968) to the effect—

220 (1) Except in the case of a wakf for a mosque the wakif may at the time of making the wakf reserve the following benefits for himself... Thus relying on the above statements, Mr. Farukhi maintains that a wakf with reservation to mosque is void unless accompanied by delivery of possession.

26. The learned author Tyabji below Section 515 has stated:

"This is in accordance with all the schools of law. For Abu Yusuf's exposi-

tion of the Hanafi law alone permits the wakif to reserve any benefit to himself in a wakf of any kind whatsoever. But even according to Abu Yusuf, where a mosque is the object of the wakf the wakif cannot be a beneficiary." But in the foot-note the learned author states:

"It is not quite clear whether reservation alone is void, or entire dedication." Thus it would appear from the foot-note that the statement by Tyabji in Section 515 of his book stands considerably weakened.

27. Then, I have not been able to gather any information from Verma's Mohammedan Law as to why in the case of a wakf for a mosque the wakif cannot make any reservations for himself during his lifetime. The other two distinguished authors on Mohammedan Law, namely, Sir Dinshah Mulla and Ameer Ali do not make any distinction between a wakf for a mosque and a wakf for any other religious or charitable or pious purpose.

28. But, Mr. Farukhi relied on the exception mentioned to Section 177 in Mohamedan Law by Mulla (Fifteenth Edn.) P. 156, which is—

"The wakf of a mushaa for a mosque or burial ground is not valid, whether the property is capable of division or not."

One of the reasons stated is that 'the continuance of a participation in anything is repugnant to its becoming the exclusive right of God.'

29. But Ameer Ali in his book observes that—

"...The wakf of an undivided share of a property which is capable of partition, is valid according to Abu Yusuf. Mohammed differs from him, and bases his difference on the difficulty of delivering possession of a property, which was not specifically divided off or apportioned from the rest. Abu Yusuf, however, holds delivery of possession wholly unnecessary in the case of a wakf.... And the Fatawai Alamgiri adds, the moderns decide according to the opinion of Abu Yusuf, who held that the wakf was lawful, and this is approved..."

According to the Siraj-ul-Wahaj the wakf of Mushaa is valid by consensus.

But where the property is incapable of partition, Mohammed agrees with Abu Yusuf and holds that the dedication of a share thereof is lawful,....

Both Abu Yusuf and Mohammed, however, agree in holding that where a piece of land is dedicated for erecting a mosque or building a tomb thereon, that piece of land ought to be divided off. The reason of this is apparent. But no division is necessary, according to Abu

Yusuf, if the dedication is in favour of a mosque or for the maintenance of a Mausoleum..." (vide pages 268-269)

Thus the view of Ameer Ali is at variance with that of Tyabji. It would therefore be seen that Tyabji's statement weak as it is stands lonely when compared with the views of the other distinguished authors.

30. From the discussion so far made it would seem that the consensus of opinions among the Muslim Jurists seem to be in favour of accepting the opinion of Abu Yusuf in preference to that of Mohammed.

31. Mr. Farukhi however, sought to rely upon the decision in Mohd. Shafi v. Mohd. Abdul Aziz, AIR 1927 All 255 where, two learned Judges differed on a question as to whether the authority of Mohammed should be preferred to that of Abu Yusuf. Pullan, J. took the view that the deed of wakf was not valid since the wakf was in favour of the mosque in which the wakif had reserved to himself a benefit, whereas Ashworth J. differed from him and relies on Ameer Ali's exposition of the law that Mohammed's view is not recognised among the Hanafis of India'. It is also to be noted that Justice Ashworth did not agree with Tyabji's statement in Section 515 stated earlier in view of Ameer Ali's exposition of the law. Though Mr. Justice Pullan accepted the view of Mohammed in preference to that of Abu Yusuf, with respect, to my mind, his view is not in accordance with the consensus of Muslim Jurists, as I gather from the discussion in the books on Mohammedan Law by Mulla, Ameer Ali, Saxena and others. The consensus of opinion among Muslim jurists as stated earlier, seems to prefer the view of Abu Yusuf to that of Mohammed. Therefore, the contention of Mr. Farukhi based essentially on the opinion of Mohammed, has to be rejected.

32. Here, I should like to refer to a decision of the Full Bench of the Allahabad High Court in Mohd. Yasin v. Rahmat Ilahi, AIR 1947 All 201 where it was held that according to the Hanafi School of Muhammadan Law, it is not necessary for the completion of the wakf that the person appointed Mutwalli should be given possession of the dedicated properties. It is worthy to note that in that case wakf was also in favour of a mosque and the Full Bench accepted the view of Abu Yusuf in preference to that of Mohammed.

33. However, in view of this difference of opinion in relation to the wakf created by a Hanafi Mussalman, the Legislature enacted (Act No. VI in the year 1913) the Mussalman Wakf Validat-

ing Act and Section 3 of that Act states—

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman Law for the following among other purposes:

(a) . . .

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated:

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman Law as a religious, pious or charitable purpose of a permanent character. Section 4 of this Act provides—

No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating wakf.

34. Thus it would appear that the controversy which related to the creation of a wakf by a Hanafi Mussalman wherein he reserves the benefit of the wakf for his life has been laid at rest by the Legislature stating that it is lawful for a Hanafi Mussalman while creating a wakf to make a reservation for his own maintenance during his lifetime. The Legislature does not seem to make any difference between a wakf for a mosque or a wakf for any other religious, charitable or pious purposes.

35. 'Wakf' is defined in Section 3 (1) of the Wakf Act, 1954 to mean, the permanent dedication by a person professing Islam of any moveable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable. The view that the Mussalman Wakf Validating Act has laid at rest the controversy finds support from Saxena's Muslim Law (Third Edn.) wherein it is stated—

"It is the Hanafi exposition of Abu Yusuf alone that permits the wakif to take any benefit under the wakf, but no other school has allowed this benefit. The Wakf Act has now recognised this rule of Abu Yusuf. . ." (P. 462) This is also what has been stated in Wilson's Anglo Muhammadan Law (Sixth Edn.) by Yusuf Ali, in which the learned author refers to the 1913 Mussalman Wakf Validating Act and states that it is lawful for a Hanafi Mussalman to create a wakf for any religious or charitable purpose with a reservation for himself during his lifetime. (P. 362).

36. Mr. Farukhi states that even according to the 1913 Act, the wakf created must in all other respects be in accordance with the provisions of Muslim law and the Muslim Law according to him is that in case of a wakf for a mosque, the wakif cannot make a reservation for himself during his lifetime. But this submission is not borne out by any of the provisions of the 1913 Act, where the term "wakf" is defined and that definition makes no distinction between a wakf created for a mosque or the one created for any other religious, charitable or pious purposes.

Therefore, in my view, after a careful consideration of the views expressed by various learned authors on Muhammadan Law and the authorities cited, and after considering the relevant provisions of the Mussalman Wakf Validating Act of 1913, a wakf created by a Hanafi Mussalman even in favour of a mosque making reservation for himself during his lifetime without delivering possession, is perfectly valid wakf and is in accordance with the tenets of the Muhammadan Law relating to a wakf created by a Hanafi Mussalman. Therefore, the contention of Mr. Farukhi for the appellants has to be rejected. I therefore, hold that the Wakf created by Abdulla Hussain in favour of the plaintiff-mosque making reservation for himself during his lifetime and without delivery of possession is a valid wakf.

37. The third submission made by Mr. Farukhi, is that the wakf is not acted upon and therefore, the deceased Abdulla Hussain did not intend to create a wakf in favour of the plaintiff-mosque. The wakf was created in the year 1948. The wakif died in the year 1951. The lower court has found that during that period he must have paid the necessary assessment for the properties to the authorities concerned. It is also apparent from the contents of the deed that the wakif divested himself of the ownership of the property and became a mutwalli till his death and P. W. 3 was to act as mutwalli thereafter. Therefore, one thing is certain that there has been a dedication of the property to the mosque. The dedication or consecration is complete and he was only acting as mutwalli during his lifetime. What happened after 1951 is that his wife, defendant 1, remained in possession of the property with other defendants who are staying there as tenants. It was therefore in the year 1956, that the plaintiff-mosque after giving notice, filed the suit claiming possession.

38. It is true, as contended by Mr. Farukhi, that there is a register maintained relating to the properties held by the mosque and that there is no entry in that register in respect of this pro-

perty. Therefore it is suggested that the executant never intended to create a wakf of that property. I am unable to accept this contention. Abdulla Hussein has clearly expressed his intention to create a wakf in the deed itself and constituted himself as the first mutwalli and died as such. P. W. 3 was to be the next mutwalli. There are some other acts of omission on which reliance has been placed by Mr. Farukhi to state that they are inconsistent with the creation of a wakf. But such acts of omission may amount to a breach of the trust but would not make the dedication or consecration invalid. This is what has been observed in Beli Ram & Bros. v. Mohd. Afzal, AIR 1948 PC 168:

"...Once, there is an effective dedication in wakf it cannot be revoked, and breaches of trust on the part of a trustee however, numerous, and extending over however long a period, cannot put an end to the trust."

Therefore, there is no substance in the contention that Abdulla Hussein did not intend to create the wakf and that it was not acted upon, since there has been a complete dedication or consecration of the wakf property to the mosque. Such acts do not make the wakf invalid.

39. Finally, it was contended by Mr. Farukhi that the suit filed by the plaintiff is not maintainable in law since according to the learned counsel, the plaintiff has not, as admitted by P. W. 1, taken any permission of the Advocate-General as required by Section 92 of the Code of Civil Procedure. It is to be observed that it was contended in the trial court that the suit is not maintainable because the suit filed on behalf of the mosque was not by the mutwalli. But having lost in the trial court on that point, he is now making this submission in this court relying on a statement appearing in the evidence of P. W. 1 that he did not take the permission of the Advocate-General under Section 92 C. P. C. There is no substance in this contention because Section 92 C. P. C. has no application to the facts of this case and as pointed out by the Privy Council in O. Rm. O. M. Sp. Firm v. Nagappa, AIR 1941 PC 1, to a suit by a trustee against a stranger to recover trust property, Section 92 C. P. C. does not apply and the consent of the Advocate-General under Section 92 is not necessary in order that a trustee may recover property in the hands of a stranger to the trust.

In the instant case, the property is dedicated to the mosque and therefore, the plaintiff-mosque has a right to claim possession thereof. But it did not secure possession because defendant 1 and others were in occupation of the property after the death of Abdulla Hussein

and therefore, it had to file the suit for recovery of possession after serving notices on them as trespassers. Defendant 1 or any other defendants have no right to occupy the property because the property is a wakf property and they in relation to such property are strangers. Therefore, if a suit is filed on behalf of the plaintiff-mosque to recover possession of wakf property from strangers, Section 92 C. P. C. can have no application. Hence, this contention of Mr. Farukhi has also to be rejected.

40. In the result, all the contentions urged by Mr. Farukhi for the appellants fail. Consequently, I confirm the decree made by the Court below and dismiss this appeal. No order as to costs.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 MYSORE 111 (V 56 C 24)

M. SANTHOSH, J.

Ramangouda and another, Appellants v. Firm by name "Gonhal Basangouda Basavarajappa Rajendra Gunj Raichur", Respondents.

Misc. Second Appeal No. 145 of 1966, D/- 20-2-1968, against order of Dist. J., Raichur, in C. A. No. 38/4 of 1965.

(A) Civil P. C. (1908), O. 41 R. 27 — Admission of additional evidence by appellate Court — Reasons not recorded — Use of word "shall" in sub-rule (2) does not make Rule mandatory — Appellate Court's judgment not vitiated : AIR 1963 SC 1526 Rel. on. (Para 5)

(B) Civil P. C. (1908), O. 41 R. 27 — Admission of additional evidence by appellate Court — Evidence regarding partnership not produced in lower Court — Appellate Court allowing production of registration certificate — Held, Appellate Court could do so as certificate was required to enable it to pronounce judgment : AIR 1963 SC 1526 Rel. on. (Para 5)

(C) Civil P. C. (1908), O. 30 R. 1, O. 1 R. 10, O. 6 R. 17, S. 153 — Suit by firm — Plaintiff suing by mistake as owner of firm — Defendant signing for loan taken in books of firm — Suit cannot be held to be not maintainable on technical ground that plaintiff sued in his own name — Mistake in plaint can be set right — AIR 1961 SC 325 Rel. on. (Para 10)

Cases Referred: Chronological Paras (1964) 1964 Mys LJ (Supp) 74 4 (1963) AIR 1963 SC 1526 (V 50)=

(1964) 1 SCJ 37, Venkataramiah v. Seetharama Reddy 5

(1961) AIR 1961 SC 325 (V 48)=

(1961) 1 SCR 982, Purushottam Umedbhai & Co. v. Manilal & Sons

7, 8

- (1958) AIR 1958 Punj 260 (V 45)=
 ILR (1958) Punj 457, Bholabhai
 Bhogilal v. Rattan Chand
 (1957) AIR 1957 SC 912 (V 44)=
 1958 SCR 523, State of U. P. v.
 Manbodhan Lal Srivastava
 (1955) AIR 1955 Mad 294 (V 42)=
 ILR (1955) Mad 1293, Mura Mohi-
 deen v. Mohamed
 (1952) AIR 1952 All 695 (V 39)=
 1952 RD (HC) 108, Ram Kumar
 Ram Chandra v. Dominion of
 India
 (1951) AIR 1951 SC 193 (V 38)=
 1951 SCR 258, Arjan Singh v.
 Kartar Singh
 (1951) AIR 1951 Nag 448 (V 38)=
 ILR (1951) Nag 480, Chhotelal
 Ratanlal v. Rajmal Milap Chand
 (1940) AIR 1940 Oudh 443 (V 27)=
 1940 Oudh WN 901, Lucknow
 Automobiles v. The Replacement
 Parts Co.
 (1936) AIR 1936 Pat 140 (V 23)=
 161 Ind Cas 516, Firm Mohanlal
 v. Udai Ram Sewa Ram
 (1931) AIR 1931 PC 143 (V 18)=
 ILR 10 Pat 654, Parsotim Thakur
 v. Lal Mohar Thakur
 (1931) AIR 1931 Cal 770 (V 18)=
 35 Cal WN 432, Neogi Ghose &
 Co. v. Nehal Singh

K. A. Swamy, for Appellants; Basawalingappa, for Respondent.

JUDGMENT: The appellants before this court were defendants in the trial Court. The plaintiff filed a suit for recovery of a sum of Rs. 15,640 I. G. The suit was filed by a firm by name "Gonal Basangouda Basavarajappa Rajendra Ganj, Raichur" through owner Mahadevappa. The case of the plaintiff was that the father of the defendants was running a Dalal shop at Raichur and for the purposes of his trade, obtained the said loan, after signing in the account books of the firm; that the deceased father of the defendants did not return the loan in spite of several demands and after his death, since the defendants also failed to pay the amount, the suit against the defendants had to be filed. The main contention of the defendants was that the suit was not maintainable as it was a partnership firm and Mahadevappa was not its sole proprietor. The defendants also denied that their deceased father took the loan.

2. The learned Civil Judge, after recording fully the evidence, dismissed the suit merely on the preliminary ground that the suit is not maintainable. He held that there was no evidence as to who were the partners of the said firm and there was nothing to show that the plaintiff had got any interest in the said firm. In the appeal filed by the plaintiff, the learned District Judge of Raichur permitted the plaintiff under

Order 41 Rule 27 of C. P. C. to produce the Registration Certificate issued by the Registrar of Firms which showed that Mahadevappa was one of the partners of the firm. The learned District Judge set aside the order of the lower court and remanded the case back for disposal according to law. This appeal is directed against the said order passed by the learned District Judge of Raichur.

3. Sri K. A. Swami, learned counsel appearing on behalf of the appellants, has urged two points before: (1) The suit has been brought on behalf of Mahadevappa and it cannot be said that the suit is brought on behalf of the firm. (2) The lower appellate court erred in taking additional evidence and the learned District Judge in doing so acted against the provisions of Order 41 Rule 27 of C. P. C.

4. I will first deal with the second contention of Sri Swami. He argues that the learned District Judge acted in violation of the provisions of Order 41 Rule 27 C. P. C. in admitting additional evidence in the appeal. This was not a case where the evidence admitted was not available in the trial court. By admitting the evidence, the learned District Judge permitted the plaintiff to patch up the weak points of his case and fill up the lacuna in his evidence. Though the defendants had raised objections in the written statement, the plaintiff failed to produce this evidence and this evidence has been made use of to fill up the lacuna and as such it should be ignored. He also contends that the learned District Judge has not recorded any reasons for permitting the production of this additional evidence. He has cited before me AIR 1931 PC 143; AIR 1951 SC 193; 1964 Mys LJ (Supp) 74; AIR 1957 SC 912 in support of his argument that the additional evidence should not be let in to patch up the weak points and fill up the gaps in the cases and this power should be very sparingly exercised by the appellate court after recording reasons.

5. Sri Basawalingappa, learned counsel appearing on behalf of the respondents, has relied on the later decisions of the Supreme Court and has contended that omission to give reasons does not vitiate the order. Additional evidence can be admitted to enable the court to pronounce judgment. In Venkataramaiah v. Seetha Rama Reddy, AIR 1963 SC 1526 their Lordships of the Supreme Court at para 13 of the judgment have observed as follows:

"It is true that the word 'shall' is used in R. 27 (2), but that by itself does not make it mandatory. We are therefore of opinion that the omission of the High Court to record reasons for allowing

Cases Referred: Chronological Paras
 (1961) AIR 1961 All 1 (V 48) = 1960
 All LJ 967 (FB), Mahmud Hussain
 Khan v. Motilal
 (1961) AIR 1961 Punj 439 (V 48),
 Sehgal Brothers v. Bharat Bank
 Ltd.
 (1939) AIR 1939 PC 80 (V 26) = ILR
 14 Luck 192, Oudh Commercial
 Bank Ltd. Fyzabad v. Bind Basni
 Kuer

M. M. Das, for Appellant; P. K. Dhal,
 for Respondent.

JUDGMENT: In Title Suit No. 155 of 1955 in the Court of the First Munsif, Cuttack, plaintiff obtained an ex parte decree with costs. The substantive portion of the decree runs thus.

The defendant is directed to give peaceful possession of the house within one month hence, failing which plaintiff will take khas possession of the house through Court. The defendant is directed to pay to the plaintiff an amount of Rs. 66/- on account of arrears and the plaintiff is entitled to damages at the rate of Rs. 10/- per month from the date of the suit till delivery of possession of the house in execution proceeding on payment of proper court-fee. Future interest is not allowed. On 31-7-56 Execution Case No. 156 of 56 was levied for eviction and for recovery of Rs. 214-12-0 including arrear of house rent upto July, 1956 and costs of the suit. On 1-2-64 an agreement (Ex. A) was entered into between the parties, the essential terms of which are extracted hereunder.

(i) Through the intervention of the well-wishers of the parties, it is settled that the judgment-debtor would be in possession of the suit premises for one year from the date of the agreement and after expiry of the said one year he would vacate the premises and deliver Khas possession thereof to the decree-holder.

(ii) If the judgment-debtor fails to deliver vacant possession of the suit premises to the decree-holder after the said period, the decree-holder would be entitled to execute the decree under execution without any further objection from the judgment-debtor.

(iii) The decree-holder herewith relinquishes her claim for damages from 1-8-56 to 31-10-63.

(iv) For the aforesaid one year commencing from the date of the agreement during which the judgment-debtor would occupy the house, he would pay Rs. 20 per month as damages towards occupation of the suit premises and if he would not make such payment, the decree-holder would recover the same by executing the decree through process of execution.

(v) The judgment-debtor has no objection to the decree-holder withdrawing

Rs. 214.75 paise which had been deposited by the judgment-debtor in that very execution case towards the decretal dues.

6 On the aforesaid terms it was proved by both the parties to record the settlement and to dispose of the execution case, in terms thereof. In pursuance of this settlement the execution case was disposed of on 1-2-64.

3 The judgment-debtor did not pay the money nor vacated possession. The decree-holder accordingly filed Execution Case No. 161 of 1965 for execution of the decree for eviction for recovery of Rs. 120 towards arrears at the rate of Rs. 20/- per month and for recovery of future damages at the rate of Rs. 20 per month to be calculated till the date of eviction.

The judgment-debtor filed an objection under Section 47, C. P. C. which was recorded as Misc. Case No. 8 of 1966. The pleas taken therein were—

(i) On 28-11-65 the judgment-debtor paid Rs. 240 to the decree-holder.

(ii) There was a fresh contract wherein it was agreed that the judgment-debtor would continue to stay in the house till the end of 1968 on payment of Rs. 25 as rent per month.

(iii) The agreement (Ex. A) dated 1-2-64 superseded the decree and the decree-holder had no further right to execute the decree. The decree-holder has to file a fresh suit for eviction and recovery of rent on the strength of Ex. A.

Both the Courts below overruled the objections. Against the order the learned District Judge dismissing the appeal on 30-6-67, this miscellaneous appeal has been filed.

Mr. Das did not press the first two objections as being concluded by the findings of facts that the judgment-debtor did not make payment of Rs. 240 on 28-11-65 and that there was no fresh contract extending the period of judgment-debtor's period of occupation till the end of 1968.

2. The only contention raised by Mr. Das is that the present execution case filed in 1965 on the basis of the original decree, as modified by Ex. A, is not maintainable. The original decree has become time barred. The last execution, being on the basis of Ex. A, is not maintainable if Ex. A is ignored.

This contention requires careful examination.

3. Where the parties entered into an agreement against the execution of the decree, the question whether such an agreement is a bar to the execution, depends upon the nature of the agreement and the intention of the parties. If by the agreement, the decree is superseded and abandoned and an altogether new contract is entered into, the contract would constitute the basis of subsequent suit. On the other hand, if the agreement does not

supersede the decree, the Executing Court can inquire into the effect of the agreement and decide the matter under Section 47, C. P. C. subject to the provisions of Order 21, Rule 2, C. P. C., where such an agreement amounts to adjustment of the decree. In Oudh Commercial Bank Ltd. Fyzabad v. Bind Basni Kuer, AIR 1939 PC 80 the Judicial Committee noted the conflicting authorities and observed thus—

If it appears to the Court, acting under Section 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case, to say that the creditor may, perhaps, have separate suit, is to mislead the Court, which, by requiring all such matters to be dealt with in execution, discloses a broader view of the scope and functions of an Executing Court. In the light of the aforesaid principle the contention of Mr. Das is to be tested.

4. It would be clear from the terms of the agreement (Ex. A) that it was not intended to supersede the decree. On the contrary, unequivocal terms were embodied in the agreement that in case of default on the part of the judgment-debtor, either to vacate possession or to pay arrears of rent, the decree would be executable and the possession and arrears are to be recovered only through execution proceedings. The agreement does not stand as a bar to execution and no separate suit on the basis of Ex. A is maintainable.

5. Mr. Das, however, contends that the enhancement of the damages to Rs. 20 per month substantially modifies the decree directing payment of Rs. 10 per month. The contention has no force. The agreement must be read as a whole. By one of the terms, the decree-holder relinquished her claim for damages for a period of more than seven years from 1-8-56 to 31-10-63. If this term is taken into consideration, it is not possible to say that rent was enhanced. Even assuming that the rent had been enhanced, it would not amount to supersession of the decree. All would depend upon the terms of the agreement and the intention of the parties. Before their Lordships of the Privy Council further time was given when the judgment-debtor agreed to pay enhanced rate of interest. Their Lordships construed the enhancement as governing the liability of the debtor under the decree

and had effect only upon the time or the manner of enhancement of the decree. Relinquishment of the dues of the decree-holder from 1956 to 1963 had effect only upon the time or manner of the enforcement of the decree.

6. Mr. Das placed strong reliance on Md. Hussain Khan v. Motilal, AIR 1961 All 1 (FB) in support of the contention that the aforesaid Privy Council decision has not been accepted as laying down the correct law. It is true that the majority of the Judges constituting the Full Bench have not followed the Privy Council view. With respect I agree with the minority view. The majority view has also been dissented from in M/s. Sehgal Brothers v. Bharat Bank, AIR 1961 Puni 439.

For reasons discussed I am clearly of opinion that the decree as modified by Ex. A has not been superseded and is executable.

7. In the result, the appeal fails and is dismissed with costs.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 ORISSA 34 (V 56 C 16)

G. K. MISRA, J.

Baishnaba Charan Acharyya and another, Petitioners v. Nityananda Satapathy, Opposite Party.

Civil Revn. No. 20 of 1967, D/- 19-7-1968, from decision of Sub. J., Kondrapara, D/- 7-11-1966.

Civil P. C. (1908), O. 6, R. 17 — Suit for recovery of loan on basis of insufficiently stamped handnote — Application seeking amendment in plaint to base suit on oral loan giving rise to execution of handnote filed after close of trial — Can be allowed.

Where the suit for recovery of loan is filed on the basis of insufficiently stamped handnote and an application for amendment of the plaint making out the case that the suit is based on the original cause of action on the oral loan and that the handnote was executed as evidence thereof, is made, the amendment does not change the nature of the suit. The delay by itself is no ground to refuse such amendment. If the plaintiff has made out, in his evidence, the case that the loan was advanced by an oral agreement and the handnote was taken in evidence thereof, the application for amendment should be allowed even if it is filed after close of trial. AIR 1933 Bom 476 and AIR 1966 Orissa 18, Relied on.

(Paras 6, 7 and 8)

Cases Referred: Chronological Paras (1966) AIR 1966 Orissa 18 (V 53)=ILR (1965) Cut 637, Chandra Shekhar v. Gobinda Chandra

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(1933) AIR 1933 Bom 476 (V 20)=ILR 57 Bom 802, Sarafalli v. Mahasukhbhai	5
(1932) AIR 1932 Bom 394 (V 19)=34 Bom LR 643, Burjorji v. Harmusji	6
(1918) AIR 1918 PC 146 (V 5)=ILR 46 Cal 663, Sadasuk Janki Das v. Kishen Pershad	6
Ashok Mukherji, for Petitioners; M. Patra, for Opposite Party.	

ORDER: The suit was based on a hand-note executed by defendant 1 for Rs. 301 on 20-6-62 as the loan was not repaid despite repeated demands. Defendant 1 contested the suit alleging that he did not receive the loan nor executed the promissory note. His case was that he and the plaintiff used to take advances from one Mankchand Company for supplying jute. Plaintiff settled the accounts regarding the profits accruing to defendant 1. Plaintiff wanted the defendants to do jute business with him. As defendant 1 did not agree a false suit was brought on the forged handnote.

2. The learned Munsif held that the handnote was inadmissible in evidence as it was insufficiently stamped. He rejected plaintiff's prayer for amendment of the plaint and dismissed the suit after trial. The learned Subordinate Judge in appeal allowed the amendment and remanded the suit for fresh hearing with full opportunities to the parties to lead further evidence. Against the order of remand, the civil revision has been filed.

3. There is no dispute that the hand-note is insufficiently stamped and is inadmissible in evidence. It is affixed with two revenue stamps worth one anna each when one-anna stamps were not in vogue. The suit came up for trial on 22-4-66. After the cross-examination of D. W. 1 was over, a petition for amendment of the plaint was filed. The amendment was sought for making out a case that the suit was based on the original cause of action on the oral loan and that the handnote was executed in evidence thereof.

4. The only question urged in revision is that the amendment changes the nature of the suit and was filed after the close of the evidence and should not have been allowed.

5. The questions arise for consideration:

(i) Does the amendment change the nature of the suit?

(ii) If it does not, should it be rejected merely on the ground of delay?

6. The plaint in this case is clearly based on the handnote itself as constituting the cause of action. The amendment, if allowed, would result in the claim being based on the loan itself as constituting the cause of action. The two are indisputably distinct causes of action. That in such a case the amendment does not

change the nature of the suit has clearly and forcefully been held? in Sarafalli v. Mahasukhbhai, AIR 1933 Bom 476. The Division Bench declared the law, laid down to the contrary in Burjorji v. Harmusji, AIR 1932 Bom 394 as wrong. Sir John Beaumont, C. J. was a member of the Bench and observed thus—

"It is quite true, as the learned Judge points out, that the cause of action on the promissory note is distinct from the cause of action on the loan which gave rise to the promissory note. But it is equally true that those two distinct causes of action can be set up in the same suit by the original plaintiff. Authority for that proposition, if needed, is to be found in Sadasuk Janki Das v. Kishen Pershad, AIR 1918 PC 146 where the proposition is stated by Lord Buckmaster who delivered the opinion of the Privy Council. If two alternative and inconsistent claims can be combined originally in the plaint, I see no reason on principle why they should not be combined at a later stage by amendment. Whether in any particular case the amendment is asked for at too late a stage, or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law I see no reason why an amendment of this nature should not be allowed at the trial or even in appeal".

This decision and the aforesaid Privy Council case were relied upon in Chandra Shekhar v. Gobinda Chandra, AIR 1966 Oriissa 18. See para 6 of the judgment. The facts in AIR 1966 Ori 18 were slightly different from those of the present case. There the plaint itself gave an indication that the suit was based on the original cause of action though in a confused manner. There was, therefore, no difficulty in accepting the prayer for amendment to make the matter clearer. That does not, however, establish the converse that amendment would not be allowed where the plaint did not give any indication of the original cause of action. The position does not become different even where the plaint was based on the hand-note as constituting the cause of action and an amendment is sought at a later stage to base the claim on the original loan as constituting the cause of action.

7. A caution was, however, struck in the Oriissa case to the following effect:

"Allowing amendment of the plaint does not, however, mean that the plaintiff's suit on the original cause of action, if proved, must necessarily succeed. If on the evidence the Court would come to the conclusion that there was an agreement between the parties that on the promissory note being dishonoured or becoming inadmissible in evidence, the plaintiff cannot bring a suit on the original cause of action, then only the plaintiff's suit would fail and not otherwise."

The aforesaid Orissa decision, therefore, clearly laid down the principle on the basis of which the amendment is to be allowed. The learned Subordinate Judge correctly appreciated the law.

8. The next question for consideration is whether the amendment application, filed after the close of the trial, should be allowed. On this question no hard and fast rule can be laid down as was pointed out in the aforesaid Bombay decision. It would vary in the facts and circumstances of each case. The redeeming feature in this case is that the plaintiff in his evidence made out a case that the loan was advanced by an oral agreement and the handnote was taken in evidence thereof. In para 2 of his deposition, he states thus—

Defendant 1 took the loan for the joint family business. In evidence of the suit loan defendant 1 executed the handnote in my favour.

It is not necessary at this stage to refer to his cross-examination or other evidence as to whether this part of the case is true. It is sufficient to say that even with the opening of the trial plaintiff was alive to the case in respect of which the amendment is sought. It has been repeatedly held that delay by itself is not a ground for refusing amendment. If in this case the plaintiff would not have breathed a word in his evidence regarding the oral loan as constituting the cause of action, the amendment might have been rejected on account of extraordinary delay when the trial was over. The learned Subordinate Judge had a correct approach in allowing amendment despite delay.

9. In the result, the civil revision fails and is dismissed. As the plaintiff filed the amendment application after the close of the trial and is responsible for the harassment to the defendants on account of the fresh trial, he is directed to pay a consolidated cost of Rs. 150 (rupees one hundred and fifty) to the defendants before the trial begins falling which the amendment application and the suit would stand dismissed.

CWM/D.V.C.

Revision dismissed.

AIR 1969 ORISSA 36 (V 56 C 17)

S. ACHARYA, J.

Kirtan Das and another, Petitioners v. State, Opposite Party.

Criminal Revn. No. 574 of 1968, D/- 9-8-1968, from order of S. J., Cuttack D/- 2-8-1968.

Criminal P. C. (1898), Ss. 430, 367, 237 and 238 — Prosecution under Ss. 148, 149, 323, 324 and 426, I. P. C. — Conviction under Ss. 323 and 352, I. P. C. — Prose-

cution wanted to prove assault of serious nature — Lower courts on evidence of prosecution witnesses coming to finding that instead of committing graver offence accused have committed lesser offence — It cannot be said that substratum of prosecution is disbelieved and accused are convicted on reconstructed story made out by lower courts — Convincing reasons given by lower courts for placing reliance on prosecution witnesses and in accepting prosecution case as proved — Held there were no compelling reasons to differ from concurrent findings of fact. AIR 1965 SC 277, Explained and Distinguished. (Paras 5, 6)

Cases Referred: Chronological Paras (1965) AIR 1965 SC 277 (V 52)=
1965 (1) Cri LJ 256, Ugar Ahir v. State of Bihar

R. N. Misra, R. C. Patnaik, R. K. Mohanty and P. K. Sengupta, for Petitioners; R. K. Patra (Standing Counsel), for Opposite Party.

ORDER: This is a revision against the appellate judgment of Sri L. Panda, Sessions Judge, Cuttack maintaining the conviction of the petitioners Nos. 1 and 2 under Ss. 323 and 352, I. P. C., respectively, and the sentence of fine of Rs. 150 and Rs. 60 imposed respectively on them by a First Class Magistrate, Jalpur.

2. The prosecution case, in short, is that at about 6 O'clock in the evening on 27-11-1963 the petitioners along with a few others being armed with lathis went to the house of the complainant Baidhar Das (P. W. 1), and entered into his house by forcing open the door, and removed therefrom paddy, rice and utensils etc.; and thereafter assaulted P. Ws. 2 and 3, the sister and mother respectively of P. W. 1 who were concealing themselves inside the house out of fear. Charge sheet was submitted against these petitioners and some others for offences under Sections 148, 149, 323, 324 and 426, I. P. C. As there was no evidence against the other accused persons, they were acquitted, but petitioners Nos. 1 and 2 were found guilty only under Sections 323 and 352 respectively, mostly on the evidence of P. Ws. 1, 2 and 3.

3. The petitioners' defence was a total denial of the occurrence and they stated that the police officers, who were in the village a few hours before the alleged occurrence for enquiring into another case, had assaulted and injured these petitioners, and in order to shield themselves from any liability they concocted this false case against them.

4. Mr. R. C. Patnaik, the learned counsel for the petitioners contended that in this case, the court below having disbelieved the major part of the prosecution story, should have held that the substra-

tum of the prosecution case has disappeared, and as such there was nothing on which the petitioners could have been convicted. According to him, the prosecution presented before the Police, and also before the Court, a case of grave and serious nature against the petitioners and some others, alleging acts of assault, violence of grievous nature, rioting, mischief etc. against them. As both the courts below disbelieved most part of the prosecution case as presented, Mr. Patnaik contended, that it was not for the courts below to have made out a case, even though of a minor nature against the petitioners and to have convicted them for the same. In support of his above contention, he placed reliance on a decision reported in Ugar Ahir v. State of Bihar, AIR 1965 SC 277.

5. In this case cited above, it was found as a matter of fact that the learned Additional Sessions Judge having disbelieved a major part of the prosecution case as presented, evolved a new case of his own speculation and convicted the appellants on such fact under Section 304, I. P. C. The finding of their Lordships of the Supreme Court in the above case is as follows:

"The maxim falsus in uno, falsus in omnibus (false in one thing, false in every thing) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest." In the case cited above, both the courts below practically disbelieved the whole version given by the witnesses in regard to the prosecution case, and so it was held by their Lordships of the Supreme Court that if all that was disbelieved, nothing actually remained, and as such the courts instead of removing the chaff out of grain, removed the grain and accepted the chaff. Such are not the facts in this case. In this case, there may be some exaggerations and embroideries, but all the same, it has been established from the evidence on record that both P. Ws. 2 and 3 were dragged out of the place of concealment and were assaulted by the petitioners Nos. 1 and 2 causing various injuries on their person. This part of the occurrence formed a part of the charge framed against the petitioners and has been believed by both the courts below, relying on the evidence of the above injured females (P. Ws. 2 and 3). P. W. 1 also corroborated P. Ws. 2 and 3 to the

extent that he saw P. Ws. 2 and 3 being dragged out from their place of concealment, and he heard them crying when they were being assaulted. The injuries sustained by P. Ws. 2 and 3 were proved to the satisfaction of the courts below by the evidence of P. W. 4, the Medical Officer. The case of assault which the prosecution wanted to prove was somewhat of a serious nature, but the courts, on the evidence of P. Ws. 1, 2 and 3 and on the doctor's evidence supported by his injury report, came to a finding that instead of committing the graver offence, they have committed the lesser offence. The Courts, therefore, have done their duty in a justified manner to scrutinise the evidence carefully in order to separate the grain from the chaff; and having done that they believed only that part of the prosecution case which they found to have been proved on acceptable and reliable evidence. That being so, it cannot be said in this case that the substratum of the prosecution case has been disbelieved, and that the petitioners have been convicted on a reconstructed story made out by the courts below.

The decision cited above goes also against the above mentioned contention of the learned counsel of the petitioners, inasmuch as it states that it is neither a sound rule of law nor a rule of practice that if a prosecution case is false in one thing, it is false in every thing. Therefore, the above contention of the learned counsel for the petitioners is fallacious and is not acceptable as such.

6. The reasons given by the courts below, for placing reliance on the prosecution witnesses and in accepting the prosecution case as proved against the petitioners, are convincing and I do not find any compelling reasons to differ from the concurrent finding of fact of the courts below, and as such the conviction of the petitioners as stated above is hereby maintained. As the sentence of fine against both the petitioners appear to me to be somewhat excessive, I would reduce the sentence of fine of petitioner No. 1 from Rs. 150 to Rs. 100 and that of petitioner No. 2 from Rs. 60 to Rs. 40. With this modification in the sentence, the revision is dismissed.

L.G.C/D.V.C.

Order accordingly.

AIR 1969 ORISSA 37 (V 56 C 18)

S. BARMAN C. J. AND A. MISRA, J.

Somanath Misra, Petitioner v. Union of India and another, Opposite Parties.

O. J. C. No. 146 of 1967. D/- 17-7-68.

(A) Constitution of India, Art. 309, Proviso — Government can issue administrative

IL/KL/D909/68

tive instructions to regulate service conditions without any rules made in exercise of powers under proviso — Rules being silent, such field as not covered by them may be covered by instructions which may be supplementary to rules but rules cannot be amended or superseded by instructions: AIR 1966 SC 1942 and AIR 1967 SC 1910, Ref. (Para 9)

(B) All India Services Act (1951), Section 3(1) — All India Services (Death-cum-Retirement Benefit) Rules (1958), R. 16(3) — Validity — Executive order directing member of Service to prematurely retire from service in public interest — Order is not discriminatory.

The provision made in R. 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules, 1958 that such retirement can be made "in the public interest" is clearly indicative of the legislative intention of the rule purporting to give a guide line; it is not a bald arbitrary power; there is an intelligent *differentialia*; the discrimination which is prohibited by Art. 14 of the Constitution is treatment in a manner prejudicial, as compared with another person similarly circumstanced by the adoption of a law, substantive or procedural, different from the one applicable to that of other person. Equal protection of law does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike and without discrimination to all persons similarly situated. The power of the Legislature to make a distinction between persons and transactions based on real *differentialia* is not taken away by the equal protection clause. AIR 1961 SC 1245, Ref. (Para 11)

The history of the amendment of Rule 16(3) is sufficiently indicative of the intention of the Legislature to evolve a *differentialia* in relation to the officers who may be compulsorily retired. The Government of India's Instructions, as supplemental to the Rules, afforded guidance to the State Government before making recommendations for retirement with a view to give equal protection to all officers. Therefore it cannot be said that an order passed under R. 16(3) of the Rules purporting to prematurely retire a Government servant from service in public interest is discriminatory. (Para 12)

(C) Constitution of India, Art 311 — Termination of service by compulsory retirement — Tests to be applied for ascertaining whether termination amounts to removal or dismissal.

An executive order passed under Rule 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules, 1958 purporting to retire a member of the service from service in public interest after attainment of 55 years of age and completion of 30 years qualifying service

differs both from an order of dismissal and an order of removal in that it is not a form of punishment prescribed by the rules and involves no penal consequences inasmuch as the person so retired is entitled to pension proportionate to the period of his service standing to his credit. The policy underlying Art. 311(2) of the Constitution is that when it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order; but that consideration can have no application where the order is not one of punishment and results in no loss of benefits already accrued. Thus the real criterion for deciding whether the order of terminating the services of a servant is one of dismissal or removal is to ascertain whether it involves any substantial loss of benefits already accrued or previously earned. Two tests are applied for ascertaining whether a termination of service by compulsory retirement amounts to removal or dismissal so as to attract the provisions of Art. 311. The first is whether the action is by way of punishment and to find that out, it is necessary that a charge or imputation against the officer is made the condition of the exercise of the power, the second is whether by compulsory retirement the officer is losing the benefit he has already earned as he does by dismissal or removal: AIR 1957 SC 892, Rel. on. (Para 13)

(D) All India Services Act (1951), Section 3(1) — All India Services (Death-cum-Retirement Benefit) Rules (1958), R. 16(3) — Order passed under — Court cannot look into background resulting in passing of order in order to discover whether some kind of stigma could be inferred.

Where an order passed under R. 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules, 1958 requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order may amount to 'removal' within the meaning of Art. 311 of the Constitution; but where there are no express words in the order itself which would throw any stigma on the Government servant, the Court cannot look into the background resulting in the passing of such order in order to discover whether some kind of stigma could be inferred. On the question of *mala fides*, the only relevant consideration is whether the order was made for ulterior purposes or purposes other than those mentioned in the order: AIR 1967 SC 1264 and AIR 1958 SC 163, Ref. (Para 15)

(E) All India Services Act (1951), Section 3(1) — All India Services (Death-cum-Retirement-Benefit) Rules (1958),

R. 16(3) — Compulsory retirement in public interest — So long as age of compulsory retirement and period of qualifying service for such retirement fixed by rule are reasonable, Article 311 of Constitution is not attracted.

Whether the compulsory retirement of a particular officer under R. 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules, 1958, before reaching 58, the normal age of superannuation, but after he has attained the age of 55 years and also after he has completed 30 years of qualifying service, is in the public interest or not, is a matter for the Government to decide. This view is founded on the position that under the rules, retirement can validly take place at two points of time; one at the stage when the officer has attained the age of superannuation according to the service conditions applicable to members of his service and the other at an earlier point of time prior to his attaining the normal age of superannuation. No doubt the second type of retirement is compulsory or premature retirement and may be forced on him in the public interest, but in order that this type of retirement may not operate as a punishment so as to attract the provision of Art. 311 of the Constitution, two conditions must be fulfilled, namely that the officer should have attained an age at which he can hope to get the benefits of pension after a reasonably long span of service; and secondly that the period of qualifying service must be so reasonably fixed that premature retirement may not take place at too early a stage in his career. The validity and legality of any rule, providing for premature retirement between these two points of time should be tested in the light of these conditions; and so long as the age of premature or compulsory retirement and the period of qualifying service for such retirement fixed by the rule are reasonable, then the order of retirement passed under that rule after fulfilling those two essential conditions cannot be questioned merely because the retirement is stated to be in the public interest; AIR 1968 Orissa 44, Rel. on. (Para 18)

(F) All India Services Act (1951), Section 3(1) — All India Services (Death-cum-Retirement Benefit) Rules (1958), R. 16(3) — Conditions mentioned in rule are reasonable and cannot be said to be arbitrary: AIR 1965 SC 280, Rel. on.

(Para 20)

Cases Referred: Chronological Paras

(1968) AIR 1968 Orissa 44 (V 55)= ILR 1966 Cut 737, Batahari Jena v. State

State (1967) AIR 1967 SC 1264 (V 54)=(1967) 2 SCR 496, L. N. Saksena v. State of Madhya Pradesh

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(1967) AIR 1967 SC 1910 (V 54)=	9
(1968) 1 SCR 111, Sant Ram v. State of Rajasthan	
(1966) AIR 1966 SC 1942 (V 53)=	10
(1966) 3 SCR 682, B. N. Nagarajar v. State of Mysore	
(1965) AIR 1965 SC 280 (V 52)=(1967) 2 Lab LJ 246, Shivacharan v. State of Mysore	20
(1961) AIR 1961 SC 1245 (V 48)=	
(1962) 1 SCR 151, Jagannath Prasad Sharma v. State of U. P.	21
(1961) AIR 1961 SC 1602 (V 48)=	
(1962) 2 SCR 125, Joti Pershad v. Union Territory of Delhi	22
(1960) AIR 1960 SC 1305 (V 47)=	
(1961) 1 SCR 88, Dalip Singh v. State of Punjab	23
(1958) AIR 1958 SC 163 (V 45)=1958 Cri LJ 283, Puranlal Lakhanpal v. Union of India	
(1958) AIR 1958 SC 538 (V 45)=	24
1959 SCR 279, Ram Krishna Dalmia v. Justice S. R. Tendolkar	
(1957) AIR 1957 SC 892 (V 44)=1958 SCR 571, State of Bombay v. Subhagchand	25

R. N. Misra, R. C. Patnaik and P. K. Sengupta, for Petitioner; Government Advocate, for Opposite Parties.

BARMAN, C. J.: In this writ petition, Sri Somanath Misra, a member of the Indian Administrative Service, challenges the order of the Government of India purporting to prematurely retire him from service in the public interest on the expiry of three months from the date of service of notice on him. The provision under which the Government purported to have passed the said order of retirement is Rule 16(3) of the All India Services (Death-cum-Retirement Benefit) Rules, 1958 made by the Central Government under Section 3(1) of the All India Services Act, 1951 after consultation with the Governments of the States.

2. Rule 16(3) under which the said order of retirement was passed is this:

"16(3). The Central Government, in consultation with the State Government may require a member of the Service who has completed 30 years of qualifying service or who has attained the age of 55 years to retire in the public interest provided that at least three months' previous notice in writing will be given to the member concerned."

The validity of this Rule as contravening Article 14 of the Constitution has been challenged as hereinafter discussed.

3. The impugned order of retirement of the petitioner passed by the Government of India is set out below:

GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS

No. 29/19/66-AIS (II).

In pursuance of the powers conferred by sub-rule (3) of Rule 16 of the All India

Services (Death-cum-Retirement Benefit) Rules, 1958, the President, in consultation with the Government of Orissa is pleased to order the retirement of Sri Somanath Misra who attained the age of 55 years on 1st November 1966, from the Indian Administrative Service in the public interest on the expiry of three months' notice from the date of service of notice on him.

New Delhi, By order of the President
15th May, 1967.

Sd. P. K. Dave.

Jt. Secretary to the Govt. of India

4. The facts leading to the passing of the impugned Central Government order of retirement are stated to be as follows: The petitioner who was born on November 1, 1911, entered the Provincial Civil Service of Orissa on March 9, 1936. After more than 20 years service during which he had several promotions, he was subsequently appointed to the Indian Administrative Service with effect from June, 14, 1957. In 1964 there was an enquiry against him for corruption initiated by the Central Bureau of Investigation which was subsequently taken over by the State Vigilance Commissioner which terminated in February 1966. It is said that he was acquitted of the charges. Somehow, the question was raised about the desirability of retaining him in service beyond the age of 55 years. In that connection the question of his integrity — which was involved in the enquiry against him which had terminated in 1966 — was taken into consideration and there was a suggestion to make a reference of his case to the Government of India so that he may be retired at the age of 55 years. Ultimately, in July 1966 the State Government is stated to have decided to continue the petitioner in service beyond 55 years. The petitioner's grievance is that after the State Government had taken this decision to retain him in service beyond 55 years, the Central Government wrongfully passed the impugned order of retirement on May 15, 1967 in terms aforesaid, purporting, as already stated, to act under Rule 16(3).

5. Although the State Government had taken the said decision to retain the services of the petitioner beyond the age of 55 years, it does not appear that this decision was made known to the Central Government. In the meantime, the Central Government after consideration of all the papers relating to the enquiry, including the Vigilance Commissioner's findings, in a communication addressed to the State Government on December 19, 1966, appears to have suggested that the petitioner may be retired from service. The reasons for taking this view were mentioned in their letter. Ultimately on May 15, 1967 the petitioner was served with the impugned notice issued under

Rule 16(3) after consultation with the State Government.

6. The grounds on which the petitioner challenges the validity of the impugned order of retirement are, in substance, these: If any action to retire him from service was to be taken by the Government it should have been taken prior to November 1, 1966 the date on which he attained the age of 55 years. The State Government's decision to keep him in service beyond 55 years having been taken after the termination of the enquiry, the subsequent notice to retire him which was no more than executive direction from the Government of India was without any basis; that the impugned retirement order was arbitrary, illegal and mala fide. The petitioner accordingly claims to continue in service even after he attains the age of 55, that is, until November 1, 1969, when he attains the age of 58 years which is the normal age of retirement on superannuation, of officers of the Indian Administrative Service. His further point is that any executive order directing the petitioner to retire from service from an earlier date in the public interest amounts to removal from service with a stigma and, as such, attracts the provisions of Article 311 of the Constitution. That apart, it violates the constitutional guarantee of equal protection of law under Article 14. It was further submitted on behalf of the petitioner that the term 'public interest' in the notice issued in pursuance of Rule 16(3), is too wide and does not appear to provide any guiding principle for the exercise of the power to retire. Accordingly the notice given for his premature retirement as mentioned in the impugned order necessarily amounts to removal from service which requires the observance of the procedure laid down in Article 311 of the Constitution.

7. In support of his contentions the petitioner relied on certain Instructions of the Government of India laying down the criteria and procedure to be followed by the State Government while referring cases to the Central Government under Rule 16(3) with a view to ensure all India uniformity of operation of the said sub-rule and also to ensure equitable treatment in all cases of premature retirement. These Instructions are printed at pages 596-99 of the All India Service Manual (corrected upto May 1, 1967) issued by the Government of India, Ministry of Home Affairs under Rule 16(3). In the course of argument the petitioner relied on these Instructions, including Instruction No. 7 which is as follows:

"(7) Once it is decided to retain an officer beyond the age of 55 years, he should be allowed to continue up to the age of 58 without any fresh review unless this be justified by any exceptional reasons,

such as his subsequent work or conduct or the state of his physical health, which may make earlier retirement clearly desirable. The Government of India feel that in order that an officer who is cleared for continuance at the stage of attaining the age of 55 years can settle down to another three years of work with a sense of security and those working under him accept his control and discipline without any reservation an annual review between the years of 55 and 58 would not be desirable. In arriving at this view, they have among other factors taken into consideration the fact that at these stages, members of all India Services generally occupy very senior appointments on which particularly such a sense of security about their tenure is desirable in the public interest. Further, having arrived at an assessment in favour of further continuance in service at the age of 54, 12 years or so, there would ordinarily be no occasion for changing the assessment during the next three years, so that an annual review would serve little practical purpose. Finally, in any case, sub-rule (3) of Rule 16 of the AIS (DCRB) Rules would enable appropriate consideration at any time in very exceptional circumstances."

8. The petitioner's point is that once it was decided by the State Government to retain his services beyond 55 years, as an officer who had been cleared for continuance at the stage of attaining the age of 55 years, he should not have been prematurely retired before attaining the age of 58 years, according to the principle enunciated in Instruction No. 7 quoted above.

9. The question is: what is the effect of these Instructions in relation to the statutory rules made under the All India Services Act? It is open to the Government to issue instructions to regulate the service conditions without any rules made in exercise of the powers under the proviso to Article 309 of the Constitution; if the rules are silent, then such field as not covered by the rules may be covered by instructions which may be supplementary to the rules. This view is fully supported by the decisions of the Supreme Court who held that it is not obligatory, under the proviso to Article 309, to make rules regulating the recruitment before a service can be constituted or a post created or filled; this is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in the rules. There is nothing in the terms of Article 309 of the Constitution which abridges the power of the Executive to act under Article 162 without a law; if there is a statutory rule or Act the Executive must abide by that Act or rule. In the present case, there is nothing in the Government of India's

Instructions which is inconsistent or in any way in conflict with the statutory rules made under the All India Services Act. These instructions are for the guidance of the State Government while making recommendations to the Central Government. It is true that the Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed. *B. N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942, 1944; *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910, 1914.

10. Then, the validity of Rule 16(3) itself was challenged on the ground that the said provision, as violative of Article 14 of the Constitution, is unconstitutional. The petitioner's point, in substance, is that the impugned Rule 16(3) is discriminatory in that it applies unequally to persons similarly situated and that the rule does not contain any guide line in its application. In our opinion, this argument is not tenable. When the Court is called upon to test the constitutionality of any particular law attacked as discriminatory and violative of the equal protection clause, the broad principles which have to be borne in mind, as laid down by the Supreme Court are these: There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles; it must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that discriminations are based on adequate grounds; in order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation; while good faith and knowledge of existing conditions on the part of the Legislature are presumed, if there is nothing in the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation. It is not essential for the legislation, to comply with the rule as to equal protection, that the rules for the guidance of the designated authority which is to exercise the power or which is vested with the dis-

cretion, should be laid down in express terms in the statutory provision itself. Such guidance may be obtained from or afforded by the preamble read in the light of the surrounding circumstances which necessitated the legislation, taken in conjunction with well known facts of which the court might take judicial notice or of which it is appraised by evidence before it in the form of affidavits, as an instance where the guidance can be gathered; or even from the policy and purpose of the enactment which may be gathered from other operative provisions applicable to analogous or comparable situations or generally from the object sought to be achieved by the enactment. *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538, 547; *Jyoti Pershad v. Union Territory of Delhi*, AIR 1961 SC 1602, 1609.

11. Thus considered in the light of the guiding principles mentioned above, Rule 16(3) must be presumed to be constitutionally valid. The provision made in Rule 16(3) that such retirement can be made "in the public interest" is clearly indicative of the legislative intention of the rule purporting to give a guide line; it is not a bald arbitrary power; there is an intelligent differentia; the discrimination which is prohibited by Article 14 is treatment in a manner prejudicial, as compared with another person similarly circumstanced by the adoption of a law, substantive or procedural, different from the one applicable to that of other person. Equal protection of law does not postulate equal treatment of all persons without distinction; it merely guarantees the application of the same laws alike and without discrimination to all persons similarly situated. The power of the Legislature to make a distinction between persons and transactions based on real differentia is not taken away by the equal protection clause. *Jagannath Prasad Sharma v. State of Uttar Pradesh*, AIR 1961 SC 1245.

12. In the present case, the history of the amendment of Rule 16(3) is sufficiently indicative of the intention of the Legislature to evolve a differentia in relation to the officers who may be compulsorily retired. Before amendment, under the corresponding Rule 17(2) of 1958, a member of the Service could be required to retire if he had completed 30 years of qualifying service. The only preconditions were that the approval of the Central Government was to be taken and three months' prior notice in writing was to be given. Subsequently, in 1963 by an amendment the said provision was amplified in that the notice could be given at any time provided the officer had completed 30 years qualifying service or has attained the age of 55 years. In 1965, the

rule was further amended and in fact completely recast in that besides introducing the clause relating to action being taken in the 'public interest', it was for the first time that authority was conferred on the Central Government to issue notice provided the other conditions regarding consultation with the State Government and attainment of 55 years of age and 30 years of qualifying service by the officer were satisfied; the Government of India's Instructions, as supplemental to the Rules, afforded guidance to the State Government before making recommendations for retirement with a view to give equal protection to all officers. Therefore it cannot be said that such an order is discriminatory.

13. It was argued that the impugned order of compulsory retirement of the petitioner under Rule 16(3) amounts to punishment. This argument has no force. Indeed an order of such retirement after attainment of 55 years of age and completion of 30 years qualifying service—as in the present case—differs both from an order of dismissal and an order of removal in that it is not a form of punishment prescribed by the rules and involves no penal consequences inasmuch as the person so retired is entitled to pension proportionate to the period of his service standing to his credit. The policy underlying Article 311(2) is that when it is proposed to take action against a servant by way of punishment and that will entail forfeiture of benefits already earned by him, he should be heard and given an opportunity to show cause against the order; but that consideration can have no application where the order is not one of punishment and results in no loss of benefits already accrued. Thus the real criterion for deciding whether the order of terminating the services of a servant is one of dismissal or removal is to ascertain whether it involves any substantial loss of benefits already accrued or previously earned. Two tests are applied for ascertaining whether a termination of service by compulsory retirement amounts to removal or dismissal so as to attract the provisions of Article 311. The first is whether the action is by way of punishment and to find that out, it was necessary that a charge or imputation against the officer is made the condition of the exercise of the power; the second is whether by compulsory retirement the officer is losing the benefit he has already earned as he does by dismissal or removal. Applying these tests, the impugned order under Rule 16(3) cannot be said to contain any charge or imputation nor can the order be held to be one of the dismissal or removal as it does not entail forfeiture of pension due for past service or other retirement benefits. This view

Is supported by the decision of the Supreme Court in State of Bombay v. Soubhagchand, AIR 1957 SC 892, 895 as subsequently clarified in Dalip Singh v. State of Punjab, AIR 1960 SC 1305.

14. It was vehemently argued on behalf of the petitioner that the impugned order of retirement from service stated to be in the public interest carried with it an implied imputation of stigma on the petitioner, namely that his retention beyond the age of 55 was considered undesirable in the public interest. In support of this contention the petitioner relied on the letter dated December 19, 1966 from the Deputy Secretary to the Government of India, Ministry of Home Affairs, to the Chief Secretary to the Government of Orissa in which the Central Government while pointing out certain mistakes in the calculations made by the Enquiring Officer in connection with the disciplinary proceedings against the petitioner, proposed to the State Government to retire the petitioner compulsorily from service on his attaining the age of 55 years and to issue an order under Rule 16(3) for the reasons stated in the said letter. It was within a few months after the receipt of the said letter that the impugned order of retirement dated May 15, 1967 was issued. It was also contended that the impugned order of retirement was mala fide. In our opinion, these contentions are not tenable.

15. It is the settled law that where an order requiring a Government servant to retire compulsorily contains express words from which a stigma can be inferred, that order may amount to 'removal' within the meaning of Article 311 but where there are no express words in the order itself which would throw any stigma on the Govt. servant, the Court cannot look into the background resulting in the passing of such order in order to discover whether some kind of stigma could be inferred. On the question of mala fides, the only relevant consideration is whether the order was made for ulterior purposes or purposes other than those mentioned in the order: L. N. Sakseena v. State of Madhya Pradesh, AIR 1967 SC 1264 and Puranlal Lakhanpal v. Union of India, AIR 1958 SC 163, 172.

16. Considered in the light of the above, the letter of the Central Government dated December 19, 1966, followed by the impugned order of retirement, cannot be looked into as furnishing a background for the retirement order. As regards mala fides, it was not pleaded in the writ petition; it was only for the first time in the rejoinder that the petitioner pleaded that the order of retirement is mala fide as alleged to be based on the comments on the report of a high powered Commission and the decision of the

State Government on the disciplinary proceedings; the petitioner further alleged that the real character of the termination of service is to be determined by reference to the material facts that existed prior to the order.

17. These arguments are of no avail having regard to the powers conferred on the Central Government by Rule 16(3) in exercise of which the Central Government, by its order dated May 15, 1967, compulsorily retired the petitioner in the public interest after he attained the age of 55 years and also after he completed 30 years qualifying service. Under the Government of India Instruction No. 7 wide power is given to the Central Government in that, finally, in any case Rule 16(3) would enable appropriate consideration at any time in very exceptional circumstances.

18. Further, the question whether or not the compulsory retirement of a particular officer is in the public interest before reaching 58 the normal age of superannuation but after he has attained the age of 55 years and also after he has completed 30 years of qualifying service — as in the present case — is not justifiable. That is a matter for the Government to decide. This view is founded on the position that under the rules, retirement can validly take place at two points of time: one at the stage when the officer has attained the age of superannuation according to the service conditions applicable to members of his service and the other at an earlier point of time prior to his attaining the normal age of superannuation. No doubt the second type of retirement is compulsory or premature retirement and may be forced on him in the public interest, but in order that this type of retirement may not operate as a punishment so as to attract the provisions of Article 311, two conditions must be fulfilled, namely that the officer should have attained an age at which he can hope to get the benefits of pension after a reasonably long span of service; and secondly that the period of qualifying service must be so reasonably fixed that premature retirement may not take place at too early a stage in his career. The validity and legality of any rule, providing for premature retirement between these two points of time should be tested in the light of these conditions; and so long as the age of premature or compulsory retirement and the period of qualifying service for such retirement, fixed by the rule are reasonable, then the order of retirement passed under that rule after fulfilling those two essential conditions cannot be questioned merely because the retirement is stated to be in the public interest. This view finds support from a number of decisions of the Supreme Court which have been

noticed and analysed in a Division Bench decision of this Court in Batahari Jena v. State, ILR 1966 Cut 737=(AIR 1966 Orissa 44).

19. Now what happened in the present case is this: The normal age of retirement of the petitioner, on superannuation, according to the rules governing members of the Indian Administrative Service is fixed at 58 years; but Rule 16(3) provides that it is competent for the Government to retire any member of the Service prematurely (i.e. before attaining 58 years) if it is thought that such premature retirement is necessary in the public interest; the exercise of this power however is made subject to either of two conditions; either the officer concerned must have attained the age of 55 years or he must have completed 30 years qualifying service; in other words, normal retirement by superannuation occurs after attaining the age of 58 years while premature retirement in the public interest can be forced on the Government servant after he has attained 55 years or completed thirty years qualifying service. In the present case it will be noticed that by May 15, 1967 when the impugned order was passed, the petitioner had already completed 30 years of service and also attained 55 years. Both the conditions necessary for the exercise of the power under Rule 16(3) have thus been fulfilled in this case. The requirement about prior consultation with the State Government before passing the order of retirement has also been satisfied.

20. The only question is whether the two conditions mentioned in Rule 16(3), one fixing the age of compulsory retirement at 55 and the other fixing 30 years qualifying service for such retirement, are reasonable. There can be no doubt that these conditions are reasonable and cannot be said to be arbitrary. A similar point arose for consideration before the Supreme Court in Shivacharan v. State of Mysore, AIR 1965 SC 280. In that case, the validity of Note 1 to Rule 285 of the Mysore Civil Service Rules, 1958 was under challenge. That note provided that Government may, in special cases, require any Government servant to retire at any time after he has completed 25 years qualifying service or on attaining 50 years of age where such retirement is considered necessary in the public interest, after giving three months' notice before he is so called upon to retire. The Note is similar in language and content to Rule 16(3) with which we are concerned here, but with this difference that according to the Mysore Civil Service Rules the normal age of retirement of a Government servant, on superannuation, was fixed at 55 years (as against 58 years in the case of the petitioner) and the Note 1 to R. 285 provided for premature retirement in the

public interest after the Government servant has attained the age of 50 years (as against 55 years fixed in Rule 16(3)) or after he has completed 25 years of qualifying service (as against 30 years as fixed in Rule 16(3)). While rejecting the contention that the said Note was void, their Lordships observed that the only conditions to be fulfilled before Government could exercise their power to act under Rule 285 were (i) that the Government servant concerned must have attained the age of 50 years or (ii) that he must have completed 25 years of qualifying service. Once either of these two conditions were fulfilled then it was competent for Government to exercise their power to retire a Government servant prematurely after giving three months' notice as provided in the Note to Rule 285. Their Lordships further held that whether or not the retirement of the petitioners (before their Lordships) was in the public interest was a matter for the Government to consider. Their Lordships did not accept the petitioner's plea that the order of retirement passed in that case was arbitrary or illegal. Such a question, their Lordships observed, may perhaps arise in a case where having fixed a proper age of superannuation, the rule of compulsory retirement permits a Government servant to be retired at a very early stage of his career. Such consideration did not arise in the Mysore case nor does it arise in the present case. On the other hand, the Mysore provision permitting premature retirement in the public interest at 50 years or after completing 25 years qualifying service was considered reasonable in the circumstances. In the present case also for reasons already stated, it is not possible for us to hold, on the materials placed before us, that the impugned order dated 15-5-1967 passed by the Central Govt. In exercise of the power under R. 16(3) (which is similar in content to the provision contained in Note 1 to Rule 285 of the Mysore Civil Service Rules) was arbitrary or illegal or suffered from the vice of mala fide.

21. The petitioner also claims that according to the Government of India Instruction No. 7, he as an officer who had been 'cleared for continuance at the stage of attaining the age of 55 years' should be allowed to continue in service upto the age of 58 with a sense of security. This contention is based on what the petitioner states to be a decision taken by the State Government in July, 1966 (a few months before his attaining the age of 55 years) to retain him in service beyond 55 years. But this alleged decision of the State Government does not appear to have been communicated to the Central Government. Indeed, in the letter dated December 19, 1966, the Central

Government for the first time proposed to the Orissa Government that the petitioner should be compulsorily retired and that an order under Rule 16(3) would be issued "on hearing" from the State Government. The tenor of the letter would have been different if the prior decision of the State Government to retain the petitioner beyond the age of 55 years had been communicated to the Central Government by that time. Nor does it appear that the decision was communicated at any subsequent stage. In fact, the Under Secretary to the Government of India, Ministry of Home Affairs, in his counter-affidavit dated September 2, 1967 also denies all knowledge of such a decision, in that it was stated in paragraph 7 of the counter-affidavit that the alleged decision of the State Government is "not known to the Government of India". It is, therefore, impossible to hold that the alleged decision of the State Government, stated to have been taken in July 1966 to retain the petitioner beyond the age of 55 years had been arrived at finally so as to give him a vested right to continue in service beyond the age of 55 years as claimed. In any case Rule 16(3) enables the appropriate consideration at any time as mentioned in Government of India Instruction No. 7.

22. In the result, therefore, the writ petition is dismissed, but there will be no order as to costs.

23. A. MISRA, J.: I agree.

MBR/D.V.C.

Petition dismissed.

AIR 1969 ORISSA 45 (V 56 C 19)

S. BARMAN, C. J. AND S. ACHARYA, J.

Dr. S. N. Ghosal, Petitioner v. State of Orissa, Opposite Party.

Original Jurisdiction Case No. 350 of 1967, D/- 28-8-1968.

Constitution of India, Art. 311(2) — Resolutions dated 21-5-1963 and 15-9-1965 of Govt. of Orissa, Political and Services Department — Raising of retirement age to 58 years, unequivocally.— Govt. servant attaining 55 years, consequently continuing in service for 2 more years — His compulsory retirement thereafter without giving reason is illegal.

Government and the competent authorities having arrived honestly at a decision to continue the service of the employee cannot arrive at another and totally different decision without any rhyme or reason, after the previous decision is acted upon and is in effective operation.

(Para 4)

It is necessary that a 'decision' to retire a person concerned should be stated to have been taken in the notice of retire-

ment itself, and being so, the decision must obviously be on the grounds that the person is either unsuitable or inefficient for retention in Government service.

(Paras 5, 6)

The age of compulsory retirement having been extended unequivocally by the Govt. from 55 to 58 years, an employee holding permanent post has a right to continue in service till that age, unless he has completed 30 years of service earlier and he cannot be asked to leave service without giving any reason therefor at any time before attaining that age, for it would defeat his right to continue in service and as such would be a penalty amounting to removal from service. Hence in absence of compliance with the procedure prescribed in Art. 311 (2), such action, if taken, would be illegal. AIR 1937 PC 27 and AIR 1968 SC 718 and AIR 1964 SC 600, Rel. on AIR 1968 Ori 44, Disting.

(Paras 9, 10)

Cases Referred: Chronological Paras
 (1968) AIR 1968 SC 718 (V 55)=
 (1968) 2 SCR 366, Union of India v.
 Anglo Afghan Agencies etc. 3, 4
 (1968) AIR 1968 Ori 44 (V 55)=ILR
 (1966) Cut 737, Bata Hari Jena
 v. State of Orissa 3, 4
 (1964) AIR 1964 SC 600 (V 51)=
 (1964) 5 SCR 683, Moti Ram Deka
 v. General Manager, North East
 Frontier Rly. 9
 (1937) AIR 1937 PC 27 (V 24)=ILR
 (1937) Mad 517, R. T. Rangachari v.
 Secy. of State, Madras 3, 4

R. N. Misra, for Petitioner; N. Kr. Das, (Standing Counsel), for Opposite Party.

ACHARYA, J.: This is an application under Article 226 of the Constitution of India by Dr. S. N. Ghosal, who was the Medical Superintendent, T. B. Hospital, Puri at the time when he filed this petition, challenging the validity of Notice No. 14182/H, dated July 20, 1967 (copy at annexure 4) issued by the Secretary to the Government of Orissa in the Health Department, purporting to act under the order of the Governor of Orissa, directing and requiring the petitioner to retire from Government service with effect from the date of expiry of three months from the date of the service of the said notice.

2. The petitioner's allegation in this writ petition is that while he was continuing in Government Service, the age of compulsory retirement was raised from 55 to 58 by a resolution of the Government of Orissa in the Political and Services Department dated May 21, 1963, which was circulated to all the departments of the Government and to all concerned by their communication dated May 21, 1963 as per Annexure 1 to this petition. In accordance with the said resolution, the Government took up the examination of the case of the petitioner, who was born

on July 1, 1910, along with some others in the Medical Service, and after a 'careful examination' of the matter, decided that the petitioner would continue in service till he completes the age of 58 years as per Government letter No. 10913-H dated June, 3, 1965 from the Under Secretary to the Government of Orissa, Health Department to the Director of Health Service, Orissa which decision was communicated to the petitioner by the Health Director, Orissa by his Memo No. 14914(15)M/E-165-65 dated June, 25, 1965 (copy at Annexure 3).

On the receipt of the aforesaid communication, the petitioner got the assurance that he would be allowed to continue in Government service, but after two years, he was served with the aforesaid notice dated July 20, 1967 (Annexure 4) which was received by the petitioner on July 29, 1967. On receipt of this notice, the petitioner made a representation to the Government on August 1, 1967 stating his grievances and praying for withdrawal of the impugned order, but as he did not receive any reply even after a reminder, he filed this writ petition in this Court, praying for the issue of a writ of Mandamus directing the opposite party not to give effect to the notice dated July 20, 1967 (Annexure 4), and for a further direction to continue the petitioner in service until July 1, 1968.

3. Mr. R. N. Misra, learned counsel for the petitioner contended before us that the Government of Orissa, having taken a decision, after 'careful consideration', to continue the petitioner's service till he completes the age of 58 years without imposing therein any condition whatsoever, cannot, after communicating the said decision to the petitioner, revoke such a decision to his prejudice. The Government orders as per letter No. 10913-H, dated June 3, 1965 communicated to the petitioner by Memo No. 14914(15)M/E-165-65 dated June 25, 1965 extended the service of the petitioner, along with some others, till they completed the age of 58 years, without attaching any condition whatsoever. This decision was taken in accordance with the Government Resolution dated May 21, 1963, (Annexure 1), paragraph 2 of which runs as follows:

"After careful consideration Government have now decided that the age of compulsory retirement for the State Government employees should be raised from 55 years to 58 years, with effect from the 1st December, 1962. In other words, Government employees who attained or attain the age of 55 on or after the 1st December, 1962, will be entitled to the above benefit."

On this, Mr. Misra, contends that the Government by the aforesaid resolution

raised the age of compulsory retirement for the State Government employees from 55 to 58 years, and also decided in one and the same strain that Government employees who attained the age of 55 on or after the 1st December, 1962 would be entitled to the above benefit, and this being the basis on which the Government letter No. 10913-H dated June 3, 1965 was drawn up, the petitioner had to consider the same as an unequivocal assurance of the Government that he would be entitled to remain in service till he attained the age of 58 years. That being so, the sudden decision of the Government to terminate his services, at such a short notice, acted very much to his prejudice. Mr. Misra further contends that Government once having taken a decision that the petitioner would remain in service till he completes the age of 58 years, and this decision having been acted upon and being in effective operation, they cannot go back on the said decision without any specific reason to terminate the services of the petitioner by a short and sudden notice as mentioned above. In this connection, Mr. Misra cited before us the decision of the Privy Council in R. T. Rangachari v. Secretary of State, Madras, AIR 1937 PC 27 and the decision of the Supreme Court in the Union of India v. M/s. Anglo Afghan Agencies etc., AIR 1968 SC 718, and relying on the principle on which the said decisions are based contended that it was not open for the Government to reopen the matter and cancel the previous order thereby adversely affecting the rights of the petitioner.

In reply to the petitioners' above contention, the learned Standing Counsel appearing for the State contended that after the Government resolution dated the 21st May, 1963, Government issued another resolution on the 15th September, 1965 (as at Annexure 2) which superseded all previous orders and instructions on the subject. As per paragraph No. 3 of the said resolution, Government have the unfettered discretion to require any Government servant to retire at any time after he attains the age of 55 years on three months' previous notice in writing without assigning any reason, and this being so, the petitioner cannot complain against the direction contained in the aforesaid Home Department letter dated July 20, 1967 requiring the petitioner to retire from the date stated in the said letter. In support of his above contention he cited the decision of this Court in Bata Hari Jena v. State of Orissa, ILR 1966 Cut 737=(AIR 1968 Ori 44).

4. In our view, the aforesaid decision in ILR 1966 Cut 737=(AIR 1968 Ori 44) would not apply on all fours to the present case before us. There, the validity of the notices of premature retirement served on two officers immediately be-

fore or after their attaining the age of 55 years was under challenge. One of them was an officer of the Central Government and the other was an officer of the Government of Orissa. The decision related to the constitutional validity of substantially similar provisions made by the Government of India in the Ministry of Home Affairs in the case of the Central Government Officer, and by the State Government in the Political and Services Department in the case of the Orissa Government Officer — both dealing with the premature retirement of a Government employee. But the facts on which the decision in ILR 1966 Cut 737=(AIR 1968 Ori 44) was based, were entirely different inasmuch as in the case of one of the officers he was asked to retire on attaining the age of 55 years by the issue of a notice previous to his attaining that age and in the case of the other officer he was served with a notice issued just one day after he attained the age of 55 years. In the case of neither of these officers as in the present case — the appropriate Government "after careful consideration" actually communicated their orders retaining their services till they completed 58 years, nor allowed them to continue for two years on the basis of those orders. On the other hand, Government took a final decision to retire both the officers almost immediately before or after they attained 55 years of age. In our view therefore the abovementioned decision would not apply to the facts of the present case before us.

In the present case, the State Government 'after careful consideration' raised the age of compulsory retirement from 55 to 58 by their resolution dated the 21st May, 1963 (as at Annexure 1) which was in effect reiterated in little more detail by the State Government resolution dated the 15th September, 1965 (Annexure 2). While raising the age of superannuation from 55 to 58 it is stated in both the said resolutions that Government employees "who attained or attain the age of 55 years on or after the 1st December, 1962, would be entitled to the above benefit". The Health Department of the Government acting in due compliance with the Government decision embodied in the aforesaid resolution of 1963, took up the case of the petitioner along with eighteen other doctors and again 'after careful consideration' decided to continue the services of the petitioner and those 18 others till they attained the age of 58 years. The Director of Health communicated the aforesaid Government decision to the petitioner by his Memo No. 14914 (15) M/E-165-65 dated the 25th June, 1965 and he, as is contended by the petitioner, acting on this assurance of the Govt, was led to take the decision to continue in Government service till he attained the

age of 58 years and accordingly planned his life, the education of his children, and other important commitments in his life.

From the tenor of the Government decision embodied in the resolution of 1963 reiterated by the resolution of 1965, and the purport of the Government letter extending the petitioner's services ordering him to continue till the age of 58, it can be easily inferred that the petitioner was held out an assurance to be able to continue in service till he attained the age of compulsory retirement at 58. As a matter of fact, he also continued as such for more than two years, when suddenly he was asked to retire by the aforesaid notice dated July 20, 1967. All this will support the case of the petitioner that he was seriously prejudiced by this sudden decision of the Government upsetting the planning of his life, in all its aspects. Moreover, following the principle on which Rangachari's case cited above, AIR 1937 PC 27 was decided, we are inclined to hold that Government and the competent authorities having arrived honestly at a decision to continue the service of the petitioner could not have arrived at another and totally different decision without any rhyme or reason, after the previous decision was acted upon and was in effective operation.

The recent decision of the Supreme Court reported in AIR 1968 SC 718 though not direct on the point under consideration, proceeds on the same principle holding that "it could not be said that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment" and that "Union Government and its officers were not entitled at their mere whim to ignore the promises made by the Government." In the present case, before us, it cannot, however, be said that the aforesaid decision of the State Government amounted to a "promise", but at the same time it can very well be construed as an assurance by the Government to the petitioner to continue his services till he attained the age of 58; and in this view of the matter, we are of the opinion that so long the decision remained effective it could not be altered to the prejudice or detriment of the petitioner without any sufficient cause.

5. Now coming to paragraph 3 of the resolution dated the 15th September, 1965 (Annexure 2) we find that it is as follows:

"Notwithstanding anything contained in the foregoing paragraph, the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' previous notice in writing without assigning any

reason. This power shall be exercised in the case of Government servants who are found to be unsuitable or inefficient for retention in Government service. For this purpose the concerned authorities should keep constant vigilance on the work of a Government servant continuing beyond the age of 55 years. With a view to ensure uniformity, a notice required to be given by the appointing authority to a Government servant shall be in the form as specified in Annexure I appended hereto".

This suggests that the appointing authority may require a Government servant to retire after he attains the age of 55 years on three months' previous notice in writing without assigning any reason. In the said paragraph it is laid down in the same strain that the authorities can exercise the abovementioned power if they find that such Government servants are in any way unsuitable or inefficient for retention in Government service. Therefore, the criterion to come to a decision for the purpose of exercising the power to retire any person asforesaid can be exercised only when a Government servant is found to be unsuitable and inefficient for retention in Government service.

That being so, the authority exercising such power to terminate the services of a Government servant after 55 years should have been satisfied from materials before him that the said Government servant was unsuitable or inefficient to be retained in Government service, and should have at least directed their attention to a consideration of this matter in the light of the criterion laid down in the above resolution as mentioned above.

6. We find that the direction of the Government contained in letter dated July 20, 1967, directing the petitioner to retire does not indicate that the said considerations stated above were present in the mind of the authorities concerned. Moreover, the paragraph mentioned above states about a notice which has to be given in a particular form as specified in Annexure I appended to the said resolution. The form of the notice is as follows:

"NOTICE
To,
Sri.....
(address).....
....."

Whereas you have completed the age of 55 years on and it has been decided to retire you from Government; I/the State Government therefore do hereby direct and require you to retire from Government service with effect from the date of expiry of three months from the date of this notice."

From this it would appear that it is necessary that a 'decision' to retire a person concerned should be stated to have been taken in the said notice itself, and this being so, the decision should obviously be on the grounds as stated in paragraph 3 of the resolution quoted above, namely, that the said person was either unsuitable or inefficient for retention in Government service. The aforesaid letter dated July 20, 1967, is in the nature of a direction without indicating if the same was actuated by any decision. The impugned notice dated July 20, 1967 therefore is not in accordance with the prescribed notice required to be sent under paragraph 3 of the said resolution.

7. Mr. Misra has drawn our attention to a copy of letter No. 25361 M/E-346-61 dated November 2, 1967 from the Additional Director of Health Services, Orissa to Dr. S. N. Ghosal, Medical Superintendent, T. B. Hospital, Puri (Annexure 7), whereby the petitioner was informed that he was eligible for consideration for recruitment to the Indian Medical and Health Services. Our attention is also drawn to a copy of the Notification No. 20181/H.L. Med. IXC-7/67 dated October 31, 1967 (Annexure B) wherein the petitioner who was then officiating as Civil Surgeon was confirmed in his said appointment from August 10, 1962. These two letters are indicative of the fact that the petitioner till October-November, 1967 was not considered unsuitable or inefficient in any manner, and on the other hand was rather considered as an efficient and suitable person to be considered for recruitment to the Indian Medical and Health Services. The fact that he was confirmed in the post of Civil Surgeon would also indicate that he was till then not considered to be unsuitable or inefficient to be retained in Government service also. This being the consideration weighing with the Director of Health Services, Orissa with regard to the petitioners' efficiency, and suitability even as late as in the month of October-November, 1967, we do not understand how and on what basis the Government directed the petitioner to retire from Government service by their letter dated July 20, 1967 when this decision was to have been taken only on a consideration that the petitioner was unsuitable or inefficient for retention in Government service as per paragraph 3 of the Annexure 2 referred to above.

We are, therefore, of the view that the Government at the time of issuing the direction as contained in their letter dated July 20, 1967 (Annexure 4) did not act in accordance with the provisions of paragraph 3 of the abovementioned resolution and issued the aforesaid direction without any consideration of the basic

principles on which such a decision could have been taken. As such we are of the view that this notice is not in accordance with law, and as such it is liable to be quashed.

8. Mr. Misra further contended that the age of compulsory retirement having been extended from 55 to 58 years by the Government unequivocally by their Resolution No. 7406-2-R/1-23/63-Gen. dated May 21, 1963 (Annexure 1), and Resolution dated 15th September, 1965 (Annexure 2), the petitioner who held a permanent post under the Government and whose service was so extended upto the age of 58 years, had a right to continue in service till that age, and if he is asked to leave his service, at any time before attaining that age, that would mean a defeat of his right to continue in service and, as such it is in the nature of a penalty and amounts to removal from service. That being so, the provisions of Article 311 of the Constitution prescribing the procedure to be adopted before such action is taken, should have been complied with, and the exercise of the State Government's pleasure for the purpose of terminating the services of the petitioner would be regulated accordingly.

9. In this connection, he cited the Supreme Court decision in Moti Ram Deka's case (AIR 1964 SC 600, Moti Ram Deka v. General Manager, North East Frontier Railway) which may, with respect, be quoted here:

"A person who substantively holds a permanent post has a right to continue in service, subject, of course, to the rule of superannuation and the rule as to compulsory retirement. If for any other reason that right is invaded, and he is asked to leave his service, the termination of his service must inevitably mean the defeat of his right to continue in service and as such, it is in the nature of a penalty and amounts to removal. In other words, termination of the services of a permanent servant otherwise than on the ground of superannuation or compulsory retirement, must, per se, amount to his removal, and so, if by Rule 148(3) or Rule 149(3) such a termination is brought about, the Rule clearly contravenes Article 311(2) and must be held to be invalid. It is common ground that neither of the two Rules contemplates an enquiry and in none of the cases before us has the procedure prescribed by Art. 311(2) been followed. We appreciate the argument urged by the learned Additional Solicitor-General about the pleasure of the President and its significance; but since the pleasure has to be exercised subject to the provisions of Art. 311, there would be no escape from the conclusion that in respect of cases falling under Art. 311(2), the procedure prescribed by the said Article must be complied with and the

exercise of pleasure regulated accordingly."

Our attention is also drawn to para 28 of the above-mentioned case, wherein their Lordships of the Supreme Court have opined as follows:

"At this stage, we ought to add that in a modern democratic State the efficiency and incorruptibility of public administration is of such importance that it is essential to afford to civil servants adequate protection against capricious action from their superior authority. If a permanent civil servant is guilty of misconduct, he should no doubt be proceeded against promptly under the relevant disciplinary rules, subject, of course, to the safeguard prescribed by Art. 311(2); but in regard to honest, straightforward and efficient permanent civil servants, it is of utmost importance even from the point of view of the State that they should enjoy a sense of security which alone can make them independent and truly efficient."

The aforesaid observations of their Lordships of the Supreme Court are based on salutary principles and are meant to be followed and observed by all concerned.

10. It must also be noted here that the petitioner, as we find from the Civil List published by the Government, entered into Government service on 2-5-1941, and by the time i.e. July, 1967 he had not completed 30 years of qualifying service as provided for in para 4 of the resolution of 1965.

11. For the reasons stated above, we are of the opinion that the impugned notice dated July 20, 1967 directing the petitioner to retire from service with effect from the date of expiry of three months from the date of service of the notice is void and liable to be quashed, and as such is hereby set aside. The petition is allowed.

12. In the circumstances of the case, there will be no order as to costs.

13. BARMAN, C. J.: I agree.
DVT/D.V.C. Petition allowed.

AIR 1969 ORISSA 49 (V 56 C 20)

B. K. PATRA, J.

Anandasingh Neggi, Petitioner v. State, Opposite Party.

Criminal Revn. No. 499 of 1966, D/- 9-8-1968, from order of S. J., Koraput, D/- 27-8-1966.

Penal Code (1860), Ss. 304A, 279, 338 — Scope—Distinction—Rash or negligent act — Meaning.

Rash or negligent act referred to in Section 304-A means an act which is the

immediate cause of death and not an act or omission which can at best be said to be a remote cause of death. This section is correlative with Sections 279 and 338 I. P. C. Section 279 applies to the driving of any vehicle, or riding, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person where no hurt has actually been caused. Section 338 applies to a case where grievous hurt has been caused to any person by an act being done so rashly or negligently as to endanger human life or the personal safety of others. Section 338 is more general than Section 279 and embraces not only the act of driving or riding but all acts which endanger human life or personal safety. Section 304-A while being as general as Section 338 is restricted to cases where death has been caused. Thus there must be direct nexus between the death of a person and the rash or negligent act of the accused AIR 1968 SC 829, Rel. on. (Paras 4 and 5)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 829 (V 55)=1968

Cri LJ 1013. Suleman Rahiman

Mulani v. State of Maharashtra 5

P. V. B Rao, for Petitioner; G. C. Das on behalf of Standing Counsel.

ORDER: The petitioner, a motor driver, was prosecuted in the court of the Magistrate 1st Class, Nawarangpur on a charge under S. 304-A I. P. C. and was convicted and sentenced to undergo R. L. for a period of 2 months and to pay a fine of Rs. 100 and in default to undergo R. L. for a further period of 15 days. His appeal was dismissed by the Sessions Judge, Jeypore.

2. The facts which are no more in dispute are that in the evening of 16-3-64 the appellant was driving an ambulance van bearing No. ORK 870 and was proceeding from Umarkote towards Jhorigam. The road is 24 ft wide of which the mormured portion is 12 ft at the centre. At a place near the village Mendhabeda, 3 women labourers were found proceeding on the right side of the road. On hearing the sound of the approaching vehicle, two of them crossed the road and went to its left side.

Immediately after, the 3rd woman, Gunji Malliani turned to cross the road to its left side and seeing this the petitioner turned the vehicle to further left of the road obviously with a view to prevent it from running over the woman. But unfortunately, Gunji Malliani dashed against the mud-guard of the vehicle, fell down on the road and died immediately thereafter. After the accident, the vehicle stopped at a distance of 20 ft. ahead from the place of occurrence. Information was lodged at the Thana the same evening and autopsy of the dead body was held

next day. The doctor found as many as 12 injuries on the person of the deceased one of which, however, the most important are injuries Nos. 4 and 11.

Injury No. 4 is a bruise on the upper right of the abdomen and injury No. 11 is a bruise on the middle of the upper part of the left back. On dissection of injury No. 4 it was found that the lobes of the liver have been damaged and on the dissection of injury No. 11 fracture of the lower half of the right shoulder blade at 4 places and fracture of 6 ribs were found. The doctor was of the opinion that injuries Nos. 4 and 11 could be caused by a sudden dash of the vehicle or due to a fall on a hard substance like stone. He, however, opined that none of the injuries appears to have been caused as a result of the vehicle running over the deceased. In fact it is not the prosecution case that the deceased was run over by the vehicle.

3. Section 304-A runs thus:

"Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." According to the prosecution case, the rash or negligent act of the petitioner consisted firstly, in driving the vehicle at a high speed and secondly, in not blowing the horn. It is P. Ws. 2, 3 and 4 who say that the vehicle was running at a high speed, but what actually meant by high speed has not been clarified. These witnesses are illiterate village folk and one cannot depend on their conception of what high speed is to arrive at a conclusion that the petitioner was driving the vehicle rashly or negligently.

The investigating officer, P. W. 7 who reached the place of accident immediately after the occurrence found that the vehicle had stopped at a distance of 20 feet from the place of accident. On the basis thereof the Inspector of Motor Vehicles opined that the speed of the vehicle could not have been more than 16 miles per hour. P. Ws. 3 and 4 have deposed that there were stones on the road and this is a circumstance which makes it further improbable that the vehicle could have been running at a very high speed. These are the circumstances which ought to have weighed with the courts below to accept the testimony of the Motor Vehicle Inspector regarding the speed of the vehicle in preference to the testimony on this point given by unsophisticated villagers like P. Ws. 2, 3 and 4. That the driver had not blown the horn has been spoken by P. Ws. 2, 3 and 4 and the courts below have accepted that evidence. But it is clear from the testimony of the witnesses themselves that non-blowing of

the horn was in no way responsible for the accident.

P. W. 2 who was one of the companions of the deceased stated that "on hearing the sound of the vehicle, we crossed the road to the left side". P. W. 3 deposed that "people knew that the vehicle was coming from its sound. Two of them crossed the road and the 3rd was hit while coming". P. W. 4 who was walking at a short distance behind the unfortunate woman stated, "we could know the coming of the vehicle from behind even when the vehicle was at a long distance." The purpose of blowing a horn is only to make the people aware that a vehicle is coming from behind but in this case, it is clear that non-blowing of the horn was of no consequence because from the sound of the vehicle people knew that a big vehicle was coming from behind.

4. Rash or negligent act referred to in Section 304-A means an act which is the immediate cause of death and not an act or omission which can at best be said to be a remote cause of death. This section is correlative with Ss. 279 and 338 I.P.C. Section 279 applies to the driving of any vehicle, or riding, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person where no hurt has actually been caused. Section 338 applies to a case where grievous hurt has been caused to any person by an act being done so rashly or negligently as to endanger human life or the personal safety of others. Section 338 is more general than S. 279 and embraces not only the act of driving or riding but all acts which endanger human life or personal safety. Section 304-A while being as general as section 338 is restricted to cases where death has been caused.

5. In a recent decision of the Supreme Court reported in AIR 1968 SC 829 Suleman Rahiman Mulani v. State of Maharashtra, their Lordships held that the requirements of this section (S. 304-A) are that the death of any person must have been caused by the accused by doing any rash or negligent act. In other words, there must be proof that the rash or negligent act of the accused was the proximate cause of death. There must be direct nexus between the death of a person and the rash or negligent act of the accused. What happened in that case was that a person who possessed only a learner's licence was driving a jeep which struck against a person on the road as a result of which the latter sustained serious injury and died shortly thereafter. He was convicted in the trial court and the High Court held that the very fact that the person concerned was holding only a learner's licence implied that he did not know driving and must be assumed to be incapable of controlling the vehi-

cle. If such a person drives a car or a vehicle on a public road, he obviously does an act which can be said to be rash or negligent as contemplated by Section 304-A I. P. C.

Their Lordships of the Supreme Court observed that even assuming that the High Court is right in its conclusion that the appellant had not acquired sufficient proficiency in driving and was, therefore, guilty of rash or negligent act in driving the jeep, that by itself is not sufficient to convict him under S. 304-A, I. P. C and that the prosecution must go further to prove that it was that rash or negligent act of his that caused the death of the deceased.

6. As I have pointed out before, non-blowing of the horn, having regard to the evidence in this case, was not of any material consequence. It is on hearing the sound of the approaching vehicle that the three women who were proceeding on the right side of the road, for reasons best known to them, decided to cross the road and go over to the left side. Two women including P. W. 2 crossed the road before the vehicle reached the spot. P. W. 4 says that "as the two women went, the 3rd (deceased) also began to run by which time the vehicle was quite near. Accused also turned the vehicle further left and even then there was a dash."

P. W. 3 stated that on seeing the deceased coming the petitioner turned the vehicle further left. It is, therefore, clear that it was the belated attempt of the deceased to cross the road which resulted in this unfortunate accident. The driver, far from being rash or negligent, made a desperate attempt to prevent the vehicle from running over her and turned it further to the left. By that time the woman had come very near to the vehicle and instead of being run over by the vehicle, she dashed against the mud-guard and fell down on the road. There was no mechanical defect in the vehicle. The driver had applied brake in time and in fact the vehicle stopped at a distance of 20 feet from the place of occurrence. In the circumstances, I am satisfied that the petitioner was not guilty of any rash or negligent act.

7. I would accordingly allow this revision, set aside the conviction of the petitioner and the sentence imposed on him and direct that he be set at liberty forthwith. The fine, if any, paid by him shall be refunded. While admitting this revision, a rule had been issued to the petitioner to show cause why the sentence should not be enhanced. In view of my finding above, this rule is discharged.

GGM/D.V.C.

Petition allowed.

AIR 1969 ORISSA 52 (V 56 C 21)

G. K. MISRA, J.

Manoranjan Samanta Kumar, Petitioner
v. Brundabati Veergam, Respondent.

Civil Revn. No. 74 of 1967, D/- 1-8-
1968, from decision of Dist. J., Cuttack,
D/- 15-2-1967.

(A) Civil P. C. (1908), O. 32, R. 11(2)
— Suit against mother and her minor son
through her as guardian — Non-appearance
of mother — Failure to appoint
Court guardian — Ex parte decree passed
against both — Decree is nullity as
against the minor.

Where, in a suit, a minor is impleaded
through his mother as guardian along
with his mother and on non-appearance
of the mother an ex parte decree is
passed against both without appointing a
Court guardian, the decree as against the
minor is a nullity and is liable to be set
aside for violation of the mandatory provi-
sions of O. 32, R. 11(2). Ex parte
decree can be passed against the mother
but suit cannot proceed against the
minor. (Para 3)

(B) Civil P. C. (1908), O. 9 R. 13(1), pro-
viso — Suit against mother and her ille-
gitimate minor son for nullification of
parenthood and cancellation of mainten-
ance allowance to him — Ex parte de-
cree against both held to be nullity as
against the minor — Causes of action
against mother and her son being inter-
twined, decree against mother also is
liable to be set aside. (Para 4)

(C) Civil P. C. (1908), S. 115 — Powers
of High Court under — Ex parte decree
against minor upon non-appearance of
guardian — Court failing to appoint
guardian for minor — Decree against
minor can be set aside in revision even if
petition is not filed by minor.

The High Court has wide powers to
suo motu exercise its revisional jurisdiction
when the matter somehow comes to
its notice. Thus, where the lower court
failed to exercise its jurisdiction by not
appointing Court guardian for minor,
when his mother through whom he was
impleaded failed to appear, and passed
an ex parte decree contrary to the mandatory
provisions of O. 32, R. 11(2), the
High Court can interfere and set aside
the decree against the minor it being a
nullity, even though the matter came to
its notice on the revision filed, not by the
minor or his mother but by the opposite
party. (Para 5)

B. Mohapatra, R. Das and P. K. Das,
for Petitioner; R. Mohanty, R. K. Kar
and R. Sharma, for Respondent.

ORDEE: Brundabati (defendant-opposite party) is the widow of the maternal uncle of Manoranjan (plaintiff-petitioner).

Brundabati filed an application under
Section 488, Cr. P. C. on behalf of her
minor son alleging that the latter was
born to her through the petitioner. The
parties are Indian Christians. In Cri-
minal Revision No. 493 of 1962, this Court
allowed the application under Section
488, Cr. P. C. and directed the petitioner
to pay every month a sum of Rs. 20 to
the opposite party for the maintenance of
the minor son.

Title Suit No. 24 of 1964 was filed
by the petitioner in the Court of the
First Munsif, Cuttack, for a declaration
that the petitioner is not the father of
Brundabati's illegitimate son and that
the minor is not entitled to recover any
maintenance. Brundabati was arrayed
as a defendant with the description "for
herself and as representing her alleged
illegitimate minor son". Thus though
the name of the minor son was not given
in the cause title, both Brundabati and
her minor son through her as the guardian,
were impleaded as parties. Notice of
the suit was served on Brundabati who
did not file the written statement in time.
On 10-9-64 the petitioner filed an applica-
tion for appointment of the defendant
as guardian of the minor. On 10-11-64
the opposite party took no steps and was
set ex parte being absent on call. Peti-
tioner's application for appointment of the
defendant as guardian for the minor son
was put up on 16-11-64. As the plain-
tiff absented himself on that day, the suit
was dismissed for default. It was, how-
ever, restored to file on 17-12-64. On
18-12-64 plaintiff was directed to take
notice to the defendant regarding settle-
ment of issues. As the plaintiff took no
steps, he was again directed to take notice on
22-12-64. On 4-1-65 plaintiff filed a
memo that the suit be posted for ex
parte hearing by dispensing with notice
to the defendant. The notice was dispensed
with on that day and the suit was post-
ed for ex parte hearing to 19-1-65. The
suit was decreed ex parte on 5-2-65. On
11-8-65 notice regarding cancellation of
the order decreeing maintenance under
Section 488 Cr. P. C. was served on the
defendant. On 14-8-65 the application
for setting aside the ex parte decree was
filed by the opposite party. It was dis-
missed by the Munsif on 7-4-66 as being
barred by limitation. On 15-2-67 the
District Judge reversed the judgment of
the Munsif and remanded the case to him
with an order that the application filed
before him at the appellate stage to con-
done delay under Section 5 of the Limita-
tion Act would be considered by the
trial Court. Against the order of District
Judge remanding the case, the civil revi-
sion has been filed by the plaintiff.

2. Mr. Mohapatra very seriously con-
tended that an application to condone de-

lay under Section 5 of the Limitation Act should not have been entertained at the appellate stage and that the application under Order 9, Rule 13, C. P. C. filed by Brundabati was barred by limitation as summons had been served on her and she did not file the application within 30 days from the date of the ex parte decree. It is not necessary to consider this argument in view of what is going to be stated hereunder which was overlooked by the Courts below who exercised their jurisdiction illegally.

3. As would appear from the narration of facts already given, the minor was impleaded as a party defendant in the suit through her mother as the guardian though his name was not mentioned. If Brundabati failed to appear in the suit, it was the bounden duty of the Court to direct the plaintiff to appoint a Court-guardian to conduct the suit on behalf of the minor. Order 32, Rule 11(1) lays down that where the guardian for the suit desires to retire, or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit. Sub-rule (2) thereof says that where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

As Brundabati did not appear the suit could be rightly decreed ex parte against her; but the suit would not proceed against the minor through Brundabati as guardian when she neglected to do her duty. In the circumstances, the Court should have directed the plaintiff to appoint a Court guardian. The suit was, therefore, decreed ex parte against the minor represented through Brundabati in violation of the mandatory provision. The decree against the minor is a nullity and must be ignored by the Court. The suit must proceed from the stage where it became ex parte against the minor and the plaintiff would be directed to take steps for appointment of a guardian for the minor. The ex parte decree against Brundabati as representing the minor cannot stand and must be set aside.

4. Order 9, Rule 13(1) Proviso, C. P. C. clearly says that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or many of the other defendants also. The causes of action against the minor and the mother are intertwined and accordingly the ex parte decree passed against her must be set aside.

5. The next question for consideration is whether this Court can suo motu exercise its power under Section 115,

C. P. C. to set aside the ex parte decree in the absence of any revision filed by either Brundabati or the minor son. Section 115 enacts that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

There is no dispute that having jurisdiction to appoint a guardian for the minor, the Munsif failed to exercise his jurisdiction so vested in him and allowed the ex parte decree to be passed contrary to the mandatory provision resulting in the decree being a nullity as against the minor. This is, therefore, a fit case for interference. No first appeal or second appeal lies to the High Court against the order passed by the Munsif or the District Judge. All the limitations imposed upon the exercise of the power being absent, the High Court has wide powers to suo motu exercise its revisional jurisdiction when the matter somehow comes to its notice. In this case the serious illegality resulting in lack of jurisdiction has come to the notice of the Court in course of the hearing of the revision application filed by the petitioner. It is not necessary to cite authorities in respect of the wide powers of this Court under Section 115, C. P. C. There are abundant Full Bench decisions of different High Courts in India.

6. As a result of the aforesaid discussion the order passed by the Munsif is set aside. The case would be remanded to the trial Court who would try the case from the beginning, call upon the plaintiff to give notice to Brundabati and the minor son through her as the guardian. If she fails to discharge her duties, a Court-guardian would be appointed to represent the minor. Plaintiff would be called upon to describe Brundabati and her minor son as separate defendants. The suit would proceed thereafter in accordance with law and the observations made above. It would not be necessary now to consider the application under S. 5 of the Limitation Act.

7. In the result, the judgments of both the Munsif and the District Judge are set aside and the case is remanded to the trial Court for disposal in accordance with law and the observations made above. Parties to bear their own costs throughout upto this stage.

BNP/D.V.C.

Revision allowed.

AIR 1969 ORISSA 54 (V 56 C 22)

G. K. MISRA, J.

Sri Damodar Jew Thakur, Appellant
v. Hema Narayan Misra and others, Respondents.

Second Appeal No. 175 of 1964, D/- 8-10-1968, from decision of Dist. J., Balasore, D/- 10-10-1963.

Limitation Act (1963), Arts. 64, 65 — Decree for declaration of title and recovery of possession — No steps taken to get possession — Adverse possession prior to suit is not interrupted. AIR 1932 Sind 35 and AIR 1958 Cal 437, Dissented from.

A mere decree for declaration of title and recovery of possession without any step being taken to get back possession would not interrupt the running of time. It stands on the same footing as a mere declaratory decree. If, however, the decree for recovery of possession is followed by actual seizure of the property either in execution or by amicable arrangement or compromise, then a break in the running of time comes into operation from the date of the seizure.

Where the decree was not followed by execution for recovery of joint possession and the plaintiff's case that he got amicable possession was found against him concurrently by the courts below the suit was barred by adverse possession. AIR 1923 Mad 88(2) and AIR 1939 Bom 261 and AIR 1944 Pat 77 and AIR 1948 Bom 149 and AIR 1957 Trav-Co 32 (FB) & AIR 1959 Andh Pra 146. Relied on: AIR 1932 Sind 35 & AIR 1958 Cal 437. Dissented from. (Paras 7, 8)

Kar, B. B. Sahu and M. K. De, for Respondents.

JUDGMENT: The disputed properties belong to the deity Sri Damodar Jew Thakur. The deity is the plaintiff. The suit was brought through Barada Kanta Misra one of the marfatdars. The trustee appointed by the Endowment Commissioner has been substituted in this Second Appeal in place of the marfatdar representing the deity. Defendants 1 and 3 to 19 are the marfatdars of the plaintiff deity who has also been put as defendant No. 2.

Defendant no. 1 was the landlord of the disputed lands and thus had dual roles. He as landlord filed a rent suit in 1935-36 against Barada Kanta Misra and some of the defendants-marfatdars and obtained an ex parte decree which was executed in Execution case No. 264 of 1936-37. He purchased the disputed lands on 29-7-36. After the sale the father of Barada Kanta Misra and other cosharer marfatdars filed an application to set aside the decree for rent on the ground of fraud. During the pendency of that proceeding there was a compromise. The decree for rent was set aside and another decree was passed to the effect that defendant no. 1 would be entitled to realise Rs. 150/- by certain date and in case the judgment-debtors did not satisfy the decree defendant no. 1 would be entitled to execute the decree.

The case of defendant No. 1 is that he did not execute the decree, but took delivery of possession amicably. The marfatdars filed Original Suit No. 400 of 1941 against defendant no. 1 and others for setting aside the rent sale. It was however dismissed for default. The plaintiff thereafter again filed Original Suit No. 303 of 1943 alleging that he was a minor at the time of the institution of O. S. No. 400 of 1941. O. S. No. 303 of 1943 was decreed on 22-12-44. It was thereby declared that defendant No. 1 did not have any right, title and interest in the disputed properties by virtue of the rent sale, and that the plaintiff had joint title with him and was entitled to recover joint possession. Barada Kanta Misra and other marfatdars alleged that defendant No. 1 voluntarily put them in joint possession and they did not accordingly take delivery of possession through court.

The present suit is filed on 21-12-56 on the allegation that defendant No. 1 transferred the disputed properties to defendants 21 to 49 by 8 permanent registered leases Exts. A to A(7) on 19-4-44 and 20-4-1944. It is to be noted at this stage that the total disputed lands consist of 46.93 acres. Out of these, 2.20 acres are tenanted lands. 22 acres are covered by the permanent pattas Exts. A to A(7) in favour of defendants 21 to 49. The bal-

Cases Referred: Chronological Paras (1959) AIR 1959 Andh Pra 146 (V 46).	
M. Bhikashmiah v. Venugopala-rao	7
(1958) AIR 1958 Cal 437 (V 35), Achhiman Bibi v. Abdur Rahim	7
(1957) AIR 1957 Trav Co 32 (V 44)=ILR (1956) Trav Co 755 (FB), Padmanabha v. Velayudhan	7
(1948) AIR 1948 Bom 149 (V 35)=49 Bom LR 767, Dagadabai v. Sakhamram	7
(1944) AIR 1944 Pat 77 (V 31)=ILR 22 Pat 513, Krishna Prasad v. Adyanath	7
(1939) AIR 1939 Bom 261 (V 26)=41 Bom LR 497, Bhogilal v. Ratilal	7
(1932) AIR 1932 Sind 35 (V 19)=26 Sind LR 127, Gagumal Metharam v. Allahabux	7
(1923) AIR 1923 PC 175 (V 10)=ILR 46 Mad 751, Subbaiya Pandaram v. Md. Mustafa	6
(1923) AIR 1923 Mad 63(2) (V 10)=ILR 46 Mad 525, Singaravelu Mudaliar v. Chokkalinga Mudaliar	7
G. Rath, D. Mohapatra and S. C. Mohapatra, for Appellant; R. Mohanty, R. K.	

ance 22.78 acres are said to be in possession of defendant No. 1 and his wife defendant No. 20 in whose favour a permanent lease has also been effected by defendant No. 1. Defendants 1 and 20 did not contest. Defendants 21 to 49, the transferees contested the suit mainly on the basis of adverse possession. Both the courts below have held that the suit has been barred by adverse possession and accordingly dismissed the plaintiffs' suit. The plaintiff deity has filed this Second Appeal.

2. Mr. Rath contends that the suit is not barred by adverse possession, and the learned courts below misconceived the legal position.

3. To correctly appreciate the position it would be necessary to distinguish the various types of land involved in the suit. As has already been stated 2.20 acres are in possession of the tenants under defendant No. 1. The tenants are not necessary parties. The suit has proceeded ex parte against defendants 1 and 20. The plaintiff's positive case is that after the decree in O. S. No. 303 of 1943 he was put into joint possession. As the plaintiff's title and possession are not controverted in respect of the tenanted land, he is entitled to declaration of joint title and symbolical possession with the other marfatdars.

4. With regard to 22.78 acres, the plaintiff's positive case is that he took joint possession amicably after the decree in O. S. No. 303 of 1943. Defendants 1 and 20 did not appear in the suit and challenge the plaintiff's case. The plaintiff is therefore entitled to a decree. There would be declaration of joint title in favour of the plaintiff and he would be entitled to joint possession.

5. The real difficulty arises with regard to 22 acres which is the subject matter of alienation by permanent Pattas in favour of defendants 21 to 49. These Pattas were granted in April 1944. The concurrent findings of the courts below are that these transferees are in possession ever since then till the date of the suit which was instituted on 21-12-56. On this finding the plaintiff's suit is prima facie barred by adverse possession as the transferees are in possession for more than 12 years in their own right, title and interest openly.

Mr. Rath however contends that the decree passed on 22-12-44 in O. S. No. 303 of 1943 whereby the plaintiff's joint title was declared and he was entitled to recovery of joint possession interrupts the running of adverse possession. If the decree acts as a break then clearly the suit is within limitation. The suit was filed on 21-12-56. This necessitates an examination of the legal position whether

a decree for declaration of title and recovery of possession without possession being taken either in execution or amicably would interrupt the running of adverse possession.

6. There can be no controversy that a mere declaratory decree does not interrupt the running of adverse possession. The matter is concluded by Subbaiya Pandaram v. Md. Mustafa, AIR 1923 PC 175. Lord Buckmaster observed thus:

"Their Lordships do not think that the decree had that effect. At the moment when it was passed the possession of the purchaser was adverse, and the declaration that the property had been properly made subject to a trust disposition, and therefore ought not to have been seized, did not disturb or affect the quality of his possession; it merely emphasised the fact that it was adverse. No further step was taken in consequence of that declaration until the present proceedings were instituted, when it was too late." There is clear indication in the aforesaid passage that after a declaratory decree is obtained unless appropriate steps are taken for recovery of possession, the declaratory decree by itself would not prevent the running of time and the adverse possession prior to the suit can be tacked to the adverse possession continuing thereafter.

7. There is conflict of thought as to whether the aforesaid principle would apply to a decree for declaration of title and recovery of possession not followed by delivery of possession either symbolical or actual. Most of the authoritative pronouncements are in favour of the view that a mere decree for declaration of title and recovery of possession would not interrupt the running of time. It stands on the same footing as a mere declaratory decree. If, however, the decree for recovery of possession is followed by actual seizure of the property either in execution or by amicable arrangement or compromise, then a break in the running of time comes into operation from the date of the seizure. Some of the important decisions in support of this view are Singaravelu Mudaliar v. Chokkalinga Mudaliar, AIR 1923 Mad 88(2); Bhogilal v. Ratilal, AIR 1939 Bom 261; Krishna Prasad v. Adyanath, AIR 1944 Pat 77; Dagadabai v. Sakhararam, AIR 1948 Bom 149; Padmanabha v. Velayudhan, AIR 1957 Trav Co 32 (FB) and M. Bhikashmiah v. Venugopalaraao, AIR 1959 Andh Pra 146. The best exposition of the law in this regard is to be found in AIR 1948 Bom 149. Their Lordships observed thus:

"If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, we do not see how it can be said that it has interrupted possession; nor can it in law affect the

nature of the possession, so far as we can see, unless it does so in fact; and whether it does so in fact would probably depend upon the attitude with which it was received by the defendant But in fact it was a decree in ejectment, and for ourselves we cannot say why the fact of ejectment being ordered should make any difference. Surely what counts is not the order for ejectment but the actual ejectment or cessation of possession."

Their Lordships further observed that they were not referred to any reasoned decision that the decree for possession even when followed by an unsuccessful execution must be deemed as a matter of law to have the effect of either interrupting possession or altering its character. Their Lordships went further to say that they did not think that there was ever likely to be any such decision.

The opposite view has been taken in *Gagum Metharam v. Allahbux*, AIR 1932 Sind 35 and *Achhiman Bibi v. Abdur Rahim*, AIR 1958 Cal 437. None of these two decisions have given any cogent reasons as to why a distinction is to be made between a mere declaratory decree and a decree for recovery of possession not followed by any effective step either in execution or otherwise to get back possession. Even the Calcutta case does not refer to the Bombay series of decisions and the Patna and the Travancore Cochin Cases. In AIR 1959 Andh Pra 146 the Calcutta view was dissented from & if I say so with respect rightly. I am clearly of opinion that a mere decree for declaration of title and recovery of possession without any step being taken to get back possession stands on the same footing as a mere declaratory decree for title and does not interrupt adverse possession.

8. In this case the decree dated 22-12-44 was not followed by execution for recovery of joint possession and the plaintiff's case that he got amicable possession has been found against concurrently by the courts below. The suit is accordingly barred by adverse possession in respect of these 22 acres.

9. On the aforesaid analysis the plaintiff's suit is decreed in respect of the tenanted land of 2.20 acres and 28.78 acres in which the plaintiff got joint possession amicably. The suit is dismissed with regard to the balance of 22 acres in respect of which permanent Pattas were granted.

10. In the result, the judgments of the courts below are set aside in part and the second appeal is allowed in part as indicated above. In the circumstances parties to bear their own costs throughout. HGP/D.V.C. Appeal partly allowed.

AIR 1969 ORISSA 56 (V 56 C 23)

S. ACHARYA, J.

Raj Kishore Mahapatra and others, Petitioners v. Narasingh Mishra, Opposite Party.

Crl. Revn. No. 485 of 1967, D/- 19-8-1968, from an order of Judl. Magistrate, 1st Class, Cuttack, D/- 17-8-1967.

Criminal P. C. (1893), S. 517 — Scope — Merely provides summary method for maintaining status quo ante — Rival claims as to ownership and possession of idol — Idol in possession of accused since some time past not without any basis or right — Accused acquitted in complaint case under S. 406 Penal Code, but directed to deliver physical possession of idol to complainant — Direction held was wrong — Such rival claims could not be decided in criminal cases — Penal Code (1860), S. 406. Case law referred. (Paras 5, 6) Cases Referred: Chronological Paras (1967) 33 Cut LT 868=ILR (1967)

Cut 722, Radhacharan Das v. Padma Charan Patnaik (1960) AIR 1960 Andh Pra 122 (V 47)= 1960 Cri LJ 302, Padma Chandriah v. Pamjwoml (1957) AIR 1957 Pat 685 (V 44)= 1957 Cri LJ 1442, Harihar Singh v. Nilkanth Singh (1954) AIR 1954 Mad 214 (V 41)=1954 Cri LJ 207, Muthiah Muthirian v. Vairaperumal (1927) AIR 1927 Mad 797 (V 14)=ILR (1950) Mad 916=28 Cri LJ 879, Srinivasa Moorthi v. Narsimhalu 5

P. K. Dhal and S. C. Sahu, for Petitioners; H. Kanungo, R. N. Mohanty and H. N. Kanungo, for Opposite Party.

ORDER: This is an application in revision against the order contained in the judgment in Complaint Case No. 97 of 1966 passed by Sri P. C. Panda, Judicial Magistrate, 1st Class, Cuttack directing the accused persons, while acquitting them, to deliver physical possession of the idol of Sri Chandrasekhar Mohaprabhu along with His ornaments, clothings, seat etc. to the complainant for being worshipped in the house standing on plot No. 2447.

2. Mr. Dhal, the learned counsel for the petitioners contended that the above mentioned order is illegal and unwarranted in view of the findings arrived at and observations made in the judgment of the said court.

3. Mr. Kanungo, learned counsel for the opposite party contended that the trial court was justified in passing the said order in view of the fact that the Endowment Commissioner decided that the deity was a private deity of the complainant's family; and that they also had the

right to possess the deity for performing the Seva Puja; and because of the petitioners worshipped in a house on plot No. 2447.

4. The above order was passed in a complaint case filed by one Narasingha Misra under Section 406 of the Indian Penal Code against these four petitioners on the allegation that they had taken away the above named idol, the family deity of the complainant, and did not return the same to the complainant's family for their performing the Pancha Dola Jatra.

5. While acquitting the accused persons the court below found as a matter of fact that the said deity was "the joint property of both the parties" and that the accused persons had a right to the Seba Puja of the deity as marfatdars. Regarding entrustment of the deity by the complainant to the accused the findings of the court below may be quoted as follows:

(i) "It is doubtful if there was any entrustment with the deity by the complainant in favour of the accused persons.....

(ii)it would rather be just to say that Mahapatra family acquired a right to take the deity for six days for holding Dola Jatra and truly speaking there was no entrustment of the property by P. W. II.

(iii)it cannot be said that complainant entrusted the idol for purpose of discharge of any trust."

In paragraph 7 of the court's judgment, the observations of the trial court are as follows:

"In case of deity, the position is on a different footing and the law is also well settled that all the marfatdars of the deity represent the deity as a whole and not in part according to one's own share in the property. The only course open for the complainant is to file a civil suit for recovery of the possession of the deity, and also to get a declaration to the effect that Mahapatra family are only entitled to the possession of the image of the deity for specified period in a year so that it will be a legal contract, to be enforced in law. The dispute as it appears is a dispute of civil nature regarding the properties of the deity".

On the above findings and observations of the court below, it is evident that there is a dispute between the rival parties claiming possession of the deity. This being so, it is not expected under the provisions of Section 517 of the Code of Criminal Procedure to try this dispute which is of a civil nature. Their Lordships of the Madras High Court in their decision reported in Muthiah Muthirian v. Vairaperumal Muthirian, AIR 1954 Mad 214 in quoting a passage from Chitaley and Annaji Rao's Criminal Procedure Code, observed as follows:

"But a Criminal Court, as well pointed out in the exhaustive analysis in Chitaley and Annaji Rao's Criminal Procedure Code, Vol. III, 4th (1950) Edn. at page 2862, is not expected, under the provisions of S. 517 to "try" civil cases. It is not the function of a criminal court to decide nice questions involving principles of civil law, if there is a dispute between rival parties claiming a return of the property. It should not help a party whose object is to endeavour to obtain its judgment upon a question which ought to be determined in a Civil Court. Where, therefore, there is a "doubt as to ownership" of property, or where a "question of bona fide title" by purchase or otherwise arises, the duty of the criminal court is to leave the parties to their remedy in a civil suit."

This view has been reiterated in a decision of this Court in Radhacharan Das v. Padma Charan Patnaik, (1967) 33 Cut LT 868. I would with respect quote a portion of paragraph 5 of the said decision which is as follows:

"The object of the section is to enable the Court to direct the property to be given to the person to whom it belongs, or to allow it to continue in the possession of the person in whose possession it was found. Criminal Courts are not expected to try civil cases. The section merely purports to provide a summary method for having the status quo ante. An order under this section does not decide the question of ownership of the property but merely decides the right to possession and the ownership is to be determined in the Civil Court".

In a decision of the Patna High Court in Harihar Singh v. Nilakanth Singh, AIR 1957 Pat 685 their Lordships accepted with approval the Madras High Court view in the following manner:

"It is observed in that case ILR 1950 Mad 916=AIR 1927 Mad 797 that where the title to seized property is doubtful, it should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable."

The same view has been expressed by their Lordships of the Andhra Pradesh High Court in Padma Chandriah v. Pamjwomi, AIR 1960 Andh Pra 122 which is as follows:

"In such cases the proper procedure would be to adopt the normal course of returning the articles to the person from whom they were taken".

From all these decisions it is evident that Section 517 of the Code of Criminal Procedure merely purports to provide a summary method for maintaining the status quo ante, unless of course there are special circumstances which will render such a course unjustifiable.

6. The idol in this case has been with the petitioners since some time past, and such possession, in the context of the findings of the court below as discussed above, is not without any basis or right. This being so, the deity with the ornaments and articles belonging to him should be allowed to remain in possession of the petitioner. The rival claims of the opposite party to the ownership and possession of the deity, as has been held in the cases cited above, cannot be decided in this case, and therefore if he has any such right, he may seek his relief in a proper court of law.

7. In this view of the matter, the order passed by the court below directing the petitioners to hand over physical possession of the idol of Sri Chandrasekhar Mahaprabhu along with his ornaments, clothings, seat etc. available with the petitioners, in favour of the complainant is hereby set aside, and the revision is accordingly allowed.

HGP/D.V.C.

Revision allowed.

AIR 1969 ORISSA 58 (V 56 C 24)

G. K. MISRA AND B. K. PATRA JJ.

Director of Industries, Orissa, Defendant-Appellant v. Janardan Nanda, Plaintiff-Respondent.

First Appeal No. 82 of 1964, D/- 24-6-1968, against decision of Sub J. Puri, D/- 30-6-1964.

Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 43(3) — Notice under S. 80 of Civil P. C. necessary for maintainability of suit under the provisions—(Civil P. C. (1908), S. 80). AIR 1955 Pat 404 and AIR 1963 Andh Pra 164, held impliedly overruled by AIR 1966 SC 1068.

A certificate-debtor can file a civil suit under S. 43(3) to cancel the certificate or for other reliefs only after serving a notice under S. 80 of Civil P. C., on the Director of Industries. Though the Act itself provides for a suit when the objection of a certificate-debtor is overruled in appeal, a notice under S. 80 Civil P. C., is mandatory and its application is not excluded by any provision of the Act. AIR 1955 Pat 404 and AIR 1963 Andh Pra 164, held impliedly overruled by AIR 1966 SC 1068 and AIR 1927 PC 176, Foll., AIR 1951 SC 253, Ref. (Paras 3, 4 & 6)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 1068 (V 53)—

(1966) 1 SCR 985, Sawai Singhla v. Union of India

(1963) AIR 1963 Andh Pra 164 (V 50)=

(1962) 2 Andh LT 383, Hussain Ali Mirza v. State of Andhra Pradesh

3, 5, 6

(1955) AIR 1955 Pat 404 (V 42)=1955-27 ITR 643, Hiraluxmi v. L.T. Officer

Officer 3, 5, 5

(1951) AIR 1951 SC 253 (V 38)=1951 SCR 474, State of Seraikella v. Union of India

Union of India 3, 4

(1927) AIR 1927 PC 176 (V 14)=ILR 51 Bom 725, Bhagchand v. Secy. of State

Standing Counsel, for Appellant; L. Rath, for Respondent

G. K. MISRA, J.: Plaintiff's case may be put in short by eschewing out unnecessary details. He took a loan of Rs. 17000 from the Government on furnishing proper security under the Bihar and Orissa State Aid to Industries Act. A certificate was issued against him for Rs. 19,200 inclusive of interest. Plaintiff filed objection before the Certificate Officer in Certificate Misc. Case No. 51/58-59. His objection was overruled. An appeal against the same was dismissed. The suit is filed under Section 43/(3) of the Bihar and Orissa Public Demands Recovery Act, 1914 (hereinafter referred to as the Act) for a declaration that the certificate is void and that the same should be cancelled. A plea was taken that no proceeding was drawn against the plaintiff under the provisions of the State Aid Industries Act to obtain his explanation for the default and that the certificate was premature and without jurisdiction.

In the written statement a plea was taken that the suit was liable to be dismissed as no notice was issued under Section 80, C. P. C. to the defendant, who is the Director of Industries. Plaintiff failed to repay the loan for three instalments which fell due on 31-3-56, 31-3-57 and 31-3-58. He also did not furnish the utilisation certificate to the effect that the loan amount had been utilised for the purpose it was granted. Accordingly the certificate for the entire loan amount inclusive of interest was validly issued. Court's jurisdiction to try the suit was also questioned.

2. The learned Subordinate Judge held that the certificate and the proceeding arising therefrom were illegal and void and that the Court had jurisdiction to try the suit. He held that notice under Section 80, C. P. C. was not necessary as the suit was a continuation of the certificate proceeding. He accordingly decreed the suit with costs. Against this decree, the defendant has filed the appeal.

3. The learned Standing Counsel contended that the suit is liable to be dismissed as no notice under S. 80, C. P. C. was served on the defendant. Admittedly no notice has been served. Mr. Rath relied upon State of Seraikella v. Union of India, AIR 1951 SC 253; Hiraluxmi v.

I-T. Officer, AIR 1955 Pat 404 and Hussain Ali Mirza v. State of Andhra Pradesh, AIR 1963 Andhra Pradesh 164 in support of his contention that a notice under Section 80 C. P. C. was not necessary. Section 43(3) of the Act runs thus:

"43. The certificate-debtor may, at any time within six months—

(3) if he appeals, in accordance with Section 60, from an order passed under Section 10 — from the date of the decision of such appeal.

bring a suit in a Civil Court to have the certificate cancelled, or modified, and for any other consequential relief to which he may be entitled."

Thus the Act itself makes provision for a suit when the objection of a certificate debtor is overruled in appeal.

4. Question for consideration, however, is whether a notice under S. 80 C. P. C. is excluded by any provision under the Act.

In AIR 1951 SC 253, Rule 5 of the Federal Court Rules, framed under Section 214 of the Government of India Act, 1935, laid down that none of the provisions of the Code of Civil Procedure shall apply to any proceeding in the Federal Court unless specifically incorporated in those Rules. The provisions of S. 80 C. P. C. had not been incorporated in the Rules and that being so, their Lordships held that S. 80, C. P. C. could not affect suits instituted in the Federal Court under S. 204, Government of India Act, 1935. There is no provision in the Act which excludes operation of S. 80, C. P. C.

5. AIR 1955 Pat 404 and AIR 1963 Andh Pra 164 support the contention of Mr. Rath. In the Patna case it was held that a suit under S. 25 of the Act was merely a continuation of the previous claim proceeding under S. 21 of that Act and that no notice under S. 80, C. P. C. was necessary. The same view was taken in Andhra Pradesh case where a certificate was issued under the Government Demands Act. Their Lordships held that notice under Section 80, C. P. C. was not necessary relying on certain cases under Order 21, Rule 63, C. P. C. which, according to them, was analogous to S. 6 of the Government Demands Act.

6. In Sawai Singhai v. Union of India AIR 1966 SC 1068 a question arose whether notice under Section 80, C. P. C was necessary before a suit under O. 21, Rule 53 C. P. C. was instituted. Their Lordships accepted the opinion expressed in Bhagchand v. Secy. of State, AIR 1927 PC 176. The Judicial Committee had observed:

"Section 80 is express, explicit and mandatory and it admits of no implications or exceptions.

The matter was summed up by their Lordships of the Supreme Court in Paragraph 14 thus:

"It appears that on this question there has been a divergence of judicial opinion in India. But, in our opinion, the view that suits under O. 21, R. 63 did not attract the provisions of S. 80, is inconsistent with the plain, categorical and unambiguous words used by it.

The identical reasons apply to suits under Section 43 of the Act. A notice under Section 80 is mandatory unless expressly excluded by any special statute. In view of the aforesaid Supreme Court decision, AIR 1955 Pat 404 and AIR 1963 Andh Pra 164 cannot be treated as laying down good law.

Defendant's objection that the suit is liable to be dismissed as no notice under Section 80 was served, must be upheld.

7. In view of the aforesaid conclusion, it is unnecessary to express any view on the other question decided by the learned Subordinate Judge. The appeal can be disposed of on the sole point that the suit is to be dismissed as no notice under Section 80, C. P. C. was served.

8. In the result, the judgment of the learned Subordinate Judge is set aside and the plaintiff's suit is dismissed. The appeal is allowed with costs throughout.

9. PATRA, J.: I agree.
TVN/D.V.C. Appeal allowed.

IVN/D.V.C. **Appeal allowed.**

AIR 1969 ORISSA 59 (V 56 C 25)

S. ACHARYA, J.

Narasingo Maharana and others, Petitioners v. Chaitanya Sahu, Opposite Party.

Criminal Revn. No. 663 of 1966, D/- 2-8-1968, from order of S. J. Ganjam-Boudh, Berhampur, D/- 17-9-1966.

(A) Evidence Act (1872), S. 145 — Inconsistency between complainant's evidence and complaint petition on a point — Complainant's attention not drawn under S. 145 to such inconsistency — Complainant's evidence on such point corroborated by prosecution and even defence witnesses — Concurrent finding of fact of both lower courts on such point in favour of complainant — In revision, defence cannot take advantage of such inconsistency. (Para 5)

(B) Penal Code (1860), S. 379 — Sentence — Case of removal of crop from complainant's land — Co-accused, though associates of main accused, not found interested in land or in crop — Extent of deliberations with which they associated with crime not known — Fine of Rs. 100

each and in default to one month's rigorous imprisonment excessive for co-accused — Fine reduced to Rs. 50 each.

(Para 9)

J. K. Mohanty, for Petitioners; H. G. Panda, for Opposite Party.

ORDER: This revision petition is directed against the appellate judgment dated 17-9-1966 passed by Sri T. Misra, Sessions Judge, Ganjam-Boudh in Criminal Appeal No. 19 of 1966 maintaining the conviction of the petitioners under Section 379 I. P. C. passed by the trial court, and reducing the sentence of fine passed thereunder from Rs. 200 to Rs. 100 each, and in default to undergo rigorous imprisonment for one month each.

2. The prosecution case, in short, is that the complainant (P. W. 1) had taken lease of the disputed land locally known as Khatadi Kiari, from the Revenue Inspector on 24-7-1964, and grew paddy thereon. The petitioners on 14-12-1964 forcibly entered upon these lands and cut and removed the paddy crop grown thereon in spite of the remonstrance by P. W. 1, the complainant. The complainant after informing the Revenue Inspector, the Revenue Divisional Officer and the police, filed the complaint in the court against the petitioners.

It is to be noted here, that the disputed lands were the subject matter of a proceeding under Section 145 Cr. P. C. and having been attached in the said proceeding were kept in the management of the Revenue Inspector, who had leased out the said lands to the complainant for Rs. 195 under orders of the Sub-Divisional Officer.

3. The petitioners in defence denied all knowledge about the occurrence and stated that they did not cut and remove the paddy from the disputed lands.

4. Mr. Mohanty, the learned counsel for the petitioners raised the following points for consideration:

(i) The appellate court grievously erred in not considering the departure made by the complainant in his evidence before the trial court from the case presented by him in his complaint petition, specially with regard to the growing of crops by him on the disputed land.

(ii) The identity of the disputed land has not been established in this case.

(iii) The complainant has not been able to prove by satisfactory evidence that he actually took delivery of the disputed land from the Revenue Inspector after taking the lease of the suit land.

5. With regard to the first point, Mr. Mohanty contends that in the complaint petition it was categorically alleged that there was standing crop on the lands when the complainant took lease of the disputed lands, but during trial P. W. 1 and some of the P. Ws. led evidence to

the effect that the complainant grew the crop after taking lease of the disputed land. So the prosecution is guilty of suppressing the true facts.

In reply, Mr. H. G. Panda, the learned counsel for the opposite party contends that the defence in this case cannot take advantage of the above-mentioned inconsistency, if any, as the above statement in the complaint petition being a previous statement of the complainant was not put to the complainant in his cross-examination as required under Section 145 of the Evidence Act.

It is admitted by Mr. Mohanty that the attention of the complainant was not drawn to the relevant portion of his previous inconsistent statement in the complaint petition which is sought to be utilised as an important contradiction to his deposition with regard to the above point under consideration. The complainant, when he was examined in court, should have been confronted with his previous inconsistent statement, if any, in the complaint petition, in accordance with the provisions of Section 145 of the Evidence Act, in order to give him an opportunity to explain the discrepancies or inconsistencies, and to clear up the particular point of ambiguity.

As that has not been done in this case, and this being a matter of substance and not of mere form, the defence is not entitled to take advantage of any such inconsistency. Moreover, the complainant's case that he grew the crop has been sufficiently corroborated by the evidence of P. Ws. 2 and 3, and has also been supported by even D. Ws. 1 and 2, and the concurrent finding of fact of both the courts below has been that it is the complainant who grew the crop on the disputed land. This being so, this Court in revision has to proceed on the basis that it is the complainant who grew the crop after taking the lands on lease from the Revenue Inspector (P. W. 4).

6. Now taking up both the other contentions of the learned counsel for the petitioners regarding the identity of the land and the actual delivery of the disputed land to the complainant, Mr. Panda relied that the complainant is a man of the same village where the lands are situated, and as such he was expected to know the lands. I find it from the evidence of P. W. 1 that he had seen the lands prior to his taking lease of the same, and he knew that they were attached in a proceeding under Section 145 Cr. P. C. between two parties known to him.

Moreover, P. W. 4, the Revenue Inspector deposed that on receiving payment of Rs. 100 as the first instalment of the lease amount, he delivered possession of the disputed land to P. W. 1 on 24-7-64 in the presence of the parties of the said proceeding. This being the evidence,

which has been accepted by the courts below, it is not for this Court at this stage to examine the correctness of the said finding. Moreover, the question of identity and/or the delivery of possession is of no importance on the facts and circumstances of this case, as the plea of the accused persons was a complete denial of the occurrence, stating that they did not cut and remove the crops from the disputed lands.

Moreover, the case made out by the witnesses for the defence was to the effect that it was the complainant who reaped the paddy from the disputed land and that the accused persons did not have anything to do with the same. Thus the question, as raised, regarding the identity of the land and delivery of the same to the complainant, would be of no avail for the petitioner's defence.

7. In this view of the matter, I accept the concurrent finding of fact of both the courts below, and agreeing with the finding of the learned Sessions Judge, I maintain the conviction of all the petitioners under S. 379, I. P. C.

8. Mr. Mohanty, the learned counsel for the petitioner at last contended that petitioner No. 1, being the brother of one of the members of the second party in the proceeding under Section 145 Cr. P. C. might be said to have gone upon the lands, if at all, with some animus. But the other seven petitioners, i.e. petitioners Nos. 2 to 8 did not have any interest in the land or the crop standing thereon, and as such, the sentence of fine of Rs. 100 passed against each of them is rather excessive.

9. In the lower appellate court it was contended that the petitioners Nos. 2 to 8 acted merely as labourers, but the said court could not take that fact into consideration as the same plea was not taken in the trial court. I, however, find that these seven petitioners were no doubt the associates of petitioner No. 1, but there is nothing to show that they were in any way interested in the land or with the crop grown thereon.

It cannot also be ascertained from the evidence on record as to with what degree of deliberation they associated themselves in the commission of the crime. In this view of the matter, the sentence passed against these petitioners appears to me to be somewhat excessive and I, in reducing the same, hereby order that each of these petitioners Nos. 2 to 8 is to pay a fine of Rs. 50 and in default to undergo rigorous imprisonment of one month each. The sentence passed against petitioner no. 1 is, however, maintained as such. With this modification in the sentence, as stated above, the revision is dismissed.

JRM/D.V.C.

Petition partly allowed.

AIR 1969 ORISSA 61 (V 53 C 26)
S. BARMAN C. J. AND A. MISRA, J.
Prasanta Mohapatra, Petitioner v. State of Orissa, Opposite Party.

O. J. C. No. 141 of 1968, D/- 17-7-1968.

Constitution of India, Arts. 311(2) and 309 — Temporary appointment for a fixed period to officiate in a post — Revision to lower rank before expiry of such period — Nothing in appointment order permitting such premature termination — Reversion illegal.

Where a person, temporarily appointed for a fixed period to officiate in a post, is reverted to a lower rank before the expiry of such period and nothing in the appointment order permits such premature termination, the reversion is illegal.

(Para 6)

When a government servant has a right to a post or to a rank under the terms of contract of employment, express or implied, or under the rules governing the conditions of his service, premature termination of his service by reversion before the expiry of the period specified in the appointment order, is by itself and *prima facie* a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto. He will then be entitled to the protection of Art. 311 of the Constitution.

AIR 1958 SC 36, Foll. (Para 5)

Thus where a person, temporarily appointed for a fixed period to officiate in a post, is reverted to a lower rank before the expiry of such period, and there is nothing in the appointment order permitting such premature termination, the reversion is illegal. He had acquired a right to hold the post till the expiry of that period and his service cannot be prematurely terminated unless he is guilty of misconduct, negligence, inefficiency or other disqualifications and proceedings under the rules read with Art. 311(2) are taken.

(Para 6)

Cases Referred: Chronological Paras (1958) AIR 1958 SC 36 (V 45)=1958
SCR 828, Parshotam Lal Dhingra v.

Union of India 5

R. Mohanty and R. K. Kar, for Petitioner; Advocate-General, for Opposite Party.

BARMAN, C. J.: The petitioner challenges the order of his reversion from the post of Director of Fisheries, Orissa to which post he was temporarily appointed to act for specified period to the post of Joint Director of Fisheries, by an order dated February, 27, 1968 passed by the Government of Orissa.

2. The permanent incumbent of the post of Director of Fisheries, Orissa was one Sri G. N. Mitra who since September,

1963 has been and still is, on deputation to the Government of India retaining however his lien in the post. The then senior-most Deputy Director of Fisheries Sri G. B. Mohanty was promoted to officiate in the said post of Director of Fisheries in the place of Sri G. N. Mitra. In June, 1964 Sri G. B. Mohanty died. Thereafter the petitioner Sri Prasanta Mohapatra was appointed temporarily to act as Director of Fisheries in the vacancy caused by Sri Mitra's deputation, for periods of six months successively by a series of orders. The last of these orders dated November 2, 1967 which is relevant for the purpose of this writ petition, reads as follows:

Government of Orissa.
Agricultural Department.
Notification:

Dated Bhubaneswar 2nd November, 1967.

No. 3 FY-OA-7/36-33797/Ag. Sri Prasanta Mohapatra, who was appointed temporarily to act as Director of Fisheries, Orissa, is allowed to continue as such till 25th May, 1968, or till the return of Sri G. N. Mitra, Director of Fisheries, under deputation to Government of India, whichever is earlier.

By order of the Governor.
Sd. B. K. Mohanty
Deputy Secretary to Government"

3. By the impugned order dated February 27, 1968 the petitioner was reverted and appointed temporarily as Joint Director of Fisheries which is lower in rank than that of Director of Fisheries for the period specified in that order. The order reads as follows:

"Government of Orissa.
Agricultural Department:
Notification.

Bhubaneswar, 27th February, 1968.
No. 6558-Ag. On relief by Sri P. Misra, I. A. S., Sri Prasanta Mohapatra, who was last appointed temporarily, as Director of Fisheries in Notification No. 33797 AG dated 2-11-67 is reverted and appointed temporarily as Joint Director of Fisheries for a period of six months or till a selection is made in consultation with the Public Service Commission, Orissa, whichever is earlier. The headquarters of the Joint Director will be at Cuttack.

By order of the Governor.
Sd. B. K. Mohanty.

Deputy Secretary to Government".
The petitioner challenges this order of reversion to a lower post after premature termination of his services as officiating Director of Fisheries, as amounting to a punishment as this was done obviously without giving him an opportunity to represent against such reversion in contravention of Article 311(2) of the Constitution. His point is that the impugned order, in so far as it brings about the

termination of his services as temporary Director of Fisheries from a date prior to the date specified in the order of appointment dated November 2, 1967, operates as a punishment for which the procedure under Article 311 should have been followed and this not having been done the order is liable to be quashed.

4. In support of the order of reversion, the argument urged on behalf of the State, in substance, is this: In case of probationary, officiating or temporary appointments the persons appointed have no right to the posts; their services can be terminated at any time according to the rules and service conditions if any; Article 311 has no application. The State relied on Rule 31 of the Orissa Service Code, Vol. I which provides that a Government servant officiates in a post when he performs the duties of a post on which another person holds a lien; a Government servant may, however, be appointed to officiate in a vacant post, on which no other person holds a lien, by the authority competent to make a substantive appointment to that vacant post; it was submitted that the petitioner's appointment as Director of Fisheries was an officiating appointment in that he was appointed temporarily to act in place of the permanent incumbent on deputation.

Therefore, it is submitted, he has no right to the post and so premature termination of his services by reversion at any time during such officiation cannot be challenged as unconstitutional. This argument, in our opinion, is not tenable in view of the settled position in law as discussed hereunder.

5. The test for determining whether the termination of the service of a Govt. servant is by way of punishment is to ascertain whether the servant, but for such termination, had the right to hold the post. If he had a right to the post at the time of the termination of his service by way of reversion, such premature termination of service by reversion before the expiry of the period specified in the order of his officiating or temporary appointment, will by itself be a punishment, and he will be entitled to the protection of Article 311. Shortly put, the principle is that when a servant has a right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant, or his reduction to a lower post, is by itself and *prima facie* a punishment for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto: *Purshotam Lal Dhingra v. Union of India*, AIR 1958 SC 36, 48.

6. What happened here is this: The petitioner had already been appointed for successive periods continuously to act temporarily as Director of Fisheries in place of the permanent incumbent on deputation, by a series of orders. The last such order dated November 2, 1967 permitted him to "continue" to act as Director of Fisheries till May 25, 1968 or till the return of the permanent incumbent Sri G. N. Mitra whichever is earlier. It is thus a case of temporary or officiating appointment for a fixed period under the terms of employment as communicated in the order of November 2, 1967. There is nothing in the said order dated November 2, 1967 permitting premature termination of his appointment before the expiry of the period fixed in that order.

Therefore, following the principles laid down by the Supreme Court, the petitioner having been allowed to continue to act as Director of Fisheries though temporarily or in an officiating capacity for the period specified in the order of November 2, 1967, he acquired a right to hold the post till the expiry of that period and his service cannot be terminated before the expiry of that period unless he has been guilty of some misconduct, negligence, inefficiency or other disqualifications and appropriate proceedings are taken under the rules read with Article 311(2) of the Constitution.

7. In this view of the case, the impugned order of the Government dated February 27, 1968 is quashed. The writ petition is allowed with costs. Hearing fee Rs. 100.

8. A. MISRA, J.: I agree.

JRM/D.V.C. Petition allowed.

AIR 1969 ORISSA 63 (V 56 C 27)

G. K. MISRA, J.

Smt. Brajabala Das, Petitioner v. Radha Kamal Das and others, Respondents.

Civil Revn. No. 288 of 1966, D/- 23-7-1968, from decision of Addl. Sub J., Balasore, D/- 27-6-1966.

(A) Civil P. C. (1908), Sec. 115 and O. 21, R. 90 — Finding of fact — Finding that sale proclamation was not published at the site is one of pure fact — Cannot be disturbed in revision — Such non-publication clearly amounts to material irregularity in publishing sale.

(Para 2)

(B) Limitation Act (1963), S. 17 — Change in law — Limitation Act (1908), S. 18.

Section 18 of the old Act has been recast in Section 17 of the new Act on the lines of Section 26 of Limitation Act, 1939 of the United Kingdom. The expres-

sion "could with reasonable diligence have discovered it" has been newly introduced in Section 17 which was not a part of Section 18 of the old Act.

(Para 4)

(C) Limitation Act (1963), S. 17 — Fraud — Pleading and proof — Nature of proof required to prove fraud — Shifting of onus — Application under O. 21, R. 90 C. P. C. for setting aside sale prima facie barred — Applicant invoking aid of S. 17 must prove fraud beyond all reasonable doubt — Opposite party has then to establish that applicant had full knowledge of all facts resulting in sale beyond period of limitation.

An applicant under O. 21, R. 90, Civil P. C. who invokes the aid of S. 17 Limitation Act to save the bar of limitation must plead and prove fraud. The principles underlying O. 6, R. 4 and O. 7, R. 6, Civil P. C. regarding pleadings apply equally to applications.

(Para 5)

Fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion or conjecture. Knowledge of fraud must not be vague but clear and definite of all facts constituting the fraud. AIR 1923 PC 73 and AIR 1940 PC 98 and AIR 1941 PC 93, Rel. on.

(Paras 5 and 8)

If fraud is established, then the onus would shift to the other party to prove that influence of the fraud has ceased to operate, or that the applicant could have with reasonable diligence discovered the fraud. The opposite party must show that the applicant under O. 21, R. 90 had knowledge of the sale beyond the period of limitation. Such knowledge must be clear and definite of the facts constituting the particular fraud. It is not sufficient merely to establish that the applicant had a vague knowledge or opinion of the sale but that he had a full knowledge of all the facts resulting in the sale. (1893) ILR 17 Bom 341 (PC) and (1912) 16 Cal WN 694 and AIR 1922 Cal 157, Rel. on.

(Para 6)

(D) Civil P. C. (1908), S. 115 and O. 21, R. 90 — Erroneous decision on question of law concerning jurisdiction — High Court would interfere in revision — Order dismissing application under O. 21, R. 90 as time barred reversed by appellate Court by committing error of law on question of fraud — Order set aside.

If a subordinate Court itself commits error of law and the said error has relation to the question of jurisdiction of the Court to try the dispute, then the High Court can interfere under S. 115. A plea of limitation or of res judicata is a plea of law which concerns the jurisdiction of the Court which tries the proceedings. A finding on those pleas in favour

of the party which raises them would oust the jurisdiction of the Court. An erroneous decision on these pleas can be said to be concerned with the question of jurisdiction falling within the purview of Section 115, C. P. C. AIR 1966 SC 153, Foll.
(Para 9)

Where, therefore, the appellate Court reversed the decision of the trial court dismissing an application under O. 21, R. 90 C. P. C. as barred by limitation by committing an error of law on the question of fraud and thereby gave itself the jurisdiction which did not vest in it, the High Court in revision set aside the order of the appellate court setting aside the sale.
(Para 9)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 153 (V 53)= (1966)	
1 SCR 102, Pandurang v. Maruti	9
(1941) AIR 1941 PC 93 (V 28)=1946	
RLR 213, Narayanan v. Official	
Assignee, Rangoon	5
(1940) AIR 1940 PC 98 (V 27)=ILR	
(1940) Kar PC 216, Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co., Ltd.	5
(1923) AIR 1923 PC 73 (V 10)=39 Cal LJ 165, Satish Chandra v. Satis Kantha Roy	5
(1922) AIR 1922 Cal 157 (V 9)=ILR	
49 Cal 886, Biman Chandra v. Promotho Nath	6
(1912) 16 Cal WN 894=16 Ind Cas 464, Narayan Sahu v. Damodar Das	6
(1893) 20 Ind App 1=ILR 17 Bom 341 (PC), Rahimbhoy v. C. A. Turner	6

G. Rath, for Petitioner; L. K. Dasgupta and G. N. Sengupta, for Opposite Party.

ORDER: Petitioner Brajabala (auction-purchaser) is the wife of opposite party No. 2 Radha Kumuda Das (one of the judgment-debtors), who is the elder brother of opposite party No. 1 Radha Kamal Das (the other judgment-debtor). Opposite Party No. 3 is the decree-holder.

Both the judgment-debtors received notice under Order 21, Rule 22, C. P. C. in Execution Case No. 62 of 1954 in the Court of the Munsif Balasore, arising out of a money suit No. 1277 of 1941 of the court of the Munsif, Kendrapara. Judgment-debtors took no steps. The disputed property was attached on 18-7-54. They received valuation notice and filed no objection. Sale-proclamation was issued on 21-9-54. Opposite Party No. 2 applied for instalments which were allowed. He paid Rs. 700 in six instalments in between 16-7-55 and 30-4-56. Thereafter he defaulted. The total decretal dues were Rs. 1284-9-0. There remained thus a balance of Rs. 500 and odd out of the decretal dues, without payment. A fresh sale-proclamation was issued on 20-11-59. It was published in the daily Prajatantra on 26-12-59 and

also at the site by beat of drums. The sale took place on 15-1-60 and the property was purchased by the petitioner who was the sale bidder at the auction sale. The sale was confirmed on 19-2-60. Possession of the lands was delivered to the auction-purchaser on 1-8-62. Opposite Party No. 1 filed an application under Order 21, Rule 90, C. P. C. on 11-4-64 for setting aside the sale. In the application it was alleged that the decree-holder in collusion with the auction-purchaser and her husband fraudulently suppressed the sale-proclamation which was not published at the site and that opposite party No. 1 had no knowledge of the sale as a result of such fraud and consequently he was unable to make an application under Order 21, Rule 90 in time. He accordingly invoked the protection of Section 17 of the Limitation Act, 1963 (hereinafter referred to as the new Act.)

Opposite parties 2 and 3 did not contest. The petitioner contested the application saying that there was no material irregularity or fraud in publishing the sale-proclamation and that opposite party No. 1 was not entitled to invoke the aid of Section 17 of the new Act.

The learned Munisif held that fraud was not established and the application under Order 21, Rule 90 was barred by limitation. The learned Subordinate Judge in appeal held that a valuable property worth Rs. 7000 was sold for a grossly low value of Rs. 900 that there was fraudulent suppression of the sale-proclamation at the instance of opposite party No. 2 and that the application was within time as opposite party No. 1 was entitled to the protection of Section 17 of the new Act. He accordingly set aside the sale. Against the judgment setting aside the sale, the civil revision has been filed.

2. There is no dispute that a valuable property containing houses, orchard and two tanks upon an area of 2.75 acres and odd of land within the municipal area of Balasore town by the side of the main road, has been sold for a shockingly low sum of Rs. 900 in an auction sale where the auction-purchaser, wife of one of the judgment-debtors was the sale bidder. The learned lower appellate court has found that the sale-proclamation was not published in the locality.

Order 21, Rule 90, C. P. C., so far as relevant, runs thus:

Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to a share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it;

- (1922) AIR 1922 Pat 258 (V 9)=
 ILR 1 Pat 717, Sir L. E. Rallie v.
 A. H. Forbes
 (1919) AIR 1919 All 126 (V 6)=
 49 Ind Cas 353, Ram Singh v.
 Baij Nath
 (1904) ILR 32 Cal 296=32 Ind App
 23 (PC), Khiarajmal v. Daim
 (1892) 19 Ind App 203=ILR 20 Cal
 296 (PC), Sarat Chunder Dey v.
 Gopal Chunder Laha

Prem Lall, Parmeshwar Prasad Sinha and Sadhu Saran Sahai, for Appellants; Lal Narain Sinha, J. C. Sinha, Keshri Kishore Saran and Rajendra Prasad Sinha, for Respondents.

KANHAIYAJI, J.:— This second appeal is by the defendants against the concurrent judgments and decrees of the two courts below decreeing the suit of the plaintiff for redemption of the Sudbharna bond dated the 28th March, 1932, executed by Raghunandan Prasad Sahu alias Ragho Sahu, son of Ramadhin Sahu (hereinafter called Raghunandan Sahu) in favour of Mohari Bai wife of Kushal Marwari.

2. The facts leading to this appeal, in short, are that Raghunandan Sahu borrowed a sum of Rs. 1,800/- from Mohari Bai and executed a Sudbharna bond in her favour in lieu of interest and gave his two houses mentioned in Schedule 1 of the plaint as security and put her in possession over the houses as Sudbharnadar. Subsequently, Raghunandan died leaving behind him his two sister's sons Satyanand Gupta and Pandit Bidyanand Vedalankar who were full brothers. On 3rd December, 1950 there was partition between the two brothers by which the two houses along with other properties were allotted to the share of Satyanand Gupta. In 1958 Satyanand Gupta filed a petition before the Anchal Adhikari, Khagaria for getting his name mutated with regard to the said two houses, but on contest by the defendants the petition was dismissed. Thereafter Satyanand Gupta offered the mortgage money to the defendants and on their refusal filed the present suit, for the reliefs mentioned in the plaint. Mohari Bai is dead and her heirs are the defendants of the suit. Defendants nos. 1 to 4 who are majors filed a joint written statement and contested the suit. Their main defence was that the document executed by Raghunandan Sahu on the 28th March, 1932 in favour of Mohari Bai was deed of sale and not a Sudbharna bond.

The houses fell down during the earthquake of 1934 and were reconstructed by Mohari Bai who incurred an expenditure of about Rs. 1,00,000 over their construction to the knowledge of Raghunandan Sahu. Their further case was that in case it be held that the document dated

the 28th March, 1932 was a Sudbharna bond, then it has been extinguished by the conduct of the parties. They also pleaded adverse possession, estoppel and acquiescence. According to defendants nos. 1 to 4, the plaintiff was neither the Bhagina of Raghunandan Sahu nor was he his heir and legal representative. The Guardian-ad-litem filed a formal written statement on behalf of the minor defendants supporting the case of the major defendants.

3. The plaint of the present suit as originally filed, contained the following reliefs:—

"21 (Ka) — It may be adjudicated and decided by the court that the deed dated 28-3-1932 executed by Sri Raghunandan Prasad Sahu alias Ragho Sahu in favour of Srimati Mohari Bai was in fact a Sudbharna mortgage bond and not a deed of sale or conditional sale, and it may be further declared that the plaintiff is the legal heir in his capacity as the Bhagina (sister's son) of Sri Raghunandan Prasad Sahu alias Ragho Sahu, deceased, and the plaintiff has got the right of redemption of the Sudbharna property.

(Kha) — After adjudication of the above facts, a decree for redemption may be passed in favour of the plaintiff and he may be permitted to deposit the Sudbharna money, and the defendants may be directed to withdraw the Sudbharna money and to give up their possession of the Sudbharna property and to deliver it to the plaintiff.

(Ga) — If the defendants fail to deliver possession to the plaintiff within the period fixed by the court, possession thereof may be delivered through court, and in that case a decree for future mesne profits from the date fixed in the decree till the date of delivery of possession may be passed in favour of the plaintiff against the person and property of the defendants after ascertainment thereof by the (Pleader) Commissioner.

(Gha) — The costs of the suit may be awarded to the plaintiff against the defendants.

(Angha) — Other reliefs deemed fit in the circumstances of the case may be granted to the plaintiff."

Subsequently by an amendment allowed by the learned Munsif, Clause 'Kha' of the reliefs mentioned in paragraph 21 of the plaint was amended as follows:—

(Kha) — A decree for redemption of rehan may be passed by the court in favour of the plaintiff and the plaintiff may be put in exclusive possession of the Sudbharna property on dispossession of the defendants after taking the Sudbharna money."

4. The trial Court framed nine issues and decided all the issues in favour of the plaintiff and decreed the suit. It held

that the suit was properly valued, document was a mortgage and not a sale-deed, and the suit was not barred by estoppel or acquiescence. The plaintiff has got a cause of action and right to redeem and his right has not been extinguished by adverse possession. It further held that the plaintiff was the sister's son of Raghunandan Sahu and the suit as framed was maintainable. In appeal before the Subordinate Judge filed by the defendants at the time of argument, the lawyer for the defendants did not challenge the finding of the trial Court that the document dated the 28th March, 1932 was a Sudbharna bond and not a sale deed. However, from the argument advanced, the learned Subordinate Judge formulated the following points for determination:—

"1. Whether the plaintiff and his brother Pandit Bidyanand Vedalankar are the Bhagini of Shri Raghunandan Prasad Sahu alias Ragho Sahu and whether after the death of Sri Raghunandan Pd. Sahu they came in possession over his entire properties including the house in suit?

2. Whether the plaintiff is only entitled to redeem the Sudbharna bond dated 28-3-32?

3. Whether the plaintiff's title has been extinguished by adverse possession?

4. Whether the suit is barred by estoppel?"

The learned Subordinate Judge decided all the points in favour of the plaintiff-respondent and dismissed the appeal. He held that, the plaintiff was the sister's son of Raghunandan Sahu, the plaintiff and his brother were the only nearest reverters of Raghunandan Sahu at the time of the filing of the present suit, the defendants did not acquire title to the suit houses by adverse possession and the suit was not barred by estoppel.

5. The main questions which have been argued before us by Mr. Prem Lall appearing for the appellants are that the Sudbharna bond has become a sale deed by the acts of the parties. The plaintiff is estopped and it is not open to him to challenge that the document is not a sale deed but a Sudbharna bond. The plaintiff has lost the right of redemption by adverse possession and lastly the Munisif had no power to amend the plaint to assume jurisdiction to try the suit. Mr. Prem Lall did not challenge the finding of the lower appellate court that Satyanand Gupta (Plaintiff) and Pandit Bidyanand Vedalankar were the Bhagini of Raghunandan Sahu and they were the only, reverters of Raghunandan Sahu at the time of the filing of the present suit and on partition between the plaintiff and his brothers the suit properties had been allotted to the share of the plaintiff.

6. In support of the first point Mr. Prem Lall referred to the default clause of the Sudbharna bond (Ext. 2/Ka) which is as follows:

"If I, the executant, fail to repay the aforesaid debt on the due date of repayment, save the (the money covered by this mortgage bond) (sic) shall be treated as consideration money on the expiry of the term and this Sudbharna bond shall be treated as a deed of sale and on the expiry of the term the said creditor shall enter into possession of the Sudbharna property as a vendee and shall get her name entered in the office of the zamindar by getting the name of me, the executant, removed, therefrom."

He contended that as the money borrowed on the Sudbharna bond has not been repaid by the 30th Baisakh 1340 Fasli, the consequences have taken place, as stated above. There is no dispute that the mortgagor did not repay the amount on the due date. Thereafter the defendants got their names mutated in the Sharists of the Anchal Adhikari in place of Raghunandan Sahu. Therefore, it was argued for the appellants that the equity of redemption had been extinguished as laid down under Section 60 of the Transfer of Property Act. It will also amount to this that by such consensual act of the parties, the defendants remained in possession for more than twelve years and, therefore, they acquired title by adverse possession. The argument is that even though the act itself may not transfer the title of the properties in law and may be invalid in law, but still it will give the starting point for adverse possession. In support of this argument, Mr. Prem Lall relied on two cases of this Court.

In the case of Markanda Mahapatra v. Kamleshwar Rao, AIR 1949 Pat 197 the facts were that a village which was a service tenure was granted to the ancestor of the plaintiff and of the defendants second party about 200 years ago by the Raja of Parlakhemedi. Sometime back the village had been mortgaged to the predecessor-in-title of defendant no. 1. The claim of the plaintiff was that the usufruct of the village had satisfied the usufructuary mortgages, and he was entitled to get back the village. While it was claimed on behalf of defendant no. 1 that he had acquired rights by adverse possession against the true owners as he had been possessing the whole village since after 1922 when the usufructuary mortgages had been fully satisfied. It has been decided in the above case that where the mortgagor and the mortgagee both agree by a consensual act that the possession hitherto held as mortgagee should now be held as vendee, such a transaction tantamounts to delivery of

the property by the vendor to the vendee. In support of this, reliance was placed on several decisions of the Madras High Court and other High Courts. Mr. Justice B. P. Sinha, as he then was, in paragraph 31 of the said judgment has observed as follows:—

"It is well recognised principle that a mortgagee cannot, by a mere assertion of his own or by a unilateral act on his own part, convert his possession as mortgagee into that of an absolute owner. But where, as in the present case, the bilateral acts of the parties referred to above, though invalid and, therefore, inoperative to convey title on the dates of those transactions, would operate to give adverse possession which, if continued for the statutory period, would ripen into a good title."

Another case relied upon by Mr. Prem Lall is Sukhdeo Singh v. Lekha Singh, AIR 1957 Pat 502. It only reiterates the principle that where both the mortgagor and the mortgagee agree by a transaction to which they are parties, that the character of possession as mortgagee should change into that of possession as an absolute owner in spite of the invalidity of the transaction to convey title at once, the possession so given can operate on the expiry of the statutory period to create title by adverse possession. In the above case the Courts below had found that the compromise was genuine and the mortgagees had been in adverse possession of the disputed land since the date of the compromise for more than twelve years and, therefore, they had acquired indefeasible title by adverse possession. If by some act the parties agree to transfer the equity of redemption to the transferee, but for some reason or other the instrument is invalid to pass a good title in law, it may amount to explain the nature and character of the possession thenceforth held by the parties. In such a case although the sale or the compromise may be invalid for want of registration, the character of the possession of the mortgagee changes and thereafter he begins to possess the property not as a mortgagee but as a purchaser and if he remains in possession for the statutory period, he would acquire title by adverse possession.

7. These cases stand by themselves and are distinguishable. In my opinion, these cases are not authorities for the proposition that a mortgagee may acquire title by adverse possession in all cases. The principle laid down there cannot be extended beyond the facts of those cases.

8. Learned Advocate General appearing on behalf of the plaintiff contended that the penalty clause inserted in the mortgage bond amounted to a clog and it cannot be a foundation for changing the nature of the possession of the mort-

gagee. In support of his argument he relied on a case of the Supreme Court. Umedilal v. Jagan Prasad, AIR 1965 SC 225. This was a suit for redemption of a mortgage executed on the 19th March, 1919. The bond executed in favour of the mortgagee provided that a mortgagor would get the property redeemed on payment of the mortgage amount as well as the cost of patta which may have been incurred by the mortgagee and the repairing expenses within a period of 15 years. After the expiry of the stipulated period of 15 years, this shop would be deemed as an absolute transfer for this very amount. Till the mortgage money is not paid, the mortgagor shall have no concern with the shop. The Supreme Court held that the relevant clause meant that in the event of the amount due under the mortgage remaining unpaid within the stipulated period, the mortgagor's title would be extinguished and the mortgagee would become the absolute owner of the property. Hence, the stipulation in the mortgage deed amounted to a clog and could not be enforced so as to bar the suit for redemption subject, of course, to the general law of limitation prescribed in that behalf.

Similarly in Mehrban Khan v. Makhna, AIR 1930 P. C. 142 while the Privy Council was dealing with the provisions of the mortgage deed conferring on the mortgagee upon redemption interest in the mortgage property, it was held that the said provisions amounted to a clog or fetter on the equity of redemption and as such were void since they were inconsistent with the very nature and essence of the mortgage. These decisions show that such stipulations are void, and they cannot be a foundation for changing the rights and title of the parties to the deed. In my opinion, the relationship of mortgagor and mortgagee continued as of a creditor and a debtor even after the failure of the mortgagor to pay the mortgage amount on the due date. The transaction being a mortgage, question of interpretation of the document does not arise.

9. The next question in this case is as to whether there was any subsequent act by which the character of the mortgage changed into a sale-deed. Mr. Prem Lall relied on three facts in support of his contention; that after the failure of the mortgagor to repay the amount on the due date, the mortgage became a sale. Firstly he relied on the mutation of the names of the defendants in the office of the Anchal Adhikari in place of Raghunandan Sao, secondly, admission made by Raghunandan Sao in a Criminal case and thirdly reconstruction of the house by spending a huge amount of money by the defendants sometime after the year 1934. There is no dispute that the names

of the defendants had been mutated, but there is a great dispute regarding the admission of Raghunandan Sao. It appears that there was a criminal case started against one Bansi Marwari with regard to the construction of a latrine in one of the houses in suit. Raghunandan Sao was a defence witness on behalf of Bansi Marwari and he stated,

"I know the accused. I sold a house of mine at Khagaria to the accused about a year ago."

It is difficult to accept that this statement of Raghunandan Sao is admissible to establish any change in the nature of the possession of the mortgagee. When this statement was made Mohari Bai, the mortgagee of the Sudbharna bond, was alive and continued even after the above statement was made. Therefore, the statement made by Raghunandan Sao was obviously wrong, because he had not sold the house to the accused of the criminal case. Even if it be accepted that the statement of Raghunandan Sao indicated that he made an admission that Mohari Bai had become the owner of the disputed house, even then in the eye of law it would not extinguish the right of redemption in respect of the Sudbharna bond in question.

In this connection it would be profitable to see the case reported in 49 Ind Cas 333=(AIR 1919 All 126), Ram Singh v. Baijnath, which has been relied upon by the lower appellate court. A Division Bench of the Allahabad High Court in the above case has rightly held:

"A mere admission by a mortgagor or an understanding between him and the mortgagee that the mortgagee has become the owner of the mortgaged property cannot extinguish the mortgage or destroy the right of redemption of the mortgagor.

It is open to a mortgagor and mortgagee to enter into a contract subsequently to the mortgage for the sale of the mortgaged property to the mortgagee. But the contract must not be part and parcel of the original loan or mortgage bargain. In other words, the act of the parties that is referred to in Section 60 of the Transfer of Property Act as extinguishing a mortgage must be one which is independent of the mortgage transaction and is not a part and parcel of it."

As stated by me above, the mutation and the admission both cannot be relied upon by the defendants in support of their case of adverse possession. So far the case of the defendants that they have reconstructed the houses after investment of about a lakh of rupees, the findings of the courts below are against this contention of the defendants. The defendants made out a case in their written statement that the suit houses were recon-

structed after the earthquake of 1934 to the knowledge of Raghunandan Sao and the plaintiff and they stood by and acquiesced in the same. Mr. Prem Lall contended that the plaintiff is bound by estoppel, which sometime is called building estoppel, because having acquiesced to the reconstruction of the houses, at such a heavy cost he cannot turn round and claim title to the houses. But as the court below has found none of the witnesses who were examined on behalf of the defendants stated in his examination-in-chief to reveal that he ever saw either Raghunandan Sao or the plaintiff near the disputed houses when they were being constructed after the earthquake of 1934, as alleged by the defendants, nor there is anything on the record to indicate that Raghunandan Sao gave his consent to the reconstruction of the house at the costs of the defendants. It is alleged by the plaintiff that Raghunandan Sao was living at somewhere else at that material point of time and he had no knowledge of the reconstruction of the house. There is no evidence on the record that the house of the plaintiff was at a distance of about 100 steps from the suit houses. The court below has not even accepted this allegation of the defendants that the houses were completely demolished by the earthquake of 1934, and the defendants rebuilt the same by spending a lakh of rupees. In this situation, the contention of Mr. Prem Lall that act of the mortgagor accepted by the mortgagee will change the nature of the transaction cannot be accepted.

The cases relied upon by him, namely, AIR 1965 Pat 262, Khadimul Haque v. Maral Dubey and AIR 1966 SC 405, Bharat Singh v. Mt. Bhagirathi are distinguishable and do not support the contention made on behalf of the appellant. Mr. Prem Lall also relied upon the cases Sarat Chunder Day v. Gopal Chunder Laha (1892) 19 Ind App 203 (PC), Sir L. E. Ralli v. A. R. Forbes, ILR 1 Pat 717=(AIR 1922 Pat 258) and Dr. Abdul Khair v. Miss Sheila Myrtle James, AIR 1957 Pat 308 in support of his contention that if a party having an interest to prevent an act being done acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity he has no more right to challenge the act. But there can be no acquiescence or waiver in a case where both parties are unaware of their rights in the disputed property. Unless both are fully cognizant of their right to dispute them, the parties cannot be said to acquiesce in the claims of the other. In the instant case there is nothing to show that Raghunandan Sao or the plaintiff was aware that the unilateral acts of the defendants

would change the nature of the rights. Therefore, no building estoppel or equity has arisen in favour of the defendants which can prevent the plaintiff in the circumstances of the case to claim redemption of the suit houses.

The learned Advocate General relied on two decisions in support of his submissions that generally the possession of the mortgagee cannot be regarded as adverse to the mortgagor. In the case of Khiarajmal v. Daim, (1904) ILR 32 Cal 296 (PC), the Judicial Committee of the Privy Council has observed as follows:—

"Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between the mortgagor and mortgagee. As between them, neither exclusive possession of the mortgagee for any length of time short of the statutory period of sixty years nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem."

In another case referred to by the learned Advocate General, namely, Ramlochan Singh v. Pradip Singh, AIR 1959 Pat 230 a Bench of this Court has rightly laid down the principle of law which is as follows:—

"Adverse possession is possession in denial of the right of another to immediate possession. Consequently, possession cannot be regarded as adverse against a person who is not entitled in law to possession. So long as the mortgagee remains in possession, the mortgagor has no immediate right to claim possession of the mortgaged property. In such circumstances the possession of the mortgagee cannot be regarded as adverse to the mortgagor."

Therefore, I am of opinion that the plaintiff has not lost his right to redeem the mortgage and obtain khas possession of the suit properties.

10. It was further urged on behalf of the defendants that the Munsif cannot resume jurisdiction by allowing amendment of the plaint. It was contended by Mr. Prem Lall that originally, according to the reliefs claimed, the suit was for a declaration of the plaintiff's title followed by another declaration that the plaintiff has got the right to redeem the mortgage bond and also for possession. Therefore, the valuation of the suit was not only Rs. 1,800, the value of the mortgage bond, but Rs. 72,935, the valuation of the houses estimated by an Engineer appointed in the suit. In other words according to Mr. Prem Lall, the Munsif had no pecuniary jurisdiction initially when the plaint was filed before him and, therefore, he had no jurisdiction to allow

the amendment of the plaint. According to him, the plaint comes under Section 7 Clause V(e) of the Court Fees Act and after the amendment it became a suit under Section 7 Clause X Part I of the Court Fees Act.

The declaration sought by the plaintiff that he was Bhagina of Raghunandan Sao even though it may be taken to be not necessary, still the Court will have no jurisdiction to ignore it and allow the amendment. Mr. Prem Lall in support of his contention relied upon some decisions of other High Courts, but he conceded that in case it is construed that the plaint originally framed was only for a redemption and it was from the very beginning a suit for redemption, then the suit was maintainable and the cases relied upon by him will have no application. In the first place there is no specific plea of want of pecuniary jurisdiction in the written statement. Secondly, the substance of the plaint has to be seen in deciding the nature of the suit. I have already quoted the reliefs mentioned in the plaint originally filed and also the amendment allowed by the learned Munsif. On a perusal of the facts stated in the plaint and the reliefs, I am of definite opinion that the suit from the very beginning was a suit for redemption of the Sudbharna bond and it was rightly valued at Rs. 1,800/- The valuation of a suit for redemption of a mortgage bond is both for the purposes of jurisdiction and computation of court fees.

In the Full Bench case of Ramkhelawan Sahu v. Bir Surendar Sahi, AIR 1938 Pat 22 (FB), this Court has held that the valuation of a suit for Court fee purposes is to be determined by the question whether the suit is really one for declaration in the true sense of the word, or whether it is a suit for possession. So where the plaintiff claims certain property as a reversionary heir of a deceased male after the death of his widow on the ground that the alleged gift by the widow under which the defendants claim possession is void, that suit is merely for possession, as the deed of gift can be ignored and there need be no suit or claim to have it set aside. In the instant case, the plaintiff really wanted a decree for redemption of the Sudbharna bond and the declaration as sought regarding his Bhaginiaship was merely surplusage and, therefore, the nature of the suit remained the same before the amendment and even after the amendment, and the learned Munsif had jurisdiction to allow the amendment. The valuation put on the relief at Rs. 1,800 shall also be the valuation under S. 8 of the Suits Valuation Act for the purposes of jurisdiction. It follows, therefore, that Rs. 1800 was the correct valuation of the suit and the

Munsif had full jurisdiction to allow the amendment and not to return the plaint, as contended by Mr. Prem Lall. It also appears that the defendants had come in revision before this Court against the order of the amendment allowed by the learned Munsif, but they withdrew the same, and they had taken no objection with regard to the amendment of the plaint in their memorandum of appeal filed in the court below. Therefore, the defendants cannot be allowed to raise this point in a second appeal before this Court.

11. All the points raised in the appeal on behalf of the appellants fail and the appeal is, accordingly dismissed. But in the circumstances of the case the parties will bear their own costs of this Court.

12. S. N. P. SINGH, J. --- I agree.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 70 (V 56 C 17)

N. L. UNTWALIA AND P. K.
BANERJI, JJ.

Basanta Chandra Ghose, Appellant v.
Collector of Patna, Respondent.

A. F. A. O. No. 24 of 1964, D/- 14-5-
1968, from order of Addl. Sub-J. Patna,
D/- 11-1-1964.

(A) Contempt of Courts Act (1952), S. 4
--- Conviction for contempt of court
--- Award of costs --- High Court has inherent
power to award costs. (Para 4)

(B) Civil P. C. (1908), S. 38 --- Decree
for award of costs in contempt proceedings
--- Legality of High Court's order
challenged without success in Supreme
Court --- It is not open to executing Court
to go behind the order on ground of jurisdiction. (Para 4)

(C) Criminal P. C. (1898), Ss. 385(1)(b)
(iii) and 561-A --- Order for award of
costs in contempt proceedings --- Warrant
ordered to be sent to Collector authorising
him to realise the amount --- Held, that the section had no application,
but that the High Court had inherent
power to execute and enforce its order.

The procedure in clause (b) of sub-section (1) of Section 386 of the Code, of issuing a warrant to the Collector of the District authorising him to realise the amount by execution according to the civil process, against the moveable or immoveable property, or both, of the defaulter, has been in terms prescribed for realisation of the fine imposed upon an offender by a court passing the sentence. This section cannot, therefore, be applied for realisation of the amount of cost awarded in contempt proceedings. Section 547 of the Code cannot also bring into operation the procedure prescribed in clause

(b) of sub-section (1) of Section 386 of the Code for realisation of the amount of cost, when the cost had not been awarded by the High Court under the Code. The proceeding for contempt of court is of a very special nature and for the matter of awarding cost it is not necessary for the High Court to take recourse to any special provision under the Code nor could it do so.

But it is a well-established principle of law that if the Court has got an inherent power to make an order, it has got the inherent power to execute and enforce it also in the manner and way it thinks fit and proper. That being so, direction by High Court to prepare the warrant and send it to the Collector for execution and realisation of the amount of cost by following the procedure provided under Section 386(1)(b) of the Code is perfectly legal and justified. (Para 5)

It is true that while prescribing its own procedure in a proceeding for contempt or adopting its own procedure in exercise of the inherent power for enforcement of its orders passed in that proceeding, the court cannot legislate and in terms, adopt the procedure prescribed under the Code. Factually it can adopt some of the procedures prescribed there. The procedure adopted in exercise of the inherent powers or while prescribing its own mode of execution, the court may adopt the identical procedure, yet in terms, the section of the Code will not apply and all incidents of that procedure will not come into operation. AIR 1963 SC 692, Rel. on; AIR 1960 Pat 430 (FB) and AIR 1954 SC 186, Ref. (Para 6)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 692 (V 50)=1963

(1) Cri LJ 633, Mrs. V. G. Paterson v. O. V. Forbes 5

(1960) AIR 1960 Pat 430 (V 47)=1960

Cri LJ 1254 (FB), Basanta Chandra Ghosh, In the matter of 1, 6

(1954) AIR 1954 SC 186 (V 41)=1954

Cri LJ 460, Sukhdeo Singh v. Hon'ble C. J. S. Teja Singh 6

(1935) AIR 1935 All 1013 (V 22)=36

Cri LJ 1365, Emperor v. S. M. Wahid Ullah Ashrari 7

S. C. Ghose, M. P. Pandey and S. K. Chattopadhyaya, for Appellant; K. P. Verma, for Respondent.

JUDGMENT: The sole appellant in this case was punished for contempt of court, by a Special Bench of this Court in Original Criminal Miscellaneous No. 4 of 1959, decided on 29-1-1960. The judgment is reported in the matter of Basanta Chandra Ghosh, AIR 1960 Pat 430. A fine of Rs. 250/- was imposed upon him, in default, he was sentenced to undergo simple imprisonment for a period of one month. A cost of Rs. 500/- was assessed and awarded against him.

2. Ext. A shows that on 11-3-1960 a notice was directed to issue by the Special Bench to Shri B. C. Ghosh to deposit a sum of Rs. 500, the amount of cost payable by him, within a week of the receipt of the notice, failing which a warrant was directed to be prepared and sent to the Collector of Patna for execution and realisation in terms of S. 386(1)(b) of the Criminal Procedure Code (hereinafter to be referred to as the 'Code'). It appears from the same exhibit that later on when the appellant filed an application under Art. 134(1)(c) of the Constitution of India for grant of a certificate of fitness for appeal to the Supreme Court, while rejecting that application by order dated 13-7-1960, the Special Bench repelled the contention put forward on his behalf that the order for cost was made without affording him an opportunity to show cause against that order. It was pointed out that during the course of the hearing of the proceeding for contempt, on the basis of several authorities, an indication was given to the appellant that he could be saddled with cost. His contention that the amount of cost could not be realised under S. 386(1)(b) of the Code was also repelled by observing that it was open to this Court to have the cost realised by a number of ways including by directing to deposit it within certain period failing which he might be proceeded with for contempt of court, or it was also open to the Court to resort to a milder procedure prescribed by S. 386(1)(b) of the Code.

3. The appellant paid the amount of Rs. 250 imposed upon him as fine, but is resisting the execution case filed by the Collector for realisation of the amount of Rs. 500 awarded against him as cost. He is doing so on two grounds, (1) that the order of the High Court awarding cost is without jurisdiction and a nullity, and (2) that costs cannot be realised by following the procedure prescribed under Section 386(1)(b) of the Code.

4. In our judgment, there is no substance in the first point. There are several authorities in support of the view that cost can be awarded in a proceeding for contempt. The High Court has got the inherent power to award cost in such a proceeding and no authority was cited before us taking a contrary view. We may also add that the question is not open to be examined now by the execution court, as the question of legality of the High Court's order awarding cost against the appellant was sought to be agitated in the Supreme Court but without any success. It is not open to the executing court now to say that the order is without jurisdiction and a nullity. That being so, it cannot go behind the order and has got to execute it.

5. Coming to the second point, it should be pointed out first that, in terms,

section 386(1)(b) of the Code cannot be applied. The procedure in clause (b) of sub-section (1) of Section 386 of the Code, of issuing a warrant to the Collector of the District authorising him to realise the amount by execution according to the civil process, against the moveable or immoveable property, or both, of the defaulter, has been in terms prescribed for realisation of the fine imposed upon an offender by a court passing the sentence. Section 547 of the Code runs as follows:—

"Any money other than a fine payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for shall be recoverable as if it were a fine."

This also cannot bring into operation the procedure prescribed in cl. (b) of sub-sec. (1) of Sec. 386 of the Code for realisation of the amount of cost, as, obviously the cost had not been awarded by the High Court under the Code. The proceeding for contempt of court is of a very special nature and for the matter of awarding cost it was not necessary for the High Court to take recourse to any special provision under the Code nor could it do so. We are, therefore, of the opinion that although in the order dated 11.3.1960 it was directed that the warrant should be prepared and sent to the Collector of Patna for execution and realisation of the amount of cost in terms of section 386(1) (b) of the Code, which section in terms, even with the aid of section 547 of the Code, may not apply, what was meant to be directed was that factually the Collector of Patna may proceed to realise by execution in accordance with the procedure prescribed under Section 386 (1) (b) of the Code. It is a well-established principle of law that if the Court has got an inherent power to make an order, it has got the inherent power to execute and enforce it also in the manner and way it thinks fit and proper. That being so, direction by this court to prepare the warrant and send it to the Collector of Patna for execution and realisation of the amount of cost by following the procedure provided under Section 386(1)(b) of the Code is perfectly legal and justified. In pursuance of that direction the Collector of Patna has levied the execution case against the appellant as appears from the execution petition filed in the execution court. It is open to the High Court to adopt the mode prescribed under section 386 (1) (b) of the Code for realisation of the amount of cost. In our opinion, therefore, the point raised on behalf of the appellant has no substance and must be rejected.

6. It was contended on behalf of the appellant by Mr. S. C. Ghose that the

procedure prescribed in the Code is not applicable to a proceeding for contempt. In this regard reliance was placed upon certain passages occurring in the judgment of the Special Bench in the matter of Basanta Chandra Ghosh, AIR 1960 Patna 430 and the decisions of the Supreme Court in Sukhdev Singh v. Hon'ble C. J. S. Teja Singh, AIR 1954 SC 186 and Mrs. V. G. Paterson v. O. V. Forbes (AIR 1963 S. C. 692). In the Matter of Basanta Chandra Ghosh, AIR 1960 Pat 430 at p. 437, column 1, it has been said:

".....it has been repeatedly laid down that a proceeding in contempt is a quasi criminal proceeding and the Code of Criminal Procedure does not apply . . ." Our attention was drawn to a passage occurring in column 2 at page 440 which is a quotation from the judgment of the Supreme Court in Sukhdev Singh's case AIR 1954 SC 186. We would better quote that passage from the decision of the Supreme Court itself. At page 190, column 1, Bose J., who delivered the judgment on behalf of the Court, said—

"We hold, therefore, that the Code of Criminal Procedure does not apply in matters of contempt triable by the High Court. The High Court can deal with it summarily and adopt its own procedure". The passage just extracted rather supports the view which we have expressed above. In the case of Mrs. V. G. Paterson AIR 1963 S. C. 692 the question canvassed before the Supreme Court was whether the property in question attached in a process issued against a contemner who had absconded by following the procedure under sections 87 and 88 of the Code, could be available and be at the disposal of the State Government under sub-section (7) of section 88 of the Code. The case was chiefly decided on the particular facts of the appeal before the Supreme Court, but, that apart, the question as to whether the Court had the power of arrest and of attaching the alleged contemner's property in an attempt to secure his presence, was left open, as would appear from paragraph 19, column 1 at page 697 of the report. Das Gupta, J., who delivered the judgment on behalf of the Court, stated in paragraph 18:—

"It seems to us that the Chief Court as a court of record had the right to punish persons for contempt and for the proper exercise of that power it will have all other powers necessary and incidental to it."

In the 19th paragraph it was further said, to which our attention was drawn by learned counsel for the appellant, that —

"..... The right of the Government to have any control over the attached property flows from the provisions of S. 88 of the Criminal Procedure Code. As no attachment could legally be made under S. 88, Criminal Procedure Code, in any

proceeding for contempt, the provisions of S. 88(7) of the Code of Criminal Procedure, under which the property under attachment shall be at the disposal of the State Government, if the proclaimed person does not appear within the time prescribed in the proclamation cannot come into operation."

It is true, that while prescribing its own procedure in a proceeding for contempt or adopting its own procedure in exercise of the inherent power for enforcement of its orders passed in that proceeding, the court cannot legislate and in terms, adopt the procedure prescribed under the Code. Factually it can adopt some of the procedures prescribed there. The procedure adopted in exercise of the inherent powers or while prescribing its own mode of execution, the court may adopt the identical procedure, yet in terms, the section of the Code will not apply and all incidents of that procedure will not come into operation. The observations of the Supreme Court appreciated in that light, if we may say so with respect, clearly brings about the ratio decidendi of the Supreme Court decision and instead of helping the appellant lends support to the view expressed by us.

7. We, therefore, hold that the execution levied by the Collector of Patna for realisation of the amount of cost of Rs. 500/- from the appellant is manifestly legal and justified and it cannot fail on either of the grounds urged on behalf of the appellants. In this connection we may also refer to a Bench decision of the Allahabad High Court in Emperor v. S. M. Wahid Ullah Ashrari, AIR 1935 All 1013 on which reliance was placed for the respondent by the learned Standing Counsel. The Bench of the Allahabad High Court also observed that costs awarded in a proceeding for contempt could be directed to be recovered in exercise of the inherent jurisdiction of the Court.

8. In the result, we dismiss the appeal, but in the circumstances we shall make no order as to costs.

V.G.W/D.V.C.

Appeal dismissed.

AIR 1963 PATNA 72 (V 56 C 18)

TARKESHWAR NATH AND
B. P. SINHA, JJ.

Subodh Gopal Bose, Petitioner v. State of Bihar, Opposite Party.

Misc. Judl. Case No. 38 of 1968, D-14-5-1968.

Constitution of India, Art. 215 — Disobedience of orders of High Court by State — Even State is guilty of contempt — Fact that wrong legal advise resulted in disobedience does not affect the liability.

Even the State is subject to the jurisdiction of the court in the matter of injunction and the State and its officers are guilty of contempt in case of disobedience and violation of the order of injunction, so long as it exists. It would not affect the liability of the State even if it had acted on a wrong legal advice. That fact may be considered while determining the question of punishment which is to be meted out. Where an apology is offered, the question as to whether the apology offered in a particular case is a genuine one, has to be considered on the circumstances of each particular case, and there can be no hard and fast rule about it. Where the State of Bihar had offered an unqualified apology even in the petition showing cause the apology offered was accepted.

Held on facts that the apology by the State was genuine, unqualified and State having taken steps to correct its action, apology was accepted and properties were not attached under O. 39, R. 2(3), Civil P. C., but the State was ordered under S. 151, Civil P. C. to cancel the lease granted by it in violation of order of High Court. AIR 1937 Cal 601, Rel. on AIR 1961 SC 221, Dist. AIR 1961 Pat 1 & AIR 1940 Nag 407, Ref. (Paras 16, 20 and 24)

Cases Referred:	Chronological Paras
(1963) AIR 1963 Raj 3 (V 50)=ILR	
(1961) 11 Raj 957, Magna v. Rustam	23
(1961) AIR 1961 SC 221 (V 48)=	
(1961) 1 SCR 728, State of Bihar v. Rani Sonabati Kumari	19
(1961) AIR 1961 Pat 1 (V 48)=1961 (1) Cri LJ 134, Bhola Nath, In the matter of	20
(1956) AIR 1956 Pat 455 (V 43), State of Bihar v. Usha Devi	22, 23
(1940) AIR 1940 Nag 407 (V 27)=	
1940 Nag LJ 425, Sub-J., First Class Hoshangabad v. Jawahar Lal Ramchand	
(1937) AIR 1937 Cal 601 (V 24), All India Sugar Mills Ltd. v. Sundar Singh	16
(1922) AIR 1922 Pat 382 (V 9)=ILR 1 Pat 662, Maharaj Bahadur Singh v. A. H. Forbes	21
A. C. Mitra, for Petitioner; Bajrang Sahay, Govt. Advocate, for Opposite Party.	

TARKESHWAR NATH, J.:— This is an application under Article 215 of the Constitution of India read with Order 39, Rule 2(3) of the Code of Civil Procedure for committing the State of Bihar (the sole opposite Party) for contempt of Court for violating and committing a breach of the order dated 7-4-1965 passed by this Court in Miscellaneous Appeal No. 78 of 1964.

2. The facts giving rise to the present application are these. On 30-9-1933 the petitioner purchased an estate known as Kuchwar Mahal in the district of Shahabad comprising an area of 26,592 bighas and

odd (about 16.620 acres) and he came in possession thereof. He quarried limestone in that Mahal since his purchase. There were deposits of iron pyrites, limestone and other minerals in that Mahal. The petitioner carried on his business in the name of Kuchwar Lime and Stone Co. in the said Mahal. On 2-4-1940 he gave notice to the Government under Section 14 of the Mines Act, 1923 about the opening of pyrites mines in the said Mahal, commonly known as Amjhor pyrites Mines. Thereafter, the petitioner continued quarrying limestone and developing the pyrites after spending several lacs of rupees, and he was especially encouraged to do so by the Government of India. By notification No. 1406/LR/ZAN dated 27-10-1953 which was published in Bihar Gazette on 2-12-1953, the said Kuchwar Mahal vested in the Government of Bihar under the provisions of the Bihar Land Reforms Act, 1950, and on 25-1-1954 the estate was handed over to the State, excepting mines, minerals, dhowrahs, quarters, offices, etc.

The petitioner continued in possession of the entire estate in respect of the mines and minerals. On 5-2-1954 and 24-5-1954 the petitioner filed petitions before the Collector of Shahabad for formal execution of the leases in respect of the aforesaid minerals in 16.620 acres of land according to Section 9 of the Bihar Land Reforms Act. The Additional Collector of Shahabad recommended by his Memo No. Mines 145 dated 2-4-1956 to the Commissioner of Patna Division for the grant of a mining lease of Limestones to the petitioner for an area of 1248.31 acres. The State, however, recognised the petitioner as its statutory lessee in respect of only 2.26 acres for iron pyrites and 118.06 acres only for limestone on certain terms and conditions by letter No. Mines 781 dated 30-12-1959.

3. The petitioner came to know that the State of Bihar was inclined to grant a lease of the pyrites to the Pyrites and Chemicals Development Co. Ltd., and hence he filed Title Suit No. 95 of 1963 on 15-7-1963 in the court of Subordinate Judge, Sasaram against the said Company and the State of Bihar for a declaration of his title in respect of the said mines and minerals over the entire area of Kuchwar Mahal, and he made a prayer for a permanent injunction restraining the State of Bihar from granting a lease to the said Company. Meanwhile, a Mines Tribunal was appointed at Gaya on 17-8-1960 under Section 12 of the Bihar Land Reforms Act, 1950. The petitioner filed an application in the said title suit for a temporary injunction restraining the defendants from interfering with the rights of the petitioner in respect of the mines and minerals in the entire suit property known as Kuchwar Mahal bearing tauzi No. 10742, and he made a prayer for

restraining the defendants from carrying on any mining operation whatsoever in the said property and for restraining defendant No. 1 from granting any lease in respect of that property.

The State of Bihar (defendant no. 1) objected to the grant of an injunction. The Subordinate Judge dismissed the said application on 14-12-1963, although he held that the petitioner had a *prima facie* case. Being aggrieved by the said order, the petitioner filed Miscellaneous Appeal 78 of 1964 in this Court. The petitioner filed an application in that appeal for injunction against the State of Bihar and on 20-11-1964 an order (a copy of which is Annexure A) was passed restraining the State of Bihar from granting any further lease or permit other than the one with respondent No. 2 which had already been granted in respect of the property in dispute.

4. On 7-4-1965 this Court allowed Miscellaneous Appeal No. 78 of 1964 on certain terms. A copy of the Judgment of that Miscellaneous Appeal is Annexure B, and the specific direction given in that judgment, which is relevant for the present purpose, was as follows:

"Until the disposal of the suit, the State of Bihar shall not grant any lease or permit in respect of the limestone quarries in favour of any person or body of persons."

5. The State of Bihar had referred the dispute between the parties to the aforesaid Mines Tribunal, Gaya (Miscellaneous Case No. 64 of 1963), and the dispute was as to the area which should be deemed to have been leased to the petitioner under Section 9 of the Bihar Land Reforms Act. The petitioner took a preliminary objection that the said Tribunal had no jurisdiction to decide that point but that objection was overruled on 23-2-1965. The petitioner then filed an application (C. W. J. C. 178 of 1965) in this Court under Articles 226 and 227 of the Constitution of India and further proceeding before the Tribunal was stayed pending the disposal of the said application.

6. The Pyrites and Chemical Development Co. Ltd. (defendant No. 2) filed an application in the said title suit for deciding at first a question of law as to whether the Court had jurisdiction to determine the extent of area leased out to the plaintiff petitioner or whether that matter was within the exclusive jurisdiction of the Mines Tribunal, Gaya. The learned Subordinate Judge rejected the prayer of defendant No. 2 on 27-3-1965 on the ground that the suit could not be heard piecemeal. Being aggrieved by the said order, defendant No. 2 filed Civil Revision No. 650 of 1965 in this Court and that case was admitted and further proceedings stayed in the said title suit.

7. This Court dismissed the writ application (C.W.J.C. 178 of 1965) on 31-8-1966, holding that the Mines Tribunal had the exclusive jurisdiction to decide the question about the areas deemed to have been leased and that the Civil Court had no jurisdiction to decide that question. On the same day this Court allowed the aforesaid Civil Revision and directed the Additional Subordinate Judge to decide the preliminary issue raised by defendant No. 2.

8. The petitioner filed an application for leave to appeal to the Supreme Court against the order dismissing the writ application, and leave was granted by this Court on 5-10-1966 in S. C. A. No. 182 of 1966, but the prayer for stay was refused. The petitioner filed another application for leave to appeal to the Supreme Court against the order passed in the Civil Revision, and the application was registered as S. C. A. 181 of 1966. Certificate of appeal to the Supreme Court was granted by this Court and further proceedings in the said title suit were stayed till the disposal of the Supreme Court Appeal. In this manner both the appeals were pending in the Supreme Court for disposal.

9. The petitioner learnt that Kalyanpur Lime and Cement Works Ltd. had applied for lease of some lands in Kuchwar Mahal for quarrying Limestone and he got this information when his nephew met the Minister, Mines P. W. D., Government of Bihar in this connection.

10. The petitioner came to learn on 14-3-1968 from the newspaper 'Indian Nation' that the Shoshit Dal Government had notified in the extraordinary issue of the Bihar Gazette dated 12-3-1968 the allegations against the former Chief Minister, Mr. Mahamaya Prasad Sinha and 13 former Ministers of the United Front Government. It was published in the morning edition of 'Indian Nation' dated 13-3-1968 that charge No. 6 against the former Minister of Mines and P. W. D. was that the Council of Ministers in their meeting held on 13-12-1966 approved the proposal for grant of mining lease for limestone over 272.94 acres in village Kuchwar, district Shahabad in favour of Messrs. Kalyanpur Lime and Cement Works Ltd.

It was further published in that paper that the Law Department and the Additional (Standing) Counsel, Patna High Court advised that there was no legal bar for executing the lease deed and that in case the land or any part thereof was found ultimately by the Court to have been leased on account of the provisions of Section 9 of the Bihar Land Reforms Act, 1950 to Shri S. G. Bose, then the lease granted to Messrs. Kalyanpur Lime and Cement Works Ltd. shall

stand modified or cancelled as the case might be and then the latter shall withdraw from such area as may be found to have been leased to Shri S. G. Bose under Section 9. Having read this publication, the petitioner learnt that lease had been granted for limestone in respect of 272.94 acres in village Kuchwar to Messrs. Kalyanpur Lime and Cement Works Ltd., but it was in violation of the order passed in Miscellaneous Appeal No. 78 of 1964. In these circumstances, the petitioner alleged that the opposite party (State of Bihar) had deliberately and wilfully violated the order of injunction passed on 7-4-1965. This application was filed on 26-3-1968, and it was admitted on the following day, the rule being returnable within a fortnight.

11. This application came up for hearing on 17-4-1968, but still then the opposite party had not shown cause. The learned Government Advocate, however, made a prayer for a week's time to find out the correctness or otherwise of the allegations made in this application, and hence the hearing was adjourned for a week.

12. On 25-4-1968 the opposite party filed an application showing cause, and it has been clearly admitted that the State Government issued order No. 8520 dated 19-12-1966 to the Collector of Shahabad sanctioning the mining lease to Kalyanpur Lime and Cement Works Ltd. for limestone over an area of 272.94 acres in Kuchwar and thereafter on 21-3-1968 the lease in favour of Kalyanpur Lime and Cement Works Ltd. for limestone was executed in respect of 165.65 acres only, inasmuch as the remaining area out of 272.94 acres overlapped the area of Kuchwar Limestone Co. Ltd. and Pyrites & Chemical Development Co. Ltd. The justification, according to the opposite party for the granting of the said lease in violation of the order of this Court dated 7-4-1965 in Miscellaneous Appeal No. 78 of 1964 is that the learned Additional Standing Counsel had advised as follows:

"The injunction order contained in paragraph 2 of the judgment of Hon'ble Ramratna Singh and Hon'ble Bahadur JJ. dated the 7th April 1965 in Appeal from Original Order No. 78 of 1964 is no longer operative after the judgment in C. W. J. C. No. 178 of 1965 dated 31-8-65 of Hon'ble Chief Justice and Hon'ble Sahai, J. Sri Subodh Gopal Bose has, however, filed appeal to Supreme Court against the said judgment in C. W. J. C. 178 of 1965 and he had also prayed in SCA No. 182/66 for staying the operation of the said judgment, but Hon'ble the Chief Justice and Hon'ble Bahadur J. refused his prayer for stay. Therefore the said injunction order is no longer operative."

13. It has been further stated in the show cause petition that the State Government had re-examined the position and had come to the conclusion that the legal advice was the result of confusion and the State Government was misled in sanctioning and granting the mining lease for limestone in favour of Kalyanpur Lime and Cement Works Ltd. and the State of Bihar deeply regretted that the order of injunction passed by this Court could not be respected. After discovering the mistake, the State Government had issued order No. 2103 dated 20-4-1968 to the District Magistrate, Shahabad asking him to direct Kalyanpur Lime and Cement Works Ltd. to refrain from carrying on mining operation in the area covered by the lease granted to them until further instructions, and a copy of the said order has been marked as Annexure A. The State of Bihar has offered unqualified apology for the contravention of the order of injunction and has stated that the violation was not intentional.

14. The petitioner filed a supplementary affidavit on 20-4-1968 stating that the lease in favour of Kalyanpur Lime and Cement Works Ltd. was registered on 22-3-1968 and the subject-matter of Title Suit No. 95 of 1963 was the whole of Kuchwar Mahal without any exception. The position, according to the substantive petition of the petitioner and the show cause petition of the opposite party can be briefly summarised in the following manner. The suit instituted by the petitioner in respect of the entire area in Kuchwar Mahal is still pending in the court of the Subordinate Judge at Sasaram. The order passed by the Division Bench (Ramratna Singh and Bahadur JJ.) on 7-4-1965 in Miscellaneous Appeal No. 78 of 1964 restraining the State of Bihar from granting any lease or permit in respect of the limestone quarries in favour of any person or body of persons until the disposal of the suit is still in force and operative.

The State of Bihar has admittedly granted lease in favour of Kalyanpur Lime and Cement Works Ltd. on 21-3-1968 in respect of 165.65 acres and has thus violated the order of injunction. The substantial question for consideration is as to whether there was any justification for the said violating and what steps, if any, should be taken to undo the wrong already done by the opposite party, so that there will be no further prejudice to the petitioner.

15. Learned counsel for the petitioner submitted that the State of Bihar (opposite party) did not take the least care and precaution before the granting of the lease in favour of Kalyanpur Lime and

Cement Works Ltd., particularly when the order of this Court was clear and definite that the State of Bihar shall not grant any lease or permit in respect of the limestone quarries until the disposal of the title suit. He contended that this order could not in any way be the subject-matter of scrutiny in the writ application (C. W. J. C. No. 178 of 1965) and it could not be ignored until it was modified or reversed by a court superior to the High Court. He pressed that in the circumstances of the present case the violation of the said order by the State of Bihar was deliberate and wilful. On the other hand, the learned Government Advocate pointed out that the authorities had acted on the opinion given by the learned Additional Standing Counsel and they had to depend on the advice given to them by the said counsel. It appears from paragraph 3 of the show cause petition itself that in Civil Revision No. 650 of 1965 this Court had passed an order directing the learned Subordinate Judge to decide the preliminary issue about the maintainability of Title Suit No. 95 of 1963.

There is thus no doubt that the suit was still pending for disposal, and the order restraining the State of Bihar from granting a lease was in force till the disposal of the suit. The question in the writ application (C. W. J. C. No. 178 of 1965) was as to whether the Mines Tribunal had jurisdiction to determine the area deemed to have been leased to the petitioner. The position thus is that the order of injunction passed in Miscellaneous Appeal No. 78 of 1964 remained effective in spite of the order passed either on the writ application or in Civil Revision No. 650 of 1965. This being so, it is difficult to appreciate the opinion given that the said injunction order was no longer operative after the judgment in C. W. J. C. No. 178 of 1965. The said opinion must be held to be superficial, and the true scope of the various orders was not at all considered and appreciated. There was no appeal before the Supreme Court by the State of Bihar against the order dated 7-4-1965 passed in Miscellaneous Appeal No. 78 of 1964 and thus there was absolutely no justification for giving an opinion that the said order was "no longer operative".

A careful analysis of the facts and circumstances of the various cases would have made the position quite clear, and it must be observed that when the State Government referred the matter to its legal adviser for opinion about the granting of the lease to Kalyanpur Lime and Cement Works Ltd. It did not receive the proper attention of the said legal adviser and he failed to appreciate the effect of the order of injunction dated 7-4-1965.

16. The order of injunction restraining the State of Bihar from granting any lease or permit had to be strictly carried out and every diligence ought to have been exercised to obey it to the letter, and the State of Bihar could neither disregard it nor treat it as a nullity. Even the State is subject to the jurisdiction of the Court in the matter of injunction and the State and its officers are liable for contempt in case of disobedience and violation of the order of injunction. The State of Bihar not having obeyed the said order to its letter so long as it existed is undoubtedly guilty for the violation of the said order. In the present case, however, it is quite clear that the State of Bihar acted according to the advice of the learned Additional Standing Counsel. But it would not affect the liability of the State of Bihar. The fact that the State of Bihar granted the lease on the advice given to it may be considered while determining the question of punishment which is to be meted out. In the matter of All India Sugar Mills Ltd. v. Sunder Singh, AIR 1937 Cal 601, one of the defences was that Sardar Sunder Singh was advised by his lawyers that the order restraining him from proceeding with certain criminal proceedings in Punjab was not effective and need not be obeyed. Ameer Ali J., dealing with this defence, observed as follows :—

"With regard to the defences, in my opinion, the fact that the respondent acted upon the advice and (I shall for this purpose assume he did) is not a defence. He takes the risk. It may affect the question of punishment but not of liability. I can find no authority for the proposition that because the defendant is advised or thinks that the order is wrong in law and that he is justified in disobeying it."

17. On a review of the facts and circumstances of this case, I have no hesitation in holding that the State of Bihar is liable for the violation of the order of injunction dated 7-4-1965.

18. The learned Government Advocate referred to the letter dated 20-4-1968 (Annexure A) sent by the Deputy Secretary to the Government of Bihar, Department of Mines and Geology, to the District Magistrate of Shahabad asking him to bring all the facts to the notice of Messrs. Kalyanpur Lime and Cement Works Ltd. and request them to refrain from carrying on mining operations in the area covered by the lease granted to them until further instructions. The Deputy Secretary has further mentioned that necessary steps were being taken for having the orders of injunction vacated as early as possible.

It is difficult to appreciate as to what steps the State of Bihar would take for getting that order vacated, inasmuch as the time for filing an appeal against that

order expired in the year 1965. Moreover, this request alone to Messrs. Kalyanpur Lime and Cement Works Ltd. to refrain from carrying on mining operation is not at all sufficient to be of any use to the petitioner. Even if the said Limited Company abstains from carrying on mining operations in the said area, it does not mean that the petitioner would be allowed to carry on those operations in that area. The case of the petitioner was that he had the right to the minerals in the area (16.620 acres) of Kuchwar Mahal and, in fact, he was carrying on mining operation in the entire area. By the granting of the lease a serious prejudice has been caused and Messrs. Kalyanpur Lime and Cement Works Ltd. has become a full-fledged lessee of the State of Bihar.

19. Learned counsel for the petitioner submitted that on account of committing the breach of the said order of injunction, this Court should attach the properties of the State of Bihar according to the provisions of Order 39, Rule 2(3) of the Code of Civil Procedure, as was done in the case of the State of Bihar v. Rani Sonabati Kumari, AIR 1961 SC 221. In that case, however, there was no justification, legal or otherwise, for the State of Bihar to have rushed the notification under Section 3(1) of the Bihar Land Reforms Act, 1950, when its application to modify or vacate the order for interim injunction was pending before the subordinate Court. Moreover, the attitude taken up by the State Government in that case even till the time of the hearing of the case before their Lordships was one which could hardly be commended. Their Lordships observed thus:

"If the Government had deliberately intended to disobey the order of the Court, because for any reason they considered it wrong, their conduct deserves the severest condemnation. If on the other hand it was merely a case of inadvertence and arose out of error, nothing would have been lost and there was everything to be gained, even in the matter of the prestige of the Government, by a frank avowal of the error committed by them and an expression of regret for the lapse, and it is lamentable that even at the stage of the hearing before us, there was no trace of any such attitude."

Ultimately, the appeal of the State of Bihar was dismissed by their Lordships. In the present case, before us, there was the legal advice on which the State of Bihar acted and that has been frankly stated in the show cause petition. Besides this, the State of Bihar has deeply regretted for the violation of the order of injunction and has offered its unqualified apology for the contravention of the

said order of injunction. This expression of regret finds place in the show cause petition itself, and it was reiterated by the learned Government Advocate even from the earliest stage of the hearing of the present application. In fact, he tendered unqualified apology on behalf of the State of Bihar even on the day the show cause petition was filed through him.

20. Learned counsel for the petitioner referred to the decision In the matter of Bhola Nath Choudhary Contemner, AIR 1961 Pat 1 and submitted that unless the apology indicated real contriteness and a penitent heart, the apology should not be accepted. Reference in that decision was made to the observations of Vivian Bose, J. (as he then was) in Sub-Judge, First Class, Hoshangabad v. Jawahar Lal Ramchand, AIR 1940 Nag 407. His Lordship expressed himself as follows:

"An apology is not a weapon of defence forged to purge the guilty of their offences. It is not an additional insult to be hurled at the heads of those who have been wronged. It is intended to be evidence of real contriteness the manly consciousness of a wrong done, of an injury inflicted, and the earnest desire to make such reparation as lies in the wrong-doer's power. Only then is it of any avail in a court of justice. But before it can have that effect, it should be tendered at the earliest possible stage, not the latest, and even if wisdom dawns only at the appellate stage the apology should be tendered unreservedly and unconditionally before the arguments begin and before the person tendering the apology discovers that he has a weak case and before the Judge (when that happens, as it did here) has indicated the trend of his mind. Unless that is done, not only is the tendered apology robbed of all grace but it ceases to be an apology; it ceases to be the full, frank manly confession of a wrong done which it is intended to be."

The question, however, as to whether the apology offered in a particular case is a genuine one, has to be considered on the circumstances of each particular case, and there can be no hard and fast rule about it. I have already indicated that the State of Bihar offered an unqualified apology even in the show cause petition, and the learned Government Advocate representing the State of Bihar adopted the same attitude. I would thus accept the apology offered and no further step is to be taken against the State of Bihar (opposite party). But it must be mulcted with costs of the present application which is assessed at Rs. 200/- payable to the petitioner.

21. The petitioner filed an application under Section 151 of the Code of Civil Procedure on 25-4-1968 for a direction to the State of Bihar to cancel the aforesaid lease granted to Kalyanpur Lime and Cement Works Ltd. alleging that on 29th and 30th March, 1968 the said limited Company wanted to take forcible possession by erecting pillars repeatedly which were demolished by the men of the petitioner and on that occasion serious consequences were averted. Thereafter, the said limited Company again began to disturb forcibly the possession of the petitioner on 20-4-1968 by bringing a large number of men and the said concern began to clear the land for the purpose of mining. There was a great apprehension of breach of the peace, but it was averted. Learned counsel for the petitioner submitted that it was a fit case in which the State of Bihar should cancel the lease in order to bring back the parties to the same position which they occupied prior to the granting of the lease, and an order to this effect could very well be made under Section 151 of the Code. In support of it, he referred to Maharaj Bahadur Singh v. A. H. Forbes, AIR 1922 Pat 382. The petitioner there had instituted a suit against the decree holder, claiming a certain property as his own and, as a preliminary measure in that suit, he had asked for an interim injunction restraining the decree holder from selling that property.

The Subordinate Judge had granted a temporary injunction restraining the decree holder from selling that property. Later on, an application was made before the District Judge in execution praying that the order for the sale of the property should be suspended in consequence of the interim injunction made by the Subordinate Judge. The District Judge had before him the order of the Subordinate Judge granting the injunction and the order of the High Court in so far as its terms went might be taken as being an order in the nature of a direction to sell the property upon a particular day and being uncertain as to which of these two orders he ought to obey, he refused to stay the sale of the property. This Court passed an order declaring that the sale which took place on the 11th Nov. should be set aside and treated as of no effect, as it took the view that the Court was bound to see that the order of the Court granting the injunction had been carried out and the parties against whom the injunction had been granted should not gain any advantage by reason of having acted in a way entirely contrary to that order. In that case, however, the question arose between the decree holder and the judgment debtor petitioner and a third party did not come in the picture.

22. Learned counsel for the petitioner relied on State of Bihar v. Usha Devi, AIR 1956 Pat 455. The petitioner there had taken possession of a plot in dispute in spite of an order of injunction passed during the pendency of a suit concerning the same and hence an order was passed directing the delivery of possession of that plot to the petitioner and it was held that in the circumstances like those the Court had got inherent jurisdiction to do what had been done in that case by the Munsif on the facts found by him. The application in revision against the order of the Munsif was dismissed. There also the question arose between the parties to the suit.

23. Lastly, learned counsel referred to Magna v. Rustam, AIR 1963 Raj 3, Jagat Narayan, J., relied on the decision of this Court in AIR 1956 Pat 455 and observed that the imposing of penalty on the party guilty of disobedience did not provide any relief to the party in whose favour the order of temporary injunction was passed. The object of such an order was to safeguard the rights of a party against a threatened invasion by the other party, and that if in disobedience of the order of injunction such rights were invaded during the pendency of the suit, relief could only be granted to the aggrieved party by invoking the inherent power of the Court under section 151 of the Code of Civil Procedure.

24. Learned Government Advocate, on the other hand, submitted that the cancellation of the lease would not improve the situation inasmuch as M/s. Kalyanpur Lime and Cement Works Ltd. would not be party to the deed of cancellation. On the 26th of April, 1968 the hearing of this case was adjourned at the instance of the learned Government Advocate inasmuch as he wanted to ascertain as to whether the said limited company would be prepared to stay their hands and not work out the quarries on the basis of the lease granted in their favour. This application was then again heard on the 2nd of May, 1968 and the learned Government Advocate produced the letter dated 30-4-1968 of the Additional Secretary to the Government of Bihar, Department of Mines & Geology forwarding an undertaking dated 29th April, 1968 given by the Director on behalf of the said limited company that the company would not carry on any mining operation in the area covered under the lease dated 21-3-1968 until further instructions of the Government. The Director has further indicated in that undertaking that possession of the said area was already given to the company by the Mines Department, Arrah. No affidavit has been filed on behalf of the State of Bihar stating that the said undertaking was given by the said com-

pany through its Director and thus it is not possible to take it into account. But apart from it, there is no mention at all in this undertaking that the said limited concern would allow the petitioner to carry on the mining operation in the Kuchwal Mahal. The assertion, on the other hand, is that possession had been delivered to the said limited concern. If it is so, it will be difficult for the petitioner to carry on any mining operation in the area specified in the lease granted to the said limited company.

The position can be visualised in this manner. M/s. Kalyanpur Lime & Cement Works Ltd. has already got a lease from the State of Bihar whereas there is none in favour of the petitioner so far and in the event of the petitioner going upon the said land chances of obstruction being offered on behalf of the said limited company cannot be ruled out. Even the authorities who have to maintain law and order will find that the said limited concern happen to be the lessee of the State of Bihar whereas the petitioner has no document to support his case. In such a situation the said limited concern would try to maintain its possession, if possession has already been taken and it will be in an advantageous position. I am, therefore, of the view that it would be in the ends of justice to direct the State of Bihar to cancel the lease in question and unless this is done the breach already committed, will continue. Learned counsel for the State pointed out that in the event of cancellation the said limited concern might enforce its right against the State of Bihar on the basis of the lease already granted but that cannot be helped and the State of Bihar itself is responsible for creating a situation like this and placing itself in an extremely embarrassing position.

The Court can very well exercise its inherent power under Section 151 of the Civil Procedure Code in a case like this otherwise not only in this but in other cases as well a party having committed a breach of an order of injunction by executing either a sale deed or any other deed might urge that the deed had been already executed in favour of the third party and the Court should accept the apology and pass no other order. Order XXXIX Rule 2(4), Code of Civil Procedure provides that no attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto. This rule contemplates that if the breach continues the property attached may be sold. In the present case I have not

passed any order for the attachment. Therefore, the question of sale does not arise, but the scheme of this provision is that in case of continuance of the breach for more than one year, the Court may sell the attached property, in other words, the party committing the breach can be dealt with severely. It is the duty of the Court to see that the breach should not continue and the said limited concern (third party) should not take undue advantage of the lease executed in their favour.

25. As a result of all these considerations, the application of the petitioner under Section 151 of the Civil Procedure Code is allowed and the State of Bihar (opposite party) is directed to cancel the lease executed in favour of M/s. Kalyanpur Lime & Cement Works Ltd. within a period of two months. There will be no order for costs of the present application.

26. B. P. SINHA, J. :— I agree.
GGM/D.V.C. Petition allowed.

AIR 1969 PATNA 79 (V 56 C 19)

S. C. MISRA, J.

Awadh Narain Thakur, Petitioner v. Bindeshwari Thakur and others, Opposite Party.

Civil Revn. No. 11 of 1965, D/- 2-1-1967, from order of Spl. Execution Munsif, Muzaffarpur, D/- 9-9-1964.

(A) Civil P. C. (1908), O. 21, R. 2 and App. E, Form I — Court has no jurisdiction at all to proceed in matter unless notice is issued in Form I, App. E — Order passed by Court without issuing such notice — Order would be illegal: AIR 1944 Pat 251, Foll. AIR 1918 Cal 62 & AIR 1959 Andh Pra 632 (FB) & AIR 1930 Pat 526, Ref. (Para 2)

(B) Civil P. C. (1908), S. 47, O. 21, R. 2 — Decree passed ex parte — Judgment debtor pleading complete adjustment of decree and as such disposal of execution case — Whether case would be one covered by S. 47 and as such appealable or would it be covered only by O. 21, R. 2 as regards other payments of partial nature and as such not appealable. (Quaere). (Para 3)

(C) Civil P. C. (1908), O. 9, R. 13, Ss. 151, 47 and 141 — Applicability to execution proceedings — Execution proceeding not being amenable to O. 9, R. 13, remedy open to defendant under O. 9, R. 13 is to invoke inherent jurisdiction under S. 151.

In regard to a suit which is decreed ex parte, the remedy of the defendant in such circumstances would be three-fold:

(1) an appeal from the ex parte decree,

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(2) an application for review, and (3) an application under O. 9, R. 13 of the Civil P. C. Since an execution proceeding is not covered under the term the suit, and as such not amenable to O. 9, R. 13, inherent jurisdiction provided under S. 151 would take the place of the remedy open to the defendant under O. 9, R. 13 of the Code. Even if the order is appealable under S. 47 of the C.P.C. the court could take recourse to its inherent jurisdiction. There is no contradiction between an appeal being preferred by an aggrieved party and to apply to the court for review in exercise of its inherent jurisdiction as the facts and circumstances of the case may justify. Specific provision of one kind in the Code would not necessarily rule out the exercise of inherent jurisdiction, unless that specific provision amounts to a provision against going beyond the terms of that provision: AIR 1920 Pat 750 & AIR 1962 SC 527, Rel. on. (Para 4)

(D) Civil P. C. (1908), O. 21, R. 2(2) — Copy of application by judgment debtor served on lawyer purporting to be lawyer on behalf of decree holder — Is service of notice validly effected (Quaere). (Para 5)

Cases Referred: Chronological Paras
 (1962) AIR 1962 SC 527 (V 49) —
 1962 Supp (1) SCR 450, Manohar Lal v. Hiratal 4
 (1959) AIR 1959 Andh Pra 632 (V 46) — ILR (1959) Andh Pra 499 (FB), Chengayya v. Chenga 2
 (1944) AIR 1944 Pat 251 (V 31) — 10 Cut LT 28, Ramchandra v. Narayan Das 2
 (1930) AIR 1930 Pat 526 (V 17) — ILR 9 Pat 521, Chandi Charan v. Panchanan Pandit 2
 (1922) AIR 1922 Pat 276 (V 9) — ILR 1 Pat 644, Jadunandan Singh v. Sheonandan Prasad Singh 3
 (1920) AIR 1920 Pat 750 (V 7) — 5 Pat LJ 379, Ram Ghulam v. Sham Sahai 4
 (1918) AIR 1918 Cal 62 (V 5) — 30 Cal LJ 118, Ligraj v. Mahadeb Ram 2

Baidyanath Jha and Baidyanath Prasad I; for Petitioner; A. C. Ray, for Opposite Party.

ORDER:— This is an application by the decree holder, at whose instance Execution Case No. 17 of 1963 was started in the Court of the Special Execution Munsif, Muzaffarpur. Opposite party No. 1, Bindeshwari Thakur, was one of the judgment debtors and he filed an application in the executing court on the 4th of February, 1964 stating that he paid a sum of Rs. 375 to the decree holder on the 17th of December, 1963 and that an adjustment to the extent of that amount should be made. It may be stated that no notice of this application was served

on the decree holder. What happened was that a copy of the application by the judgment debtor was served on the lawyer for the decree holder. The court thereafter started a miscellaneous case, being Miscellaneous Case No. 27 of 1964, and it was adjourned from the 4th of February, 1964 to the 8th of February, 1964, when certain defects were ordered to be removed and also for statement of address. On the 21st of February, 1964 statement of address was filed and other defects were also removed. Then, it was ordered that the case should be put up on the 6th of March, 1964 for disposal. On the 6th of March the judgment debtor filed hazri, but the decree holder did not appear, and the court ordered that the miscellaneous case should be put up for final hearing on the 11th of March, 1964. On the 11th of March also the case was not taken up, and it was ordered to be put up on the 23rd of March, 1964. On that date Bindeshwari Thakur, Judgment debtor was examined as A. W. 1 and Gouri Shanker Sahi as A. W. 2, and order was passed on the 24th March, 1964 allowing the miscellaneous case, holding that the amount of Rs. 375 was in fact paid by the judgment debtor to the decree holder. The court proceeded ex parte on the ground that although copy of the application was served on the lawyer for the decree holder no step was taken on his behalf.

2. Mr. Baidyanath Jha appearing in support of the petition challenging the correctness of the order passed by the learned Special Execution Munsif has raised a number of questions. The main point, however, on which reliance has been placed by Mr. Jha is that in terms of Order 21, Rule 2, of the Code of Civil Procedure it was the mandatory duty of the court to issue a notice to the decree holder fixing the date of hearing of the miscellaneous case, calling upon him to show cause why the payment alleged to have been made by the judgment debtor would not be certified under Order 21, Rule 2 of the Code. Only when such a date would be fixed and notice of it would be served on the decree holder would it be within the jurisdiction of the court to proceed to hear it in presence of the parties. Mr. Jha has urged that once Order 21, Rule 2, in terms, refers to notice being issued to the decree holder, mere service of notice on the lawyer, even assuming that notice was served on the lawyer for the petitioner could not be held to be sufficient compliance with the requirement of Rule 2, Order 21. He has drawn my attention to certain observation in the judgment of the Calcutta High Court in Ligraj v. Mahadeb Ram, AIR 1918 Cal 62. In that case, no doubt, the facts were different, but it has been observed that there may

be an application by the judgment debtor. Where he makes such an application for entering up satisfaction in whole or in part, it should contain a prayer for issue of notice to the decree-holder to show cause why the adjustment should not be recorded as certified. In fact, Order 21, Rule 2 itself, in terms, provides that, and, therefore, no authority is necessary for supporting the contention of Mr. Jha that the judgment-debtor should "apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

It is correct, no doubt, to say, as Mr. A. C. Ray for the opposite party has urged, that there may be cases in which a formal application by the decree holder to that effect cannot be insisted upon and the judgment debtor's objection to the execution of the decree in part or in whole, on the ground that he has paid a part of the decretal amount or whole of it to the decree-holder out of court may be held to be an application by the judgment-debtor under Order 21, Rule 2(2). This no doubt, has been held in Chengayya v. Chenga, AIR 1959 Andh Pra 632, a Full Bench decision of Andhra Pradesh High Court, following several decisions of other High Courts including a decision of this Court in Chandi Charan v. Panchanan Pandit, AIR 1930 Pat 526. But none of those cases, in fact, lays down that without fixing a date of hearing and without giving notice of such date of hearing to the decree-holder, the court can proceed to take up the hearing of the matter, as the learned Execution Munsif in the present case has done. That, in my opinion, is the most essential part of Order 21, Rule 2(2), because if such a date is not fixed, the decree-holder cannot be blamed for not appearing on the date so fixed for hearing the objection to the execution proceedings urged on behalf of the judgment-debtor under that rule. In this case, as I have shown already with reference to the various dates to which the case was adjourned, the learned Execution Munsif did not think it necessary to fix any date of hearing and give notice thereof to the decree holder. It seems, he felt that it was sufficient for the judgment debtor to serve a copy of the application for adjustment on the lawyer for the decree-holder, and for the rest, it was the duty of the decree-holder to appear and take steps. I am unable to understand what step could be taken prior to the date of hearing being notified to the decree-holder by the court below. The order passed by

the learned Execution Munsif, therefore, appears to be wholly misconceived and, as has been laid down by a learned Single Judge of this Court in Ramchandra v. Narayan Das, AIR 1944 Pat 251, the court will have no jurisdiction at all to proceed in a matter unless notice is issued in Form I, Appendix E to the Code of Civil Procedure. The court having failed to issue such notice, any order passed by the court would be illegal.

3. Mr. Ray has, however, urged that whatever view may be taken by this Court in regard to the merits of the matter and, even assuming that the Court was not right in proceeding with the miscellaneous case without notifying to the decree holder the date of hearing, the remedy, however of the decree-holder would be by way of an appeal against the order passed by the learned Execution Munsif and not to make an application under Section 151 of the Code of Civil Procedure. Learned Counsel for the parties have been at pains to support their respective contentions as to whether such an order would be covered by Section 47 and as such appealable, as was held by a Division Bench of this Court in Jadunandan Singh v. Sheonandan Prasad Singh, ILR 1 Pat 644=(AIR 1922 Pat 276), or it would be an order under Order 21, Rule 2 of the Code, plain and simple, and no provision being made for an appeal from that order under Order 43, Rule 1, such an order with regard to adjustment will not be appealable. The point is of some nicety as to whether where the judgment-debtor pleads complete adjustment of the decree and as such disposal of the execution case, it would be one covered by Section 47, but other payments of partial nature would be covered only by Order 21, Rule 2, and as such not appealable. Since, in the circumstances of the present case, the application may be disposed of on other considerations, it seems not necessary for me to pursue that point.

4. Mr. Jha, however, has urged that even assuming that such an order under Section 47 of the Code of Civil Procedure would be appealable, that would not preclude the Court from taking recourse to its inherent jurisdiction under Section 151 of the Code, because the two remedies may be supplemental to each other and not exclusive of each other. As a matter of fact, it is well settled in similar circumstances in regard to a suit which is decreed ex parte that the remedy of the defendant in such circumstances would be three-fold (1) an appeal from the ex parte decree, (2) an application for review, and (3) an application under Order 9, Rule 13 of the Code of Civil Procedure, since an execution

proceeding is not covered under the term the suit, and as such not amenable to Order 9, Rule 13, inherent jurisdiction provided under Section 151 would take the place of the remedy open to the defendant under Order 9, Rule 13 of the Code. The contention of Mr. Ray, therefore, that if the present order is appealable, the Court could not take recourse to its inherent jurisdiction has no substance. In my opinion, the contention of Mr. Jha is correct. There is no contradiction between an appeal being preferred by an aggrieved party and to apply to the court for review in exercise of its inherent jurisdiction as the facts and circumstances of the case may justify. In fact, even the decision of this Court in *Ram Ghulam v. Sham Sahai*, AIR 1920 Pat 750, which is a Division Bench decision cited by Mr. Ray himself, lays down that the Court may exercise its inherent jurisdiction to rectify its mistake, if the order is passed behind the back of the party and justice of the case suffers. This also goes against the contention of Mr. Ray and is consistent with the argument put forward on behalf of the petitioner. Moreover, Mr. Jha has relied on a decision of the Supreme Court in *Manohar Lal v. Hir Lal*, AIR 1962 SC 527, where it has been clearly laid down that unless there is a provision in the Code of Civil Procedure, its inherent jurisdiction may be resorted to by the Court to do justice between the parties, and merely because some provision has been made in the Code which, in terms, would not cover the facts of the case, it would not preclude the court from proceeding under Section 151 of the Code. Specific provision of one kind in the Code would not necessarily rule out the exercise of inherent jurisdiction, unless that specific provision amounts to a provision against going beyond the terms of that provision. In the above case, the question for consideration was whether the court would be justified in issuing injunction in terms beyond what is provided in Order 39, Rules 1 and 2 of the Code of Civil Procedure, and it was held that the Court would still proceed under section 151, if the case was not covered completely by Order 39, Rules 1 and 2. If, of course, the facts of a particular case would justify recourse to Section 151 for the ends of justice.

5. In my opinion, therefore, Mr. Jha's contention must be accepted as correct. The learned Execution Munsif committed a clear error in proceeding to take up the disposal of Misc. Case no. 27 of 1964 without notifying to the decree-holder that a particular date was fixed for hearing, which is required to be done under Order 21, Rule 2(2). Mr. Jha, as I have already stated, has also urged that a copy

of the application by the judgment-debtor was served on Bimalendu Narain Sinha and not on Anand Kumar Thakur who held power on behalf of the decree holder. Service of notice on Bimalendu Narain Sinha who held no power on behalf of the decree holder, therefore, would not be taken to be service of notice of any kind whatsoever on the decree-holder a fact to which the attention of the court below was not drawn. The learned Execution Munsif satisfied himself that it was valid service, merely because there was some kind of signature of some lawyer purporting to have been the lawyer on behalf of the decree-holder. The plaintiff's contention also appears to be correct, but it is not necessary for me to go into the details of this matter, because the application can be disposed of on the ground that Miscellaneous Case No. 27 of 1964 giving rise to this application was decided by the learned Execution Munsif without fixing a date of hearing and without giving notice of that to the decree-holder and without calling upon him to show cause on that particular date as to why the payment alleged to have been made by the judgment-debtor would not be certified.

6. The application, therefore, is allowed, the order passed by the learned Execution Munsif is set aside and the case is remanded to him for disposal on merits, after hearing the parties. The applicant is entitled to his costs. Hearing fee is assessed at Rs. 32/-.

MBR/D.V.C.

Application allowed.

AIR 1969 PATNA 82 (V 56 C 20)

S. C. MISRA, J.

Ganesh Narain Singh and another, Appellants v. Jadunandan Singh and others, Respondents.

A. F. A. D. No. 779 of 1964, D/- 23-2-1967, from a decision of 2nd Sub. J., Gaya, D/- 12-8-1964.

Evidence Act (1872), Ss. 50 and 60 — Conduct of a member of family — Evidence of a person having special means of knowledge admissible — He need not be a member of the family — Person watching the conduct of members to be treated as person with special means of knowledge — Such person's evidence must be admissible under S. 60.

It cannot be said that in no case evidence can be given with regard to the relationship by a person who is not a member of the family. (Para 5)

S. 50 has to be read along with S. 60. There may be evidence of persons having special means of knowledge with regard to the conduct of a member of the

family in relation to the persons whose relationship is in issue before the Court. If a man belongs to a certain village, who comes in frequent contact with the members of the family and has occasion to watch the conduct of one member towards another he must be taken to be a person with special means of knowledge and if he has watched this, then his evidence must be admissible under S. 60 as evidence of a person who has heard how one member is treated by another member of the family and as such he must be a person of special means of knowledge. AIR 1956 Pat 49 and AIR 1963 Pat 450 Foll.; AIR 1959 SC 914 & AIR 1943 Cal 76 & AIR 1960 Pat 480, Explained; AIR 1964 Pat 187, Ref. (Para 5)

Cases Referred: Chronological Paras (1964) AIR 1964 Pat 187 (V 51)=

1964 BLJR 152, Sheojee Tiwari v.

Prema Kuer

(1963) AIR 1963 Pat 450 (V 50),

Bhogal Paswan v. Mt. Bibi Nabihani

(1960) AIR 1960 Pat 480 (V 47)=

ILR 39 Pat 891, Smt. Fulkalia v. Nathu Ram

(1959) AIR 1959 SC 914 (V 46)=

(1959) Supp (2) SCR 814, Dalgobina Paricha v. Nimai Charan Misra

(1956) AIR 1956 Pat 49 (V 43)=

1955 BLJR 705, Ramadhar Chaudhary v. Janki Chaudhary

(1943) AIR 1943 Cal 76 (V 30)=

ILR (1942) 2 Cal 309, Chandu Lal Agarwalla v. Bibi Khatemonnessa

Prem Lal and Madan Mohan Pd., for Appellants; L. M. Sharma, for Respondents.

JUDGMENT :— This is an appeal by the plaintiffs. The plaintiffs filed a suit for declaration of title and recovery of possession of the land having an area of .09 acre bearing plot no. 4114 in khata no. 290 of village Deo. According to the plaintiffs, Jhari Dhanger had a son Somar and a daughter Somaria. Somaria had a daughter Mt. Sanichari. According to the defendants, however, Jharia had two sons Somar and Bishun. Bishun was married to Somaria. She died issueless and Mt. Sanichari was falsely set up as daughter.

2. Plot no. 4114 was recorded in the names of Somar and Somaria half and half in the record of rights. Somar sold his half share to Somaria for Rs. 35/- by a sada sale deed on 18-6-1926 when Somaria came in possession. When she died, her daughter Sanichari came in possession. Then on 14-10-1950 Sanichari sold this land to the plaintiffs by a registered sale deed for Rs. 500/- together with some other lands. After that there was a dispute between the parties which ended in a proceeding under section 145,

which was decided against the plaintiffs. Accordingly the present suit was filed on 26-11-1950.

3. The defendants' case was, as mentioned above, that Somaria was not the sister of Somar but wife of Bishun and sister-in-law of Somar. After her death, the property devolved on Mangri who was daughter of Somar and she sold it to the defendants on 20-11-1948. Sanichari not being the daughter of Somaria the kebala in favour of the plaintiffs was a bogus document.

4. According to the trial court, Somaria was sister-in-law of Somar and Sanichari was her daughter and that the plaintiff acquired valid title under the sale deed by Sanichari as her mother acquired the interest of Somar also by Sada sale deed in 1926 and was duly in possession. Hence the plaintiff's suit was decreed as his suit was within 12 years from the date of the execution of the sale deed in his favour by Sanichari. The Court of appeal below also affirmed the judgment of the trial Court except that it left the question of the relationship of Mangri and even that of Somaria with Somar undecided.

5. Mr. Prem Lal has fairly conceded that this appeal would be concluded by finding of fact but for the fact that the finding with regard to the relationship is vitiated because the witnesses for the plaintiffs, who came to depose about the relationship of the parties in the case, such as P. Ws. 1, 3 and 5, did not depose as required under Section 50 of the Indian Evidence Act and as such their evidence on the point of relationship could not have been acted upon by the courts below. So far as P. W. 1 is concerned, he stated as follows:

"Deo ke Somar Kalan Dhanger ko main janta tha. Somaria Somar ki bahan aur Bisu ki aurat thi. Yeh satya nahin ki Somar aur Bisu Bhai the. We sale bahnoi the."

More questions were put to him with regard to the knowledge of relationship of various members of the family, all of which he answered and stated further that his own village Bhawanipur was contiguous to village Deo. He stated further:

"Somaria, Somar ko bhai bhai kahti thi. Isliya main jant hun ki woh Somar ki bahan thi."

P. W. 3, who was one of the plaintiffs, also spoke thus:

"Somaria Somar ki bahan thi. Somar ne takrari plot men apna hissa Somaria ko sada kaghaz dwara kebala kar diya aur Somaria ka salah anna makan par kabza hua."

In cross-examination he stated as follows:

"Somaria kahanse aye thi mai nahin bata sakta. Somar aur Somaria ko main

ne aath bars ki umar men dekha tha."

P. W. 5 also stated thus:

"Sanichari Somari ki larki thi. Somaria Somar Kalan Dhangar ki bahan thi."

He is a resident of village Deo. He also stated that Mt. Sanichari was the daughter of Somaria. All these witnesses are, therefore, men of the locality, one of village Deo and two of the neighbouring village Bhawanipur. Mr. Prem Lal has contended that the evidence of these three witnesses cannot be held to be in compliance with the terms of Section 50 of the Evidence Act. He has drawn my attention in this connection to the decision of the Supreme Court in *Dolgobina Paricha v. Nimal Charan Misra*, AIR 1959 SC 914, which has approved the decision of the Calcutta High Court in *Chandu Lal Agarwalla v. Bibi Khatemonnessa*, AIR 1943 Cal 76.

Learned counsel has contended that their Lordships of the Supreme Court have laid down that the essential requirements of the Section are: (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact, (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition then what is relevant is his opinion expressed by conduct. Further it was laid down that Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship. The conduct or outward behaviour must be proved in the manner laid down in Section 60. That is to say, if the conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be proved by the person who heard it. That portion of Section 60 which provides that the person who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, may be proved either by testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with the facts which express such opinion and when such evidence is given by persons personally acquainted with such facts, the testimony in each case is direct within the meaning of Section 60.

The crux of the argument of Mr. Prem Lal is that the gist of the decision of the Supreme Court is that whenever such relationship between A and B is to be considered by a court it can only act upon that which is the opinion of a person having special means of knowledge expressed by conduct. In the present case the witnesses who have come to depose have not said that they had the special means of knowledge nor have they deposed to any conduct which would show that there is reason to think that the relationship deposed to by them existed between Somar, Somaria and Sanichari. In my opinion, however, this cannot be the effect of the judgment of the Supreme Court referred to above. It is true no doubt that in terms of Section 50 such a conclusion may follow and when a person has come to depose about his own opinion he must establish special means of knowledge expressed by conduct.

As their Lordships have pointed out, Section 50 has to be read along with section 60 of the Evidence Act and there may be evidence also of persons having special means of knowledge with regard to the conduct of a member of the family in relation to the persons whose relationship is in issue before the Court. Thus, if a man belongs to a certain village, who comes in frequent contact with the members of the family and has occasion to watch the conduct of one member towards another he must be taken to be a person with special means of knowledge and if he has watched this, then his evidence must be admissible under section 60 as evidence of a person who has heard how one member of the family is addressed by another, who has seen how one member is treated by another member of the family and as such he must be a person of special means of knowledge.

It is true no doubt that when such evidence is given it is open to the counsel for the other side to cross-examine him to test his special means of knowledge. But it would not be correct to say that the effect of the pronouncement of the Supreme Court is that in no case can evidence be given with regard to the relationship by a person who is not a member of the family. It was held in *Ramadhar Chaudhary v. Janki Chaudhary*, AIR 1956 Pat 49 that a person who, although not a member of the family, has special means of knowledge about the relationship of the parties, can speak in the witness box of what he has been told, and what he has learned about the relationship of the parties provided what he says is an expression of his own independent opinion. The words "or otherwise" in Section 50 clearly contemplate such a case.

A single Judge of this court also had occasion to consider this matter in *Bhogal Paswan v. Mt. Bibi Nabihan*, AIR 1963 Pat 450. In that case the question was whether plaintiff was the daughter of one S. M. Evidence was given by witnesses who were co-villagers, some of them being castemen and neighbours, having in some cases at least lived in the same village and in the same neighbourhood since the lifetime of S. M. The witnesses testified that S. M. died leaving behind his widow and her daughter the plaintiff, that the properties of S. M. devolved jointly on the widow and the plaintiff, that the widow was living jointly with the plaintiff and was in joint possession of the lands in suit and after the widow's death, the plaintiff alone remained in possession.

It was held that the evidence given by the witnesses satisfied the requirements of Section 50, Evidence Act, and as such was admissible to prove the parentage of the plaintiff. Mr. Prem Lal, however, relied on another decision of this court in *Smt. Fulkalia v. Nathu Ram*, AIR 1960 Pat 480. In my opinion, however, that decision cannot be said to be laying down any proposition different from what is contained in the aforesaid two decisions and it was held that when evidence has to be given under Section 50 with regard to the relationship it must be opinion expressed by conduct of the person who has come to depose, but when it has to be given by some other person acquainted with the facts which expressed such opinion, when the testimony must relate to external facts which constitute conduct and if given by persons personally acquainted with the facts, in that case evidence becomes direct testimony. In *Sheojoji Tiwary v. Prema Kuer*, AIR 1964 Pat 187 it has been laid down that a witness can also give his opinion in evidence as to the relationship of one person to another that is in controversy before a court, provided that opinion is expressed by his conduct, and if he as a member of that family or otherwise has special means of knowledge of that relationship.

In that case the question was not considered in the light of section 50 read with Section 60 but Section 50 read with Section 32(5) of the Evidence Act. This case, therefore, is not relevant for deciding the present controversy. I have already pointed out that their Lordships have approved the decision of the Calcutta High Court in AIR 1943 Cal 76. That was, however, a case where the matter was considered with reference to Section 50 of the Evidence Act and Section 60 was not gone into.

6. In the result, therefore, there appears to be no substance in the objection

raised on behalf of the appellants. The appeal is accordingly dismissed with costs.

MSA/D.V.C.

Appeal dismissed.

AIR 1969 PATNA 85 (V 56 C 21)

G. N. PRASAD, J.

Ramayan Dubey and others, Appellants v. Chitradeo Rai and others, Respondents.

A. F. A. O. No. 197 of 1964, D/- 11-4-1967, from decision of Addl. Sub. J., Third Court, Chapra D/- 10-4-1964.

(A) Contract Act (1872), S. 74 — Suit to recover loan with interest — Decree passed on basis of compromise between parties — Compromise providing that creditor would accept a sum forgoing even a part of principal amount in full discharge if paid before a certain date — Default clause in compromise that, if debtor failed, creditor would be entitled to decree for full amount of claim with future interest and costs — Default clause contains no element of penalty as it gave no advantage to the creditor who would have got a decree in the same terms even if debtor had chosen to contest the claim — The terms of the compromise considered as a whole were advantageous only to the debtor — Civil P. C. (1908), O. 23, R. 3. (Para 5)

(B) Civil P. C. (1908), Ss. 100, 101 — Plea of limitation — Can be raised in second appeal though not raised in lower appellate court — Limitation Act (1908), S. 3.

The fact that the appellants did not raise the question of limitation in the lower appellate court cannot preclude them from raising the question in second appeal, because it is a question of law, for the decision of which no additional facts or materials are necessary. Besides, the Court has to go into the question of limitation even where it has not been raised by the defendant or the judgment-debtor. Section 3 of the Limitation Act imposes upon the Court a duty to dismiss an application made after the prescribed period of limitation even though limitation has not been set up as a defence. (Para 6)

(C) Limitation Act (1908), Art. 182(4) — Compromise decree containing default clause — Decree-holder applying on default by judgment-debtor for amendment of decree in terms of the clause — Amendment does not provide fresh starting point.

It is not every amendment of the decree which gives a fresh start to limitation. An amendment which gives a fresh start to limitation must be an amend-

ment of a substantial character as affecting the rights of the parties. (Para 7)

In a suit to recover a debt with interest a decree was passed in terms of the compromise between the parties on 20-7-1958. The compromise provided that the decree-holder would accept a certain sum in discharge of his claim in the suit if it was paid on or before 23-10-1958. It further provided that if there was default the decree-holders would be entitled to a decree for the full amount of the claim in the suit and future interest at 8 annas per cent. per mensem. The decree also mentioned that claim in the suit was for Rs. 2,178 on account of principal and Rs. 766-10-0 on account of interest. The judgment-debtor having defaulted, the decree was amended on 28-1-1959 on the application of the decree-holder. The decree-holder filed execution on 3-1-1962.

Held that on the facts the period of three years prescribed for the application for execution started from the date of the original decree, and not from the date of the amendment of the decree, and as such, the application for execution filed beyond the period of three years from the date of the original decree must be held to be barred by limitation.

Reading the decree as a whole, that is to say, along with the compromise petition forming part of it, it was manifest that what was decreed in favour of the decree-holders at the original stage was precisely what was inserted in the decree by the amendment made on 28-1-1959. In other words, the amendment did not affect the rights of the parties in any way. The amendment only worked out the rights of the parties in terms of money in accordance with what had been decreed originally. Therefore, it was not at all an amendment in the real sense of the term, and such an amendment was wholly insufficient to give a fresh start to limitation under Cl (4) of Article 182, AIR 1917 Pat 517 & AIR 1938 Pat 57, Rel on; AIR 1942 Pat 478. Distinguished. (Para 8)

Cases Referred: Chronological Paras (1942) AIR 1942 Pat 478 (V 29)=

23 Pat LT 731, Kesho Singh v.

Bhuneshwari Kuer

7

(1938) AIR 1938 Pat 57 (V 25)=

ILR 16 Pat 453, Rameshwari Narain

7

Misra v. Raghunandan Purbey

7

(1917) AIR 1917 Pat 517 (V 4)=2

Pat LJ 286, Kalanand Singh v.

7

Raj Kumar Singh

7

Janardan Prasad Roy, Ram Suresh Roy and Kainla Prasad Roy, for Appellants; Janardan Pd. Singh, for Respondents.

JUDGMENT:— This appeal by the judgment-debtors arises out of an objection preferred by them under Sec-

tion 47 of the Code of Civil Procedure. The decree under execution is a compromise decree passed in a money suit which was instituted by the decree-holders on the foot of a handnote for Rs. 2178/- The total claim in the suit was for Rs. 2944/10/- But by compromise between the parties, it was decreed that the judgment-debtors would pay to the decree-holders a sum of Rs. 2,000 on or before the 23rd October 1958 in full satisfaction of their dues up-to-date. There was also a default clause in the compromise petition, which was made a part of the decree, to the effect that if the judgment-debtors did not pay the sum of Rs. 2,000/- to the decree-holders by the appointed date, then the claim laid in the suit would stand decreed in full together with costs of the suit and future interest at the rate of 6 per cent per annum.

The judgment-debtors failed to make the payment by 23-10-1958. Thereafter the decree-holders made an application for amendment of the decree, which was allowed, and the following words were inserted in the decree:

"It is ordered that the defendants do pay Rs. 2944/10/- as claim and do also pay Rs. 660/11/- as costs of the suit with future interest at 6 P. C. P. A. to the plaintiff."

The date of the original decree was the 20th July, 1958, and the date of the amendment was the 28th January, 1959. The application for execution of the decree was filed on the 3rd January, 1962 and the same was registered as Execution Case No. 3 of 1962.

2. The judgment-debtors put forward two objections to the execution (i) that the default clause of the decree was unenforceable, being in the nature of a penalty within the meaning of Section 74 of the Contract Act, and, (ii) that the application for execution was barred by limitation.

3. Both these objections were overruled by the executing Court. As to the first objection, the executing Court held that it was not competent to go behind the decree, but to execute it as it stood. On the question of limitation, the executing Court held that the starting point of limitation was the 28th January, 1959, when the decree was amended, and the execution petition having been filed within three years from that date, it was within time.

4. Against the decision of the executing Court, the judgment-debtors preferred an appeal in the lower appellate Court where they pressed only their first objection, namely, that the default clause in the compromise decree was penal, and as such not enforceable in law. The lower appellate Court dismissed the appeal holding that the objection was

without substance and the judgment-debtors were liable to pay the entire amount of the claim as incorporated in the amended compromise decree. Being thus aggrieved, the judgment-debtors have preferred the present appeal.

5. So far as the objection with regard to the penal character of the default clause in the compromise decree is concerned, I am clearly of the opinion that it cannot succeed. It was really not in the nature of a penalty as urged on behalf of the judgment-debtors. It is to be remembered that the decree was passed on the basis of a compromise between the parties. The judgment-debtors did not like to contest the claim which the decree-holders had made in the money suit. They only wanted some concession which the decree-holders agreed to give to them on condition that the judgment-debtors paid to them a sum of Rs. 2,000 in full satisfaction of the claim on or before the 23rd October 1958. This was undoubtedly a very favourable term so far as the judgment-debtors were concerned, because the sum of Rs. 2,000 was less even than the principal amount which was Rs. 2178/- . In other words, what the decree-holders had agreed to forgo was not only the entire interest and costs of the suit, but also a part of the principal sum which had been advanced under the handnote in suit.

As against this, the default clause merely provided that the decree-holders would be entitled to a decree for the full amount of their claim besides costs and future interest. Even on contest, the decree-holders would have been entitled to a decree in those very terms. In other words, no additional advantage was secured by the decree-holders under the default clause, to which they would not have been entitled in case a decree would have been passed in their favour after contest. In this regard also, the judgment-debtors were in an advantageous position, inasmuch as if they had contested the suit, they would have had to incur more costs of their own. Considering the terms of the decree as a whole, I am satisfied that there was no element of penalty in the default clause.

6. Learned counsel for the appellants then raised the question of limitation. As already stated, the question of limitation was not raised in the lower appellate court. That, however, cannot preclude the appellants from raising the question in this Court, because it is a question of law, for the decision of which no additional facts or materials are necessary. Besides, the Court has to go into the question of limitation even where it has not been raised by the defendant or the judgment-debtor. Section 3 of the Limitation Act imposes upon the Court a duty to dismiss an ap-

plication made after the prescribed period of limitation even though limitation has not been set up as a defence.

7. I have already mentioned the various dates which are relevant for decision of the question of limitation. The original decree was passed on 20-7-1958. The amendment of the decree was made on 28-1-1959 and the application for execution was filed on 3-1-1962. The period of three years prescribed under Article 182 of the Limitation Act, 1908, which was in force at the relevant time, would ordinarily run from the date of the decree, that is to say, the 20th July, 1958, and on this footing the application for execution filed on 3-1-1962 would seem to be barred by limitation. The decree-holders, however, seek to bring the application within the period of limitation by urging that the terminus a quo in the present case was the date of the amendment of the decree which was well within three years of the date of the application for execution. The question for consideration, therefore, is whether the stand taken by the decree-holders is fit to succeed.

Clause (4) of Article 182 provided that where a decree has been amended, the time from which the period of limitation would begin to run was the date of the amendment. It is, however, well settled by a series of decisions of this Court that it is not every amendment of the decree which gives a fresh start to limitation and an amendment which gives a fresh start to limitation must be an amendment of a substantial character as affecting the rights of the parties. For example, in Kalanand Singh v. Raj Kumar Singh, 2 Pat LJ 286=(AIR 1917 Pat 517), it was held that an amendment of a rent decree which consisted merely of a correction in the rate of rent, but did not alter the amount of rent decreed, did not provide for a fresh starting point of limitation.

Similarly, in Rameshwar Narain Misra v. Raghunandan Purbey, AIR 1938 Pat 57, it was held that an amendment consisting of a variation of the amount of costs to the extent of Rs. 1/2/- was really a clerical error or a trifling arithmetical error, and not an amendment of the decree within the meaning of clause (4) of Article 182. Speaking for the Court in that case, Fazl Ali, J. (as he then was) made the following observation:

"Coming now to the merits of the present case, it appears to me that the amendment which gives a fresh start to limitation must be an amendment in the real sense of the term, that is of some substance as affecting the rights of the parties, and not merely the correction of a clerical error or a trifling arithmetical mistake such as the Court might at any

time correct of its own motion. In the present case there was no real amendment of the decree and the Court which was asked to amend it, did not issue notice to the opposite party before passing orders upon the decree-holder's application. I am therefore inclined to think that Art. 182, CL (4) cannot be availed of by the decree-holder and the execution is barred by limitation."

On the same principle, it was held in Kesho Singh v. Bhuneshwari Kuer, AIR 1942 Pat 478 that an amendment of a substantial nature gave a fresh start to limitation under clause (4) of Article 182. In that case, the decree, as originally passed, was a money decree giving to the decree-holder the right to sell the right, title and interest of the judgment-debtors in the holding. By the amendment, the decree-holder was conferred the right to sell the holding of the judgment-debtors, and not merely their right, title and interest therein. In these circumstances, their Lordships held that the starting point of limitation was the date of the amended decree, and not the date of the original decree.

8. In the present case, I have already set out the terms in which the decree was amended on 28-1-1959. The decree as originally passed on 20-7-1958 did not mention the amount of Rs. 2944/10/- and Rs. 660/11/- as costs which were inserted by the amendment. But the decree, as originally passed, provided:

"It is ordered that the suit be decreed in terms of the compromise which will form part of the decree."

Turning to the compromise petition which forms part of the decree, I find that it was clearly provided therein that in event of the judgment-debtors defaulting in the payment of Rs. 2,000/- to the decree-holders on or before the 23rd October 1958, the plaintiffs, namely, the decree holders would be entitled to a decree for the full amount of their claim in the suit, besides the costs of the suit and future interest at 1/8/- annas per cent per mensem. In the earlier portion of the decree, it was clearly indicated that the claim in the suit was for Rs. 2178/- on account of principal and Rs. 766/10/- on account of interest on the basis of a handnote dated the 15th Kartik 1361 Fasli.

Reading the decree as a whole, that is to say, along with the compromise petition forming part of it, it is manifest that what was decreed in favour of the decree holders at the original stage was precisely what was inserted in the decree by the amendment made on 28-1-1959. In other words, the amendment did not affect the rights of the parties in any way. The amendment only worked out the rights of the parties in terms of money in accordance with what had been

decreed originally. I am, therefore, of the opinion that it was not at all an amendment in the real sense of the term, and such an amendment was wholly insufficient to give a fresh start to limitation under clause (4) of Article 182 of the Limitation Act. In other words, the period of three years prescribed for the application for execution started from the date of the original decree, and not from the date of the amendment of the decree, and as such, the application for execution filed beyond the period of three years from the date of the original decree must be held to be barred by limitation.

9. In the result, this appeal succeeds. The orders of the Courts below are set aside and the application for execution is dismissed as barred by limitation. The appeal is allowed; but in the circumstances, there will be no order as to costs.

MKS/D.V.C.

Appeal allowed.

AIR 1969 PATNA 88 (V 56 C 22)

N. L. UNTWALIA AND B. P. SINHA, JJ.
Sya Sharan Sinha and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No. 790 of 1967, D/- 29-1-1968.

(A) Municipalities — Bihar and Orissa Municipal Act (7 of 1922), Ss. 390A, 4(1) (a), 4(2) and 5 — Conversion of Notified area into municipality under S. 390A — Government must be satisfied that provisions of Ss. 4(1)(a), 4(2) and 5 are fulfilled.

The conversion of an Notified area into a Municipality under S. 390A has been subjected to the provisions of S. 4 of the Act. The State Government must be satisfied that all the three conditions, which are conditions precedent to constitute a town a Municipality in accordance with CL (a) of sub-section (1) of S. 4 of the Act have been fulfilled and that the declaration of its intention to constitute the town a municipality must be published in the official gazette and in such other manner as the State Government may direct as required by sub-section (2) to S. 4.

The wordings of sub-section (2) to S. 4 clearly indicate that the publication of the declaration of the intention to constitute a town a municipality is mandatory both in regard to its publication in the official gazette as also in such other manner as the State Government may direct. The publication of the declaration of the intention in the official gazette only is not sufficient nor is it sufficient

to give a notice of the said declaration to the Notified Area Committee, because the publication of the declaration of the intention must be in such other manner as the State Government may determine. Giving of notice to the Notified Area Committee is not the publication of the declaration within the meaning of Sec. 4(2).

In view of the provisions of S. 5 it is clear that the intention of the Legislature was that the declaration of the intention of the State Government must be published in the locality in some other manner, apart from the publication in the official gazette as the State Government may think fit and proper to direct, so that any inhabitants of the town or the area or any rate payer of the municipality concerned, if it was a case covered by the other clauses of S. 4(1), may get an opportunity to submit his objection through the District Magistrate, within six weeks from the date of the publication of the declaration under S. 4 of the Act. Such a provision, made for safeguarding the rights of the inhabitants of the locality, could not but be mandatory as it had a very good purpose behind it. If the publication of the declaration of the intention of the State Government is made only in the official gazette and in no other manner, the inhabitants of the locality are deprived of their valuable right to file their objections for the consideration of the State Government under S. 5 of the Act. Case law referred to.

(Paras 6, 7 and 9)

(B) Municipalities — Bihar and Orissa Municipal Act (7 of 1922), Ss. 390A, 4 and 5 — S. 390A is subject to provisions of both Ss. 4 and 5.

Although S. 390A in terms does not make the exercise of the power by the State Government subject to the provisions of S. 5 of the Act, when it makes it subject to the provisions of S. 4, as a rule of construction and by necessary implication it has got to be held that it is subject to S. 5 also, otherwise there would be no purpose in making it subject to S. 4 only. AIR 1968 SC 90, Foll.

(Para 13)

(C) Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 4(1)(a) — Conditions to be fulfilled under — Must be referable to facts as they exist at time of declaration of intention of State Government.

The three conditions which are to be fulfilled under Cl. (a) of sub-section (1) of S. 4 of the Act must be referable to the facts as they exist at the time of declaration of the intention of the State Government to constitute a town or an area a Municipality. The facts as they appear from the census report made several years ago before the declaration of intention of the State Government cannot be

safe criteria for the satisfaction of the State Government that the conditions have been fulfilled. AIR 1967 SC 295, Foll.
(Para 17)

(D) Municipalities — Bihar and Orissa Municipal Act (7 of 1922), S. 4(1)(a) and (2) — Pre-conditions not fulfilled — Order null and void.

When the declaration of the intention of the State Government leading to the conversion of Notified Area into Municipality did not fulfil all the three conditions of S. 4(1)(a) of the Act which were sine qua non of the formation of the intention and its declaration, the order of the State Government pursuant thereto is null and void, also because such declaration was not in compliance with the mandatory requirement of S. 4(2) of the Act.
(Para 19)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 SC 90 (V 55)=		
(1967) 3 SCR 759, Giriwar Prasad Narain Singh v. Dukhu Lal Das		12
(1967) AIR 1967 SC 295 (V 54)=		
(1966) Supp. SCR 311, Barium Chemicals Ltd. v. Company Law Board		16
(1964) AIR 1964 Pat 53 (V 51), Mahesh Prasad Sinha v. Munjay Lal		10
(1877) 2 PD 203=42 JP 6, Howard v. Bodington		10
(1861) 30 LJ Ch. 379=45 ER 715, Liverpool Borough Bank v. Turner		10

Basanta Chandra Ghose, Raghunath Jha, Sanat Kumar Chattopadhyay and Brahamanand Prasad Sinha, for Petitioners; K. P. Verma (Standing Counsel) Karuna Nidhan Keshava and Brajeshwar Mallick, for Respondents.

UNTWALIA, J. :— This is an application under Article 226 of the Constitution of India to quash the Notification No. 10021/LSG, issued by the Government of Bihar on the 8th December, 1967, a copy of which is Annexure 'A' to the writ application, and to restrain the State of Bihar (Respondent No. 1) to forbear from enforcing Annexure 'A' and the other respondents from acting thereunder. Cause has been shown by the learned standing counsel on behalf of Respondents Nos. 1, 19 (the Sub-divisional Officer, Madhepura) and respondent no. 20, the Doctor Incharge of the Madhepura Dispensary and Mr. Brajeshwar Mallick on behalf of respondents nos. 2 to 18, who are nominated as office-bearers and members of the Ad Hoc Committee appointed by the State Government of the Madhepura Municipality constituted under the impugned notification.

2. The locality known as the Town of Madhepura was formed a notified area and a Notified Area Committee was constituted by the State Government by Notification No. 3830/LSG dated the 21st

March, 1960, under Section 388 of the Bihar and Orissa Municipal Act, 1922 (B. & O. Act VII of 1922), hereinafter called the Act. According to the case of the petitioners, out of whom petitioners 1 and 2 were the Members of the Notified Area Committee and petitioner no. 3 was a mere tax-payer, towards the end of September, 1967, a notice issued by the Local Self-Government Department of the Government of Bihar was received by the Notified Area Committee intimating the declaration of the intention of the State Government to convert the Notified Area Committee into a Municipality. The Committee objected in writing, inter alia, on the ground that the conditions imposed by Sec. 4 of the Act were not fulfilled and hence the Notified Area could not be converted into a Municipality. The petitioners' grievance is that without giving any opportunity to the members of the committee to have their say in the matter and without replying to their objections, the State Government in the Local Self-Government Department, purporting to act under Section 390A of the Act, by the impugned notification has declared that the Madhepura Notified Area Committee shall be converted into a Municipality with effect from the 15th December, 1967. By the same notification it has also been declared that for the period of transition, a committee of nineteen members, consisting of Respondents 2 to 20, shall exercise and perform all the powers and duties of the Commissioners of the Municipality. The petitioners have quoted various figures from the latest census report of the Government to show that the conditions imposed by section 4 of the Act are not fulfilled, and that the impugned notification is wholly illegal and without jurisdiction, being in contravention of Section 4 of the Act. They further alleged that the State Government had no power to appoint an Ad Hoc Committee to be the office-bearers and the Commissioners of the Municipality constituted by the impugned notification and that the Minister Incharge of the Local Self-Government Department had constituted the Committee mala fide to give a majority to the people belonging to his political party.

3. The writ application was filed on the 13th December, 1967, and a supplementary affidavit was filed on the 14th December, 1967, the day when the application came up before a Bench of this court for admission. By the supplementary affidavit, certain clarifications were introduced in regard to the total male population of Madhepura as it appears from the census report. The application was admitted on the 14th December, 1967 and the operation of the impugned notifi-

cation was stayed. On the 15th January, 1968, a counter-affidavit was filed on behalf of the Sub-Divisional Officer of Madhepura, who is Respondent no. 19, and on the same date another counter-affidavit was filed on behalf of the State of Bihar, Respondent no. 1, and the Civil Assistant Surgeon, Madhepura, Respondent no. 20, as also one was filed by Shree Kapildeo Mandal, Respondent no. 3. The stand taken on behalf of the respondents is that prior to the conversion of the Notified Area into a Municipality, a preliminary notice was issued inviting objections and suggestions and the objections which were received were examined and taken into account while finally publishing the notification dated the 8th December, 1967. All the pre-conditions imposed by Section 4 of the Act have been fulfilled. The State Government had power to appoint a Board for the transitory period until elections were held under the Act and that the appointment of the Ad Hoc Committee was not mala fide.

4. At the hearing of the application, Mr. B. G. Ghose, learned Advocate for the petitioners, pressed the following four points:-

(i) That the mandatory procedure prescribed by sub-section (2) of Section 4 of the Act was not followed in this case and, therefore, the notification dated the 8th December, 1967, is null and void;

(ii) That the condition of three-fourth of the adult male population of any town being engaged on pursuits other than agricultural, as required by clause (a) of sub-section (1) of Section 4 was not fulfilled and hence the State Government had no power to constitute the town of Madhepura into a Municipality;

(iii) That the State Government had no authority under Section 390A of the Act to constitute an Ad Hoc Body of the office-bearers and the Commissioners of the Municipality; and

(iv) That, in any event, the constitution of the Body in question was mala fide.

5. We called upon the learned Standing Counsel and the learned Advocate for Respondents 2 to 18 to reply to the first two points raised on behalf of the petitioners and since we are satisfied that the impugned notification has to be held void on both these points, we did not proceed to examine, nor do we propose to express any opinion of ours, on the third and the fourth points urged on behalf of the petitioners.

6. Section 390A(1) of the Act reads as follows:-

"Conversion of a Notified Area into a Municipality:-

(1) Notwithstanding anything contained in Sections 388, 389 and 390 and subject to the provisions of Section 4, the

State Government may, by notification, declare that with effect from the date to be specified in the notification and subject to such provisions as the State Government may make for the period of transition, a notified area constituted under Section 388 shall be converted into a Municipality, and with effect from that date all the provisions of this Act shall apply to such Municipality unless the State Government in the notification, or by a fresh notification, specifically bar the application of any provision in that area."

Clauses (b) to (d) of sub-section (1) of Section 4 of the Act are not necessary to be read for the purpose of the present case. It is, however, necessary to quote clause (a) of sub-section (1) and sub-section (2) of Section 4, which run as follows:-

"(1)(a) When the State Government is satisfied that three-fourths of the adult male population of any town are engaged on pursuits other than agricultural and that such town contains not less than five thousand inhabitants, and an average number of not less than one thousand inhabitants to the square mile of the area of such town, the State Government may declare its intention to constitute such town, together with or exclusive of any railway station, village, land or building in the vicinity of such town, municipality, and to extend to it all or any of the provisions of this Act.

(2) Every declaration under this section shall be published in the Official Gazette and in such other manner as the State Government may direct."

It is manifest, therefore, that the conversion of a Notified area into a Municipality under Section 390A has been subjected to the provisions of Section 4 of the Act. In other words, the State Government must be satisfied that all the three conditions, which are conditions precedent to constitute a town a Municipality in accordance with clause (a) of sub-section (1) of Section 4 of the Act, have been fulfilled and that the declaration of its intention to constitute the town a municipality must be published in the official gazette and in such other manner as the State Government may direct, as required by sub-section (2).

7. The wordings of sub-section (2), extracted above, clearly indicate that the publication of the declaration of the intention to constitute a town a Municipality is mandatory both in regard to its publication in the official gazette as also in such other manner as the State Government may direct. The publication of the declaration of the intention in the official gazette only is not sufficient nor is it sufficient to give a notice of the said declaration to the Notified Area Committee, because the publication of the

declaration of the intention must be in such other manner as the State Government may determine. Giving of notice to the Notified Area Committee is not the publication of the declaration within the meaning of sub-section (2) of Section 4 of the Act.

8. Section 5 of the Act provides:-

"The State Government shall take into consideration any objection submitted through the District Magistrate within six weeks from the date of the publication of a declaration under Section 4, by any inhabitants of the town or area, or any rate-payer of the municipality concerned, and in the case of a declaration under clause (a) of sub-section (1) of the said section, by the district board of the district in which the town is situated."

9. In view of the provisions aforesaid, it is clear that the intention of the Legislature was that the declaration of the intention of the State Government must be published in the locality in some other manner, apart from the publication in the official gazette, as the State Government may think fit and proper to direct, so that any inhabitant of the town or the area or any rate-payer of the Municipality concerned, if it was a case covered by the other clauses of sub-section (1) of Section 4, may get an opportunity to submit his objection through the District Magistrate, within six weeks from the date of the publication of the declaration under Section 4 of the Act. Such a provision, made for safeguarding the rights of the inhabitants of the locality, could not but be mandatory, as it had a very good purpose behind it. It is a matter of common experience that the official gazette is not subscribed or read by the general inhabitants of any town or area. If, therefore, the publication of the declaration of the intention of the State Government is made only in the official gazette and in no other manner, the inhabitants of the locality are deprived of their valuable right to file their objections for the consideration of the State Government under section 5 of the Act.

10. In the case of *Mahesh Prasad Sinha v. Munjay Lal*, AIR 1964 Pat 53, a Bench of this court, to which I was a party, quoted the well-known principles from various authoritative text books to enable the court to determine as to whether a particular provision of law is mandatory or mere directory. Out of those quotations, I think, it is expedient to quote a few passages here also. In Maxwell's Interpretation of Statutes, Eleventh Edition, at page 364 occurs a passage, which reads thus:-

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere

direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not (to) be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

At page 362, the learned author has said —

"When a statute requires that something shall be done, or done in a particular manner or form, without expressly declaring what shall be the consequence of non-compliance, the question often arises: What intention is to be attributed by inference to the legislature? Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention".

Lord Campbell's observations while affirming the decision in the case of Liverpool Borough Bank v. Turner, (1860) 29 L.J. Ch 827, made in (1861) 30 L.J. Ch 379, to the effect:

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

were quoted with approval in Howard v. Bodington, (1877) 2 P.D. 203. Before quoting the said passage, Lord Penzance has said at page 210 —

"In the case of statutes that are said to be imperative, the courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the courts hold a provision to be mandatory 'or directory' they say that, although such provision may not have been complied with, the subsequent proceedings do not fail."

It has been pointed out in note (b) at page 434 of Volume 36 of Halsbury's Laws of England, Third Edition, that Lord Penzance has used the term 'mandatory' as synonymous with 'directory' in contradiction of the term 'imperative'. A passage in paragraph 5813 in Third Volume of Sutherland's Statutory Construction, Third Edition, reads as follows:—

"With respect to the question of mandatory and directory operation, as with any question of statutory construction, the primary consideration is that of determining the intent of the legislature. Each case stands pretty much on its own facts, to be determined on an interpretation of the particular language used. Various methods of attacking the problem are employed. One oft-repeated formula is that statutory requirements that are of the essence of the thing required by statute are mandatory, while those things which are not of the essence are directory. And it is said that the ordinary meaning of language should always be favoured."

11. In the light of the above principles for determining the character of the command of the legislature as to whether it is mandatory or mere directory, it has to be noticed that sub-section (2) of Section 4 requires that every declaration under this section shall be published in the official gazette and shall be published in other manner also. Of course, the State Government has been given the discretion to determine that other manner, but that does not mean that the State Government would say that publication of the declaration is not necessary in any other manner. In some other manner the declaration of the intention must be published and the word 'publication' necessarily connotes the publication of the declaration of the intention in the locality in a manner which may communicate the declaration to the residents of the locality. As I have said above, mere giving of the notice of the declaration to the Notified Area Committee was not such a publication, as was done in this case. On the affidavits filed by the parties, as also from the gazette notification, it is clear that the declaration of the intention was published only in the gazette and a notice was given to the Notified Area Committee. In no other manner it was published in the locality. The declaration of the intention was published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967. The English version of the notification published in the gazette is as follows:—

"The 21st September, 1967.

No. 8026-LSG —whereas the Governor of Bihar is satisfied that three-fourths of

the adult male population of Madhepura Notified Area in the district of Saharsa declared as such in notification No. 3830-LSG dated the 21st March, 1960, are engaged in pursuits other than agricultural and that the town comprised in the aforesaid notified area contains not less than five thousand inhabitants, and average number of not less than one thousand inhabitants to the square mile of the area of the town.

Now, therefore, in exercise of the powers conferred by section 390A of the Bihar and Orissa Municipal Act, 1922 (B. and O. Act VII of 1922), the Governor of Bihar, is pleased to declare his intention to convert the said notified area into a Municipality.

Any objection or suggestion in this regard which may be received through the District Magistrate, Saharsa, and the Commissioner of the Bhagalpur Division, within four weeks from the date of the publication of this notification in the Bihar Gazette, will be considered.

By order of the Governor of Bihar,
S. H. Karim
Deputy Secretary to Government."

A few months later followed the impugned notification converting the Notified Area into the Municipality. On the facts placed before us, it is undisputed that the declaration of the intention as published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967, was not published in any other manner. That being so, there was clear infraction of the mandatory requirement of sub-section (2) of Section 4 of the Act.

12. In support of the view I have expressed above, a reference may be made to the decision of the Supreme Court in the case of Giriraw Prasad Narain Singh v. Dukhu Lal Das, AIR 1968 SC 90. The relevant provision of sub-section (2) of Section 3 of the Bihar Land Reforms Act, which was being considered by the Supreme Court, required that the "notification referred to in sub-section (1) shall be published in official gazette and at least in two issues of two newspapers having circulation in the State of Bihar." It was held by the Supreme Court that the direction was mandatory and the publication in the official gazette, in absence of any publication in two newspapers having circulation in the State of Bihar, was not sufficient. In support of this view, Bhargava J., delivering the judgment of the Court, laid stress on the adjectival clause "at least" used in sub-section (2) of Section 3 of that Act, but, in my opinion, even in the context of the provision made in sub-section (2) of Section 4 of the Act it has got to be held that the requirement of publication of the declaration in such other manner as

the State Government may direct is also mandatory.

13. Although section 390A in terms does not make the exercise of the power by the State Government subject to the provisions of Section 5 of the Act, when it makes it subject to the provisions of Section 4, as a rule of construction and by necessary implication it has got to be held that it is subject to S. 5 also, otherwise there would be no purpose and meaning in making it subject to Section 4 only. In that view of the matter, I may point that the period for filing objection through the District Magistrate is six weeks from the date of the publication of the declaration under Section 4 and the State Government seems to have arbitrarily reduced that period to four weeks by the declaration published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967.

14. Coming to the second point urged on behalf of the petitioners, it is to be noted first that there are three requirements in respect of which the State Government is to be satisfied before declaring its intention to constitute a town or an area a Municipality and they are the following:—

(i) That three-fourth of the adult male population of the town or the area are engaged in pursuits other than agricultural;

(ii) That such town or area contains not less than five thousand inhabitants; and

(iii) That the density of the population of an average number of not less than one thousand inhabitants to the square mile of the area of the town is there.

15. It is no doubt true that the State Government, namely, the Governor, has to be satisfied as to the existence of the three conditions aforesaid before a declaration of intention is made under section 4 of the Act. The satisfaction is of the Governor and not of the Court. But when undisputed materials have been placed before the court, as have been done in this case, which necessarily lead to the conclusion that any or more of the conditions has or have not been satisfied, then the court has got to hold that the satisfaction of the State Government or the Governor was based on no material. In that view of the matter also, the notification has got to be declared invalid.

16. In the case of Barium Chemicals Ltd. v. Company Law Board, AIR 1967 SC 295, Hidayatullah J. whose view is one of the majority view of the Court, said in relation to a provision of a similar nature :—

"No doubt the formation of opinion is subjective but the existence of circum-

stances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out."

His Lordship quoted with approval a passage from the judgment of Shelat J. in the same case, which said —

"It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist."

17. I would first like to observe that the three conditions which are to be fulfilled under clause (a) of sub-section (1) of Section 4 of the Act must be referable to the facts as they exist at the time of declaration of the intention of the State Government to constitute a town or an area a Municipality. The facts as they appear from the census report of 1961 made several years ago before the declaration of the intention of the State Government cannot be safe criteria for the satisfaction of the State Government that the conditions have been fulfilled. In the instant case, there is nothing to indicate the facts as they existed in 1967 were taken into consideration before the issuance of the declaration of the intention of the State Government. This is clear from a copy of the letter dated the 30th November, 1967, written by the District Magistrate of Saharsa to the Commissioner of the Bhagalpur Division, which is Annexure 'I' to the counter-affidavit filed on behalf of Respondents 1 and 19. That letter shows that the objection of the Notified Area Committee was examined in the light of the census figures of 1961 and on no other basis. Even on that basis on the face of the materials placed before this Court, it is manifest that the first condition was not fulfilled, although undisputedly the other two were fulfilled.

18. The figures given in the petition as well as in the counter-affidavit with reference to the Census Report of 1961 are not at a variance. According to these figures, the total male population of the area of Madhepura was 6,763. This included both adult and minor male population. Out of this total, the number of male workers was 3,380, 489 of whom were cultivators and 226 were agricultural labourers, that is to say out of 3,380, 715 workers were engaged in agricultural pursuits and 2,665 workers were engaged in pursuits other than agricultural. The number 2,665 was not the three-fourth of the total adult male population of Madhepura. It appears from the supplementary affidavit, which has not been controverted, that the adult male popula-

tion out of the total male population was about 60 per cent, i. e., it was in the neighbourhood of 4,000 and the figure 2,665, falls short of the three-fourth of the adult male population which can be said to be engaged in pursuits other than agricultural. An obvious mistake seems to have been committed by the authorities in this regard as it appears from the copy of the letter written by the District Magistrate to the Commissioner of the Bhagalpur Division on the basis of which in the counter-affidavit filed on behalf of the respondents 1 and 19 it has been stated that "out of the total male population of 6,763, only 489 are cultivators and 226 are agricultural labourers. The rest are engaged in pursuits other than agricultural who are much more than three-fourth of the total male population." In the writ application itself, a fact has been mentioned that the population of the male non-workers in the Madhepura town, according to the 1961 census, was 3,383, which would include, "students or children doing no other work, or other persons engaged in household duties only, infants or disabled persons incapable of doing any work, retired persons (not re-employed), rentiers, beggars, vagrants, convicts in jails, inmates of penal, mental or charitable institutions, and unemployed persons." (Vide page xxxii of the Census of India, 1961, Bihar District Census Handbook of Saharsa). The authorities, as the counter-affidavit clearly indicates, proceeded on the assumption that the total male population of 6,763 was the total adult male population. This is one obvious error and secondly, whoever was not engaged in agricultural pursuit was taken to be engaged in pursuits other than agricultural. That is the second obvious error. In view of the glaring facts disclosed in the counter-affidavit, it has got to be held that the satisfaction of the State Government as to the fulfilment of the first requirement of clause (a) of sub-section (1) of Section 4 of the Act was based upon obvious errors and erroneous views.

19. I, therefore, hold that the declaration of the intention as published in the Bihar Gazette (Extraordinary) dated the 25th September, 1967, leading to the conversion of the Madhepura Notified Area into a Municipality by the impugned notification dated the 8th December, 1967, was null and void because all the three pre-conditions, which were sine qua non of the formation of the intention and its declaration, were not fulfilled, as also because the declaration was not in compliance with the mandatory requirement of Sec. 4(2) of the Act.

20. In the result, the application is allowed and the notification no. 1002/LSG dated the 8th December, 1967, a copy of

which is Annexure 'A' to the writ application, is held to be null and void and of no effect. A writ of mandamus will issue directing respondent no. 1 not to give effect to it. There will be no order as to costs.

21. B. P. SINHA, J.:— I agree.
DGB/D.V.C. Petition allowed.

AIR 1969 PATNA 95 (V 56 C 23)

R. L. NARASIMHAM, C. J. AND
B. D. SINGH, J.

Commissioner of Income-tax, Bihar and Orissa, Patna, Petitioner v. Uma Maheshwari through Shebait H. Barat, Dhanbad, Opposite Party.

Tax Case No. 3 of 1966, D/- 15-4-1968.

Income Tax Act (1922), Ss. 2(6AA), 41 (1) — Income earned by Shebait of an idol, as shebait is "earned income" of idol.

The personality of the idol may be said to be merged in that of the shebait. Hence, for all legal purposes, the Shebait and the idol are one. Any income earned by the shebait not on his own personal behalf but while functioning as the shebait of the deity must be deemed to be the income earned by the idol. The separation of the personality of the shebait from that of the idol for the purpose of applying the provisions of the Act will not be in consonance with the Hindu Law. Where therefore the shebait carried on the business on behalf of the idol, and earned the income it will come within the definition of "earned income" of the idol as described in Section 2(6AA) (b). AIR 1962 SC 156 & AIR 1966 Cal 494 & AIR 1966 SC 73, Disting.

(Para 11)

Cases Referred: Chronological Paras

(1966) AIR 1966 SC 73 (V 53)= (1965) 3 SCR 652, Commr. of In-	10
come Tax, Madras v. Managing Trustees, Nagore Durgha, Nagore	
(1966) AIR 1966 Cal 494 (V 53), Sri	10
Sridhar Jiew v. Income Tax Officer	
(1962) AIR 1962 SC 156 (V 49)= (1962) 44 ITR 1, Commr. of In-	10
come Tax v. S. A. S. Marimuthu	
Nadar	
(1957) AIR 1957 SC 133 (V 44)= 1956 SCR 756, Deoki Nandan v.	6
Murlidhar	

Ugra Singh, for Petitioner; Messrs. Tarkeshwar Prasad, Awadh Bihari Prasad, Rameshwari Prasad No. 2 and Manindranath Verma, for Opposite Party.

NARASIMHAM, C. J.:— This is a reference by the Income Tax Appellate Tribunal under Section 256(1) of the Income Tax Act, 1961, stating the following case for the opinion of this court.

viz. whether on the facts and the circumstances of the case, the assessee is entitled to earned income relief as defined in Section 2(6AA) of the Act.

2. The assessee (Opposite Party) is a Hindu deity, Uma Maheshwari, acting through its shebait, H. Barat, who was appointed as shebait under the orders of the Calcutta High Court made in 1936. The assessee owns several collieries and other business assets in Dhanbad District of Bihar. Here, we are dealing with the assessment year 1961-62, for which the relevant accounting year was the financial year 1960-61. Hence, the law applicable will be the old Act, viz., Indian Income-tax Act, 1922 (hereinafter referred to as the Act).

3. The assessee claimed earned income relief; but that claim was rejected both by the Income-tax Officer and the Appellate Assistant Commissioner who thought that a deity, though a juristic person for assessment, was incapable of earning any income. The Income-tax Appellate Tribunal, however, granted earned income relief relying on section 41 (1) of the Act, and observed that, inasmuch as the shebait was appointed by the Court and it was he who carried on the business of the deity assessee and he was capable of earning income, the assessee would also get the benefit of that income.

4. Hence, the main question for consideration is whether a Hindu deity, who is the owner of property, can claim earned income relief under the provisions of the Act on the ground that its shebait earned that income for the deity.

5. The relevant statutory provisions for consideration for this purpose are Section 2(6AA) defining "earned income" and section 41(1). Those provisions, omitting immaterial portions are quoted below.

"2(6AA) 'Earned income' means any income of an assessee who is an individual, Hindu undivided family, unregistered firm or other association of persons not being a company, a local authority, a registered firm or a firm treated as registered under clause (b) of sub-section (5) of Section 23 —

(a) *

(b) which is chargeable under the head profits and gains of business, profession or vocation where the business, profession or vocation is carried on by the assessee or, in the case of a firm, where the assessee is a partner actively engaged in the conduct of the business, profession or vocation; or *

(c) *

and includes any such income which though it is the income of another person, is included in the assessee's income under the provisions of this Act, but does not include any such income which is

exempt from tax under sub-section (2) of Section 14 or under a notification issued under Section 60."

6. It is now well settled that though a Hindu idol is a juristic person holding properties and the properties endowed vest in the same, nevertheless the idol is the owner only in an ideal sense — see Deoki Nandan v. Murlidhar, AIR 1957 SC 133 at p. 136. In Mukherjea's Law of Endowment (Second Edition) at page 249, the legal position about the relationship between the idol and its shebait has been summed up as follows:

"An idol is a juristic person in whom the title to the properties of the endowment vests. But it is only in an ideal sense that the idol is the owner. It has to act through human agency, and that agent is the Shebait, who is, in law, the person entitled to take proceedings on its behalf. The personality of the idol might therefore be said to be merged in that of the Shebait."

7. On behalf of the assessee, Mr. Tarakeshwar Prasad contended that, by virtue of sub-section (1) of Section 41 the tax due from the idol was leviable and recoverable from its shebait in the like manner and to the same extent as it would be leviable and recoverable from the idol itself. Hence, he urged that, though the idol may be incapable of "earning any income, the income earned by its shebait for the idol must be deemed to be the income earned by the idol for the purpose of claiming the earned income benefit.

8. Mr. Ugra Singh for the Department, however, urged that reliance on Section 41(1) of the Act will not be justified because, though that section permits the levying and recovering from a shebait in the same manner and to the same amount as it would be leviable and recoverable from an idol, it does not authorise the converse, that is to say, tax due from an idol cannot be levied and recovered in the same manner as the tax due from a shebait.

9. As regards the definition of "earned income" given in Section 2(6AA)(b) Mr. Ugra Singh contended that that would apply in terms only where the assessee himself carries on business. Here, admittedly, the idol could not and did not carry on business. He further urged that the inclusive part of the definition given at the end of sub-section (6AA) will also not help the assessee because its application is restricted only to those instances where the income of another person is included in the assessee's income under the provisions of the Act. Mr. Ugra Singh urged that the words "another person" in this portion of the definition must mean another distinct legal person other than the assessee. But,

where the shebait acts merely for the idol, according to Mr. Ugra Singh, he cannot be said to be "another person" as mentioned in the inclusive part of the definition of "earned income."

10. There is, undoubtedly, considerable force in the contention of Mr. Ugra Singh. Reliance on Section 41(1) of the Act, may not be quite appropriate because, though it permits the levy and recovery of tax from a shebait in the same manner and to the same amount as would be leviable and recoverable from the deity, it does not answer the real question at issue in this case, viz., how can a deity earn any income? The cases where section 41 has been applied are not helpful. Mr. Tarakeshwar Prasad cited the judgment of the Supreme Court in Commissioner of Income-tax v. S. A. S. Marimuthu Nadar, (1962) 44 ITR 1 = (AIR 1962 SC 156) where it was held, applying the principle of Section 41(1) of the Act, that the income of a minor will also be entitled to earned income relief if, in fact, it was earned by his guardian. This case, however, was distinguished by Mr. Ugra Singh on the ground that a minor was not incapable of earning any income, whereas an idol suffers from that incapacity. Similarly, AIR 1966 Cal 494, Sri Sridhar Jiew v. Income Tax Officer, District II(I) Calcutta, does not help us here because that decision only lays down that a shebait of a Hindu deity would come within the wide meaning to be given to the word "trustee" in Section 41(1) of the Act. Similarly, AIR 1966 SC 73, Commissioner of Income-tax, Madras v. Managing Trustees, Nagore Durgha, Nagore, may not be helpful because there the main question for consideration was whether Section 41 of the Act would be applicable where trustees of a Muslim durgha (described as Nat amaigars) actually earned the income for the durgha, though surplus out of the income was payable to some of the descendants of the original founder known as Kasupangudars. Here, again, the Kasupangudars are human beings and capable of having earned income and hence there is no difficulty in applying the principle of Section 41(1) to them.

11. In my opinion, the answer to the point raised by Mr. Ugra Singh is found in the Hindu Law concept of the relationship between the shebait and the idol. The passage from Mukherjea's book (quoted above) says that the personality of the idol might, therefore, be said to be merged in that of the shebait. Hence, for all legal purposes, the shebait and the idol are one; any income earned by the shebait not on his own personal behalf but while functioning as the shebait of the deity must be deemed to be the income earned by the idol. The separation of the personality of the shebait

from that of the idol for the purpose of applying the provisions of the Act will not be in consonance with the Hindu law as described above. This is the reason why in the assessment order the assessee has been described as Uma Maheshwari through H. Barat, i. e. the deity functioning through its shebait. Here, admittedly, the shebait carried on the business on behalf of the idol, and earned the income which is sought to be taxed. It will therefore come within the definition of "earned income" of the idol as described in Section 2 (6AA) (b).

12. For these reasons, I answer the question in the affirmative, and hold that the assessee (idol) through its shebait is entitled to the earned income relief as defined in Section 2(6AA) of the Act. The petitioner should pay the costs of Rs. 200/- to the opposite party.

13. B. D. SINGH, J. :— I agree.
BDB/D.V.C. Reference answered.

AIR 1969 PATNA 97 (V 56 C 24)

B. P. SINHA, J.

Bishwa Nath Prasad, Petitioner v. Yashoda Nandan Sinha, Opposite Party.

Criminal Revn. No: 982 of 1967, D/- 18-4-1968, against order of Sub-divisional Magistrate, Giridih, D/- 8-4-1967.

Criminal P. C. (1898), S. 192 — Stage at which transfer should be ordered — Cognisance of case taken — Enquiry directed against one of accused — No order made on enquiry report — Case transferred — Transfer legal.

Where in a case an enquiry is directed against one of the accused after cognisance is taken, but the case is transferred without passing any order on the enquiry report, the transfer is not illegal.

(Para 4)

Cognisance is taken of an offence and not of an accused, and therefore when cognisance is taken though summonses are issued against some of the accused only, the case should be transferred. There is no provision in law compelling a Magistrate to pass an order on the enquiry report before transferring the case. The only precondition for a transfer under S. 192, Criminal P. C. is that cognisance of the case should have been taken. Thus such a transfer is legal.

(Paras 3 and 4)

Birendra Prasad Sinha and Braj Kishore Prasad No. II, for Petitioner; Mrs. D. Lal and Ramnandan Singh, for Opposite Party.

ORDER :— This revision application is directed against the order dated 8-4-1967 passed by the Sub-divisional Magistrate, Giridih, in a case instituted under Section 500 of the Indian Penal Code.

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2. On 17-11-1966, Bishwa Nath Prasad, Petitioner, filed a complaint before the Sub-Divisional Officer, Giridih, against Shri Yashoda Nandan Sinha, Subhash Chandra Sarkar, Editor, Searchlight and Awadhesh Kumar Tiwary, publisher and printer, Searchlight. The learned Subdivisional Magistrate examined the complainant on S. A. and summoned the Editor and publisher of Searchlight. As against Opposite Party Yashoda Nandan Sinha, he referred the matter for an enquiry by Shri J. Das, Magistrate, 1st Class. The Enquiring Magistrate submitted his report on 5-12-66 to the effect that a *prima facie* case was made out against Yashoda Nandan Sinha as well.

On 6-12-1966, Yashoda Nandan Sinha moved the Sessions Judge against the enquiry report and the learned Sessions Judge stayed further proceedings in the court of the Sub-divisional Magistrate. Consequently, no order could be passed on receipt of the report of the Enquiring Magistrate. Ultimately, the learned Sessions Judge disposed of the matter rejecting the petition of Yashoda Nandan Sinha on 21-3-67 with the following observations:

"All that I want to point out at this stage is that the Acting Sub-divisional Magistrate, after taking cognizance should at once transfer a case to a Munsif-Magistrate. The detention of the file is against the separation scheme. At this stage the applicant who has been named as a third accused in the complaint petition has no locus standi and this application is not maintainable. I, however, make it clear that the Sub-divisional Magistrate must at once transfer the records of the case of which he has taken cognizance to a Munsif Magistrate."

On receipt of this order, the learned Sub-divisional Magistrate passed the impugned order on 8-4-67 to the following effect:

"perused the order of the learned Sessions Court. Cognizance has already been taken under Section 500 I. P. C. The case is transferred to the file of Sri G. N. Chandra, Munsif Magistrate, 1st Class, for disposal."

It is against this order that this revision application has been directed, as mentioned above.

3. The contention of learned Counsel for the petitioner is that the learned Magistrate failed to exercise his jurisdiction in not passing any order on the report of the Enquiring Magistrate. According to the separation scheme, after taking cognizance, the Sub-divisional Magistrate is to transfer a criminal case to the file of a Munsif Magistrate or a Judicial Magistrate. It is well settled that cognizance is taken of an offence and not of an accused, that is to say when cog-

nizance of the offence was taken in this case, though the order for issue of summons was against some of the accused only, the learned Magistrate should have transferred the case to the file of another Magistrate, Judicial or Munsif, for trial.

This irregularity in the procedure was noticed by the learned Sessions Judge and he rightly directed the learned Sub-divisional Magistrate to transfer the case immediately to a Munsif Magistrate for trial. Because by the order of the learned Sessions Judge, further proceedings in the matter were stayed, the learned Sub-divisional officer could not have passed any order earlier regarding the report of the Enquiry Officer either accepting or rejecting it. In the order of the learned Sessions Judge, there was a clear direction to transfer the case immediately to a Munsif Magistrate and, in obedience to that order, the learned Sub-divisional Officer passed the impugned order. Therefore, no irregularity has been committed therein. He did not either accept the report or reject it and the whole case was transferred to the Munsif Magistrate. It was that Magistrate who could consider the report of the Enquiry Officer and pass necessary order. It was not obligatory for the learned Sub-divisional Magistrate to pass order before transferring the case. There is no provision in law compelling a Magistrate to pass such order before transferring a case to the Magistrate.

4. On perusal of the record, it appears that as a matter of fact before the Sessions Court it was submitted on behalf of the petitioner himself that in view of the separation scheme immediately after the cognizance the Sub-divisional Magistrate should have transferred the case to the file of a Munsif-Magistrate who was the proper person to find out as to who else can be summoned in the case as additional accused. The learned lawyer for the petitioner had conceded that the matter had to be seen by the trial court and not by the Acting Sub-divisional Magistrate.

Now, however, the petitioner has taken a different stand which has got no footing. The impugned order is a simple order of transfer of the case to another Magistrate for disposal. Under Section 192 of the Code of Criminal Procedure such transfer order can be passed at any stage of the case before it reaches the stage of inquiry or trial. The only precondition is that the Sub-divisional Magistrate should have taken cognizance of the case. Here the cognizance of the case was already taken and, therefore, the learned Sub-divisional Magistrate was within his jurisdiction to transfer the case to another Magistrate for disposal even without passing any order on receipt of the inquiry report in respect

of Shri Yashoda Nandan Sinha, I do not find any illegality in the order.

5. The order-sheet of the trial Court indicates that, as a matter of fact, before the learned Munsif-Magistrate, the complainant raised this matter and prayed for issue of processes against Yashoda Nandan Sinha on basis of the report of Mr. J. Das, Magistrate, 1st Class. It appears that the learned Magistrate on a due consideration of the matter has passed an order that this question would be considered only after some witnesses are examined when he would be able to know whether a *prima facie* case was made out against Yashoda Nandan Sinha. He has left the matter open. I think, this was quite appropriate order.

6. Therefore, on a consideration of the entire circumstances, I find that there is no reason to set aside the order of the learned Sub-divisional Officer dated 8-4-67. The petition is, therefore, rejected.

JRM/D.V.C.

Petition dismissed.

AIR 1969 PATNA 98 (V 56 C 25)

N. L. UNTWALIA AND
P. K. BANERJI, JJ.

Ashu Lal Saraoji, Appellant v. Haji Sk. Ebadat Husain, Respondent.

A. F. O. D. No. 466 of 1962, D/- 30-4-1968, against decision of Sub. J., Purnea, D/- 17-7-1962

Civil P. C. (1908), Order 9 Rule 13 — Ex parte hearing — Neither party ready on earlier hearing dates — Joint petition for time to compromise, given by both parties — On date of such petition suit not even a year old — Refusal of time and ex parte hearing against defendant wrong. AIR 1925 Pat 534 and AIR 1929 Pat 609, Foll. (Para 4)

Cases Referred: Chronological Paras (1929) AIR 1929 Pat 609 (V 16) — 10

Pat LT 589, Ram Lal Gope v. Kali Prasad Sahu (1925) AIR 1925 Pat 534 (V 12) — 5

1925 PHCC 199, S. N. Mullick v. Ganga Gope (1925) AIR 1925 Pat 534 (V 12) — 5

B. P. Rajgarhia and Sharat Kumar Sharan, for Appellant; Jyotirmoy Ghosh, for Respondent.

JUDGMENT:— This appeal by the defendant is from a decree of the Court below passed ex parte against him in the suit filed by the plaintiff-respondent for foreclosure. Two points were urged in support of the appeal by the learned advocate for the appellant: (i) that the time petition filed by the parties on the 16th July, 1962, ought not to have been rejected and the suit ought not to have

been taken up ex parte on that date; and (ii) that even on the materials produced at the ex parte hearing the decree is erroneous, illegal and fit to be set aside.

2. Since we are inclined to accept the first submission made on behalf of the appellant, it is not necessary to express any opinion on the second point.

3. The title suit, on the basis of a document said to have been executed by the defendant on the 28th November, 1943 was filed on the 6th September, 1961. The written statement filed by the appellant was accepted by order no. 6 dated the 28th February, 1962 and issues were also settled on that date. The suit was adjourned to the 28th March, 1962 for fixing a date for hearing. On this date by order no. 7 the date for hearing fixed was the 19th April, 1962, on which date both sides filed separate petitions for time. The suit was adjourned to the 14th May, 1962 for hearing. On the 26th April 1962 the plaintiff filed a petition stating that he was very old and was laid up with blood-pressure and heart trouble; as such, he prayed that he may be examined on commission. This application was directed to be put up for orders on the date fixed. On the date fixed, that is, on the 14th May, 1962, the plaintiff filed hazri, which was not the hazri of the plaintiff but of somebody on his behalf, because the petition filed for his examination on commission was still pending to be disposed of. The defendant filed a petition for time on the ground that he had to summon witnesses. The case was adjourned to the 20th June 1962 for hearing.

The plaintiff's petition dated the 26th April, 1962 for his examination on commission was directed to be considered when moved. On the 20th June, 1962, again hazri of somebody was filed on behalf of the plaintiff. It is clear from the records of this case that hazri of the plaintiff himself was not filed, as his petition for his examination on commission was still to be disposed of. On defendant's petition for time the suit was adjourned to the 12th July, 1962, for hearing. The plaintiff's petition was not moved and it was again directed to be considered when moved. On the 12th July, 1962, a petition for time on behalf of the plaintiff was filed on the ground that he was suffering from high blood-pressure. The defendant prayed for time on the ground that his witnesses had to be summoned as they were not willing to come without summons.

The time petitions of both the parties were rejected and they were directed to get ready but on their pressing for time the suit was adjourned for peremptory hearing on the 16th July, 1962. On this date, however, parties filed a joint petition for time to compromise the suit.

The prayer for time was rejected and the parties were asked to get ready at once. The plaintiff got ready and without moving his petition for his examination on commission he examined himself at the ex parte hearing as P. W. 1. The defendant's lawyer not being in a position to cross-examine either P. W. 1 or his only other witness (P. W. 2) declined to cross-examine them. The suit was decreed ex parte on the 17th July, 1962.

4. On the facts and in the circumstances of this case it appears to us that the suit ought not to have been taken up for ex parte hearing on the 16th July, 1962. At none of the earlier dates fixed for hearing, the plaintiff was ready to proceed with the suit nor was the defendant. The suit on the 16th July, 1962, was not even one year old. In that situation, when there was a talk of compromise between the parties and a joint petition for time on that ground had been filed, in order to help the parties to arrive at a compromise, time ought to have been granted. Even assuming that the court was not inclined to grant time, although, in our opinion, it was wrongly not inclined to do so, it ought not to have taken up the suit on that very date for ex parte hearing. It ought to have adjourned the suit, may be even by a day or two, and posted it for ex parte hearing. It seems to us that the appellant has unreasonably been denied an opportunity to contest the suit by proceeding with it ex parte on the 16th July 1962.

5. The course, which we have proposed to take in this case, is warranted by the decisions of this Court in S. N. Mullick v. Ganga Gope, AIR 1925 Pat 534 and Ram Lal Gope v. Kali Prasad Sahu, AIR 1929 Pat 609.

6. We, therefore, allow the appeal, set aside the judgment and decree of the court below, remand the case to it and direct it to retry the suit after giving an opportunity to both the parties to adduce their evidence and to take part in the proceedings at the trial of the suit. The witnesses for the plaintiff, already examined by him, it is obvious, will have to be recalled for cross-examination by the defendant and may be recalled, if the plaintiff so wants, for further examination-in-chief.

The defendant will have to pay a sum of Rs. 64/- as cost to the plaintiff within the time to be fixed by the court below, but in any event before taking up the retrial of the suit in pursuance of our direction. The retrial shall commence on a date to be fixed by the court below after giving notice of the date of retrial to the parties or their lawyers. There shall be no order as to costs in this appeal.

JRM/D.V.C.

Appeal allowed.

AIR 1969 PATNA 100 (V 56 C 26)

ANWAR AHMAD, J.

Firdhar Lal Rastogi, Petitioner v. Kuer Avinash Chandra Singh, Opposite Party.

Civil Revn. No. 207 of 1967, D/- 7-5-1968, against order of Munsif, first Court, Patna D/-16-12-1966.

Houses and Rents — Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), Section 11A — Scope — Application by landlord for deposit of rent by tenant and withdrawal of it — One composite order with regard to both reliefs not proper — Opportunity of hearing must be given on both occasions.

Section 11A contemplates two different applications by the landlord for two different reliefs, namely, one for the deposit of the rent by the tenant and the other for the withdrawal of the same and, consequently, one composite order with regard to both the reliefs is not envisaged by it. It cannot be disputed that, on both these occasions, he must be given an opportunity to place his case before the Court and each application must receive separate consideration by the Court: AIR 1955 SC 425 (429), Rel. on. (Para 6)

There may be cases in which the landlord may apply only for a direction on the tenant by the Court for deposit of rent but the tenant does not choose to deposit the same. In such cases, there will be no occasion for the landlord to apply for permission of the Court to withdraw the amount. If the order restraining the landlord from withdrawing the rent is made a part of the order directing the tenant to deposit the rent, such an order will, in many cases, become infructuous. A Court should always guard itself from passing an infructuous order. (Para 7)

Cases Referred: Chronological Paras

(1955) AIR 1955 SC 233 (V 42)=1955

SCR 1104, Hari Vishnu v. Ahmad Ishaque 6

(1955) AIR 1955 SC 425 (V 42)=1955-2 SCR 1, Sangaram Singh v. Election Tribunal, Kota 5. 6

(1928) AIR 1928 PC 261 (V 15)=29 Mad LW 72, T. B. Barrett v. African Products Ltd. 5

(1925) AIR 1925 Mad 1274 (V 12)=49 Mad LJ 273, Venkatasubbiah v. Lakshminarasimham 6

(1917) AIR 1917 PC 71 (V 4)=ILR 40 Mad 793, Balakrishna Udayar v. Vasudeva Ayyar 5

Chunni Lal, for Petitioner; S. Sarwari Ali and Shashi Kumar Sinha, for Opposite Party.

ORDER: — This application in revision on behalf of the plaintiff is directed against an order dated the 16th December 1966, passed by the Munsif, First Court, Patna, rejecting his application for permission to withdraw the arrears of rent deposited by the opposite party.

HL/KL/D383/68

ber 1966, passed by the Munsif, First Court, Patna, rejecting his application for permission to withdraw the arrears of rent deposited by the opposite party.

2. The petitioner instituted the suit (Title Suit No. 294 of 1964) on the 23rd November 1964 for the eviction of the opposite party from holding No. 83, Circle No. 177, Ward No. 26, at Chowk, Patna city, on the ground of personal necessity and non-payment of rent. The opposite party did not dispute the relationship of landlord and tenant for the rate of rent claimed by the petitioner.

3. During the pendency of the suit, the petitioner filed an application under Section 11A of the Bihar Buildings (Lease, Rent and Eviction) Control Act 1947, hereinafter referred to as the Act. The Court, by its order dated the 18th July, 1966, directed the opposite party to deposit the arrears of rent from the 10th December 1963 to June 1966 at the rate of Rs. 72 per month without prejudice to the rights of the parties to lead evidence in regard to the arrears of rent and payment of rent etc. with a direction that, in case the deposit was made in pursuance of this order, the petitioner would not be at liberty to withdraw the amount of rent for the period 10th December 1963 to June 1966.

4. As stated above, the order restraining the petitioner from withdrawing the amount forms part of the order passed by the Court below on the 18th July 1966 on an application of the petitioner under Sec. 11A of the Act, wherein the only prayer of the petitioner was that the opposite party be directed to deposit the rent from the 10th December 1963 to May 1966. In the rejoinder filed by the opposite party to this application, naturally enough, no objection was raised to the withdrawal of the amount by the petitioner. The petitioner also had not applied for its withdrawal, as, till then, the amount had not been deposited. The petitioner made a prayer for the permission of the Court to withdraw the amount in his application dated the 15th December 1966. No objection was raised by the opposite party to the withdrawal of the amount by the petitioner, although a copy of the application of the petitioner had been served on the lawyer for the opposite party and the original filed in Court bears the signature of his lawyer.

5. In the impugned order, which was passed on the 16th December 1966, the learned Munsif observed that —

"the order dated 18-7-66 was dictated on the ijlas in presence of the lawyers for the parties."

It was also held that, as no objection was raised about the restraint put on the petitioner while the order was being passed, there was no reason to review or recall the order dated the 18th July 1966

and justice required that the same must continue. There is, however, nothing on the record to show that the petitioner was given an opportunity to make his submission on the point. The mere fact that, at the time the order was dictated, no objection was raised could not be a ground to divest the petitioner of his right to have his say in the matter before the Court made its mind and passed an order to his detriment. It is a principle of natural justice that, before an adverse order is passed against a person, he must be given an opportunity to make his submission. As this was not done, the order dated the 18th July 1966 must be held to be void and without jurisdiction (vide *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 425, at p. 429).

6. The way in which the order was passed was also against the scheme of the section itself. Section 11A of the Act may be split up into two parts. Under the first part, the landlord may file an application for an order on the tenant to deposit the arrears of rent and the rent falling due every month thereafter. If the tenant fails to deposit the amount as directed by the Court, his defence against ejection would be struck out. In case the amount is deposited, the second part gives an option to the landlord to apply to the Court for permission to withdraw the same. The section, therefore, contemplates two different applications by the landlord for two different reliefs, namely, one for the deposit of the rent and the other for the withdrawal of the same and, consequently, one composite order with regard to both the reliefs is not envisaged by it. It cannot be disputed that, on both these occasions, he must be given an opportunity to place his case before the Court and each application must receive separate consideration by the Court. It will be useful to quote the following passage from the decision of the Supreme Court in *Sangram Singh's case*, AIR 1955 SC 425:—

"...there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.

... a party must be heard in a Court of law, or at any rate be afforded an opportunity to appear and defend himself, unless there is express provision to the contrary, is, we think, beyond dispute. See the observations of the Privy Council in *Balakrishna Udayar v. Vasudeva Ayyar*, AIR 1917 PC 71 at p. 74, and especially in *T. B. Barrett v. African*

Products Ltd., AIR 1928 PC 261 at p. 262, where Lord Buckmaster said:—

'no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence'.

Also 'Hari Vishnu's case', AIR 1955 SC 233, which we have just quoted.

In our opinion, Wallace, J., was right in *'Venkatasubbiah v. Lakshminarasimham'*, AIR 1925 Mad 1274, in holding that—

'One cardinal principle to be observed in trials by a Court obviously is that a party has a right to appear and plead his cause on all occasions when that cause comes on for hearing'. and that —

'It follows that a party should not be deprived of that right and in fact the Court has no option to refuse that right, 'unless the Code of Civil Procedure deprives him of it.'

7. There may be cases in which the landlord may apply only for a direction on the tenant by the Court for deposit of rent but the tenant does not choose to deposit the same. In such cases, there will be no occasion for the landlord to apply for permission of the Court to withdraw the amount. If the order restraining the landlord from withdrawing the rent is made a part of the order directing the tenant to deposit the rent, such an order will, in many cases, become infructuous. It is well known that a Court should always guard itself from passing an infructuous order.

8. The intention of the Legislature, in enacting Section 11A in the Act by Section 12 of the amending Act (Act 16 of 1955) was that no tenant should be allowed to continue in possession of the rented premises unless he is made to pay the arrears of rent and the rent falling due every month thereafter. Section 11A has been inserted exclusively for the benefit of the landlord. During the pendency of the suit for ejection, the money so deposited shall as a rule be made available to the landlord so that he may get its benefit.

9. I am conscious of the fact that the petitioner did not come to this Court against the order passed on the 18th July 1966. Nonetheless, as the order dated the 18th July, 1966 was premature, I can, as is a well-settled rule of this Court, interfere with that order in the present application which has been filed against the order dated the 16th December, 1966. The impugned order is tainted with illegality inasmuch as the Court has refused to consider on merits the petitioner's application dated the 15th December 1966, to which even a rejoinder was not filed.

10. The result, therefore, is that the application in revision is allowed, the impugned order is set aside, and the case is sent back to the learned Munsif

to reconsider the application of the petitioner dated the 15th December, 1966 on merits in the light of the observations made above. There will, however, be no order as to costs.

RSK/D.V.C.

Revision allowed.

AIR 1969 PATNA 102 (V 56 C 27)

RAJ KISHORE PRASAD, J.

Satdeo Prasad and another, Appellants v. Ram Narayan and others, Respondents.

A. F. A. D. No. 531 of 1966, D/- 1-5-1968, from decision of Sub. J., Bihar, D/-26-4-1966.

(A) Tort — Malicious prosecution — Suit for damages — Essentials to be proved — Accusation against plaintiff in respect of offence which defendant claims to have seen him commit — Trial ending in acquittal on merits — Presumption will be not only that plaintiff was innocent but also that there was no reasonable and probable cause for accusation.

When the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true, in such a case, if the accused is innocent, the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable cause. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. Where, therefore, the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in an acquittal on the merits, the presumption will be not only that the plaintiff was innocent, but also that there was no reasonable and probable cause for the accusation. Case law discussed. (Para 11)

(B) Tort — Malicious prosecution — Malice — What constitutes.

The malice which is essential in an action for malicious prosecution does not necessarily connote personal spite or ill-will, but only means an indirect or improper motive, rather than a desire to vindicate the law. (Para 13)

(C) Tort — Malicious prosecution — Suit for damages — Accusation against plaintiff by Karta of Joint Hindu Family — Other members also made defendants

— That accusation was made on behalf of whole family not shown — Prosecution of plaintiff must be deemed to have been made by Karta himself in his personal capacity and other members will not be liable at all. (Para 16)

(D) Tort — Malicious prosecution — Suit for damages — Defendant belonging to scheduled caste and not possessed of enough properties from which claim of plaintiffs could be realised — Claim made though not exaggerated reduced to nominal sum which was held sufficient to vindicate rights of plaintiff. (Para 17)

Cases Referred:	Chronological Paras
(1958) AIR 1958 Pat 329 (V 45) =	
ILR 36 Pat 786, Nagendra v. Etwari Sahu	10
(1948) AIR 1948 Pat 167 (V 35), Darsan Pande v. Ghaghru Pande	8
(1947) AIR 1947 Oudh 116 (V 34) = ILR 22 Luck 1, Vilayati Begum v. Nawal Kishore	7
(1938) AIR 1938 Pat 529 (V 25) = 19 Pat LT 889, Taharat Karim v. Malik Abdul Khaliq	5, 8, 14
(1928) AIR 1928 All 337 (V 15) = ILR 50 All 713, Shubrati v. Sham-suddin	6
(1926) AIR 1926 PC 46 (V 13) = ILR 1 Luck 215, Balbhaddar Singh v. Budri Sah	5
(1913) 11 All LJ 125=18 Ind Cas 280, Radhe Lal v. Munnoo	6
(1883) 11 QBD 440, Abrah v. North Eastern Rly. Co.	8

Sidheshwar Prasad Singh, for Appellants; Narayan Singh, for Respondents.

JUDGMENT :— Plaintiffs are the appellants. They have appealed from the concurrent decisions of the Court below dismissing their suit for damages for malicious prosecution on the ground that they had failed to prove that the criminal case instituted by defendant 1 was maliciously false and without reasonable and probable cause.

2. Admittedly, Plnt. 184 was a Gair-mazarta-am ditch, and water, which accumulated therein, was used for irrigating the adjoining lands. Plaintiffs alleged that the fishery right in the said ditch was never settled with anybody; but the defendants said that it is true so long Zamindari remained there was never any settlement of fishery right but since after the vesting of the estate, the State of Bihar began to settle the fishery right, year after year, and, at the time of the occurrence, which was on 24-4-1960, defendant 1 was the settlee from the State of Bihar.

3. Defendant 1 lodged a first information report with police to the effect that on 24-4-1960, the plaintiffs were stealing fish of the ditch, which he had taken settlement of from the State of

Bihar, and, therefore, the plaintiffs had committed an offence of theft under Section 379 I. P. C. The plaintiffs were put on trial, but the criminal court acquitted the plaintiffs. Thereafter, the present suit was instituted by the plaintiffs for damages for malicious prosecution which has been dismissed by both the courts below, as stated above.

4. In second appeal, it was contended by Mr. Sidheshwar Prasad Singh who appeared for the appellants, that defendant 1, who was examined as D. W. 9, admitted that on the day and at the time of occurrence he was present at the spot and he remained standing there for 2½ to 3 hours till the plaintiffs left the place with the caught fish but this admission of defendant 1 has not been considered by any of the two courts below. He contended that here was a case in which the defendant alleged that he was an eye-witness to the occurrence and if even then the plaintiffs are acquitted, the presumption would be not only that the plaintiffs were innocent but also that there was no reasonable and probable cause for accusation, and, therefore, the plaintiffs' suit should have been decreed, since the finding of the courts below that the criminal case was without reasonable and probable cause is illegal. In support of his contention, he relied on certain decisions.

5. The first case relied upon was Taharat Karim v. Malik Abdul Khaliq, AIR 1938 Pat 529=19 Pat LT 889 which was decided by Dhavle and Agarwala JJ. In that case it was held that where the accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in an acquittal on the merits, the presumption will be, not only that the plaintiff was innocent, but also that there was no reasonable and probable cause for the accusation. Their Lordships relied in this connection on the decision of the Privy Council in Balbhaddar Singh v. Budri Sah, AIR 1926 PC 46=ILR 1 Luck 215.

6. The next case relied upon was a Bench decision of the Allahabad High Court in Shubrati v. Shamsuddin, AIR 1928 All 337=ILR 50 All 713, which was decided by Sulaiman and Kendall, JJ. Their Lordships held that it is not at all incumbent upon the plaintiff to prove that he was innocent of the charge upon which he was tried; but, if the defendant pleads that his complaint was true and leads evidence to substantiate it, the question of the truth or falsity of the complaint may arise at the instance of the defendant and when such facts are professed to be within the knowledge of the defendant, the question of the truth or falsity of the complaint may also determine the question of want of reason-

able and probable cause. His Lordship Sulaiman, J., as he then was, who delivered the joint judgment of the Court, relied on Radhelal v. Munnoo, (1913) 11 All LJ 125=18 Ind Cas 280, in which it was held that "no question of reasonable or probable cause arises where the charge is such as must be true or false to the knowledge of the defendant"

7. Reliance was also placed upon a Bench decision of the Oudh Chief Court, presided over by Misra and Kidwai, JJ., in Mt. Vilayati Begam v. Nawal Kishore, AIR 1947 Oudh 116. In this case it was held that if a man acts on his own knowledge then the fact that the complaint was a false one will raise a presumption that there was absence of reasonable and probable cause and that malice existed, unless it is shown that his memory was defective or that there was some valid ground for a misapprehension. It was further held that in an action for malicious prosecution "malice" is not merely the doing of a wrongful act intentionally but it must be established that the defendant was actuated by malus animus, that is to say, by spite or ill-will or any indirect or improper motive; if however, the defendant had reasonable and probable cause for launching the criminal prosecution no amount of malice will make him liable for damages. Similarly, if the prosecutor honestly believed that the accused was guilty of a criminal offence he is not liable for malicious prosecution no matter how wrong-headed he might have been. It was further held that ordinarily speaking, damages in a suit for malicious prosecution are given on two bases, first, on the ground of a solatium for injury to the feelings of the party prosecuted; secondly, as a reimbursement for legitimate expenses incurred by him in his defence.

8. The last case relied upon was Darsan Pande v. Ghaghlu Pande, AIR 1948 Pat 167 decided by Das, J., as he then was. His Lordship, while dealing with the case of AIR 1938 Patna 529 = 19 Patna LT 889 (Supra), referred to the observations of Bowen L. J. in Abrath v. The North Eastern Railway Co. (1883) 11 Q. B. D. 440 and held that the decision in 19 Patna LT 889 = AIR 1938 Pat 529, referred to above was correct.

9. The observations of Bowen L. J., at page 462 in the aforesaid leading case, decided by the Court of Appeal in England on appeal from the judgment of Cave, J., which was upheld, can appropriately be read here also.

"Something has been said about innocence being proof, *prima facie*, of want of reasonable and probable cause. I do not think it is. When mere innocence wears that aspect, it is because the fact

of innocence involves with it other circumstances which show that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent if he exercises reasonable care it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable care. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause".

10. A Division Bench of this Court in Nagendra v. Etwari Sahu, ILR 36 Pat 786 = (AIR 1958 Pat 329), to which I was a party and in which the judgment of the Court was delivered by me and which case has been upheld on appeal by the Supreme Court, the principles governing an action for malicious prosecution have been thoroughly discussed and all its aspects and all the authorities on the point have been reviewed.

11. On a review of the cases above-mentioned, the principles, therefore, which emerge and which would apply here may be summarised thus :—

When the prosecutor must know whether the story which he is telling against the man whom he is prosecuting is false or true, in such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and probable cause. Except in cases of that kind, it is never true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. Where, therefore, the accusation against the plaintiff was, in respect of an offence which the defendant claimed to have seen him commit, and the trial ends in an acquittal on the merits, as is the case here, the presumption will be not only that the plaintiff was innocent, but also that there was no reasonable and probable cause for the accusation.

12. When the evidence is read in the light of the above presumption, it becomes clear that the learned Subordinate Judge erred in favour of the defence when dealing with the question of reasonable and probable cause. Hence, the First Information Report which was lodged by defendant 1 was based on his own knowledge as he himself saw the occurrence being committed by the plaintiffs. In the instant case, defendant 1, who was examined as D. W. 9, clearly admitted that he was present at the time of occurrence for 2½ to 3 hours until the plaintiffs left the place of occurrence with the caught fish. This admission of defendant 1 clearly shows that he was an eye-witness to the occurrence and still the plaintiffs were acquitted. This fact shows that the defendant had no probable and reasonable cause for instituting the criminal case against the plaintiffs. The court of appeal below has mentioned in paragraph 14 that P. W. 3 admitted that on the day of occurrence other villagers caught fish and, therefore, it was not unreasonable to think that the plaintiffs also caught the fish and as such he concluded that there was no wonder that the defendant 1 thought that plaintiffs were also catching the fish at the time of occurrence. The learned Judge in paragraph 10 mentions that it was admitted that the Khata was a Gairmazarua-am Khata, and, therefore, he says that the plaintiffs had good reason to catch the fish as being one of the members of the village and the defendant 1 had equally good reason to think the plaintiffs to be the thieves as the fishery right was settled with him. In these circumstances, on the findings of the court of appeal below itself, it is clear that the finding that the criminal case was not without reasonable and probable cause is not correct. When defendant 1 saw with his own eyes, as admitted by him as D. W. 9, and also as mentioned by the learned Judge of the Court of Appeal below, and, still the criminal case terminated in favour of the plaintiffs, and they were acquitted on the merits, the presumption will be not only that the plaintiffs were innocent but also that there was no reasonable and probable cause. In such a situation the defendant certainly cannot be said to have reasonable and probable cause for instituting the case. Therefore, the defendant 1 had no reasonable and probable cause for instituting the case.

13. The malice which is essential in an action for malicious prosecution does not necessarily connote personal spite or ill-will, but only means an indirect or improper motive, rather than a desire to vindicate the law.

14. The learned Subordinate Judge, in paragraph 7 of his judgment, found that the defendants were not actuated with

malice in filing the criminal case. But the First Information Report lodged by the defendant 1 against the plaintiffs was clearly unjustified when the plaintiffs were acquitted on the merits of the charge of theft under Section 379 I. P. C. This clearly shows that the defendant 1 had an indirect and improper motive rather than a desire to vindicate the law. Malice in this sense is clearly established as against defendant 1 in respect of the plaintiffs. This view is supported by AIR 1938 Pat 529, referred to before.

15. For the reasons given above, I hold, in disagreement with the court of appeal below, that the plaintiffs had established that their prosecution by defendant 1 was without any reasonable and probable cause and that it was actuated by malice. On these findings, therefore, the plaintiffs were entitled to a decree against defendant 1.

16. The plaintiffs impleaded all the defendants on the ground that they were members of a joint family of which defendant 1 was the Karta, but it cannot be said that defendant 1, who made the accusation, did so on behalf of the whole family. In this view, the prosecution of the plaintiffs must be deemed to have been made by defendant 1 himself in his personal capacity and, as such, the other defendants are not liable at all.

17. As regards the claim for damages the courts below have found that the claim was not at all exaggerated, but as the plaintiffs failed to prove their case, their claim was dismissed. On my above finding, the plaintiffs are entitled to a decree for damages against defendant 1 only; but, to me, it appears, that in view of the fact that the defendant 1-respondent 1 is a Dusadh by caste and belongs to the Scheduled caste, and there is no evidence that he possessed enough properties from which claim could be realised, I think the claim should be reduced. In this view, therefore, I would reduce the claim to a nominal sum of Rs. 100, which would be sufficient to vindicate the rights of the plaintiffs.

18. It may be mentioned that none of the principal respondents appeared and contested this appeal. Only Deputy Registrar, guardian for minor respondent 6, appeared and argued on behalf of the minor respondent.

19. The result, therefore, is that the appeal is allowed, the judgments and decree of the courts below as against defendant 1 are set aside; but, as against defendants 2 to 6 are affirmed. As the appeal has not been contested, there will be no order for costs of this Court.

RSK/D.V.C.

Appeal allowed.

AIR 1969 PATNA 105 (V 56 C 28)

K. K. DUTTA, J.

Kesho Sao, Petitioner v. State of Bihar,
Opposite Party.

Criminal Revn. No. 999 of 1967, D/- 23-4-1968, against order of Judicial Magistrate First Class, Nawadah, D/- 20-6-1967.

Essential Commodities Act (1955), Ss. 7 and 12A — Violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order — Cognisance taken on basis of report of magistrate deputed to search premises of accused — Prosecution and defence witnesses examined on same date — Trial illegal — No cure under Section 537 Cr. P. C. — (Imported Foodgrains (Prohibition of Unauthorised Sale) Order (1958), Rule 3) — (Criminal P. C. (1898), Sections 4(1)(w), 190, 262(1), 252, 255, 256(1), and 537).

Under Section 12A a violation of R. 3 of Imported Foodgrains (Prohibition of Unauthorised Sale) Order, is to be tried summarily. But since the offence is a warrant case within the meaning of Section 4 (1) (w) of the Criminal P. C., the procedure for warrant cases has to be followed in the summary trial in view of Section 262(1) of the Cr. P. C. When cognizance of the case is taken on the basis of the report of a Magistrate deputed to search the premises of the accused, the procedure under S. 252 onwards of the Cr. P. C. applies. Therefore, when both the prosecution and defence witnesses are examined and cross-examined on the same date, that being the procedure for summons cases, the trial altogether is illegal and there can be no question of cure under S. 537, Criminal P. C. AIR 1947 PC 67, Foll. (Paras 6, 7 and 8)

Cases Referred: Chronological Paras (1947) AIR 1947 PC 67 (V 34)=48

Cri LJ 533, Pulukuri Kotayya v.

Emperor

7

Jyoti Narain, for Petitioner; Ram Nandan Singh, for the State.

ORDER:— This petition in revision arises out of a summary trial, as a result of which the petitioner has been convicted under Section 7 of the Essential Commodities Act for violation of the provisions of Rule 3 of the Imported Foodgrains (Prohibition of Unauthorised Sale) Order, 1958, and has been sentenced to pay a fine of Rs. 500 and, in default, to undergo rigorous imprisonment for two months. It has also been directed that the seized foodgrains shall be forfeited to the Government.

2. According to the prosecution case, on a petition filed by the members of the public before the Sub-divisional Officer,

Nawada, on 13-6-1967, the Sub-divisional Officer ordered for an immediate search of the business premises occupied by the present petitioner at Par Nawada, in the town of Nawada, by two Magistrates, Sri N. C. Das and Sri S. Prasad. These two Magistrates, thereupon, proceeded to the house of the petitioner, in a portion of which he had a grocery shop, and as a result of the search, there was recovery of five bags of imported wheat comprising 3 quintals and 13 kilograms and two bags of flour made from imported wheat comprising 63 kilograms, that is, in all 3 quintals 76 kilograms.

Two of the bags were alleged to have been found in a room in the residential portion of the house covered by some bags of Bhussa, while the remaining bags were found in a room attached to the shop-room of the petitioner. The Magistrates, thereafter, submitted a joint report to the Sub-divisional Magistrate regarding the seizure of the aforesaid flour and wheat and for prosecution of the petitioner for violation of the provisions of the Imported Foodgrains (Prohibition of Unauthorised Sale) Order, 1958, and cognisance of the case was taken by the Sub-divisional Magistrate on the basis of this report.

3. The defence of the petitioner in the Court below was that the bags of the foodgrains in question did not belong to him, but belonged to two other persons, namely, Paul Das and Remand Rambrichh (D. Ws. 2 and 3). The defence case was that these two persons had received certain quantities of imported wheat from the Catholic Mission, Nawada, by way of famine relief and after getting a part of the wheat crushed into flour, they had taken with them a portion of the wheat and flour to their own residence and had left the remaining quantity of wheat and flour with the petitioner for safe custody with a view to remove the same on a later date.

4. The learned Magistrate accepted the prosecution case as correct and rejected the defence version, with the result that he convicted and sentenced the petitioner under S. 7 of the Essential Commodities Act, as stated above.

5. Various points were raised on behalf of the petitioner before me by Mr. Jyoti Narain, but it is unnecessary to enter into all those points as I find that the order as passed by the learned Magistrate in the present case has got to be set aside and the case has to be remanded back for fresh trial in view of the fact that the trial is vitiated on account of non-compliance of the prescribed provisions of law.

6. As already stated, the procedure for summary trial was adopted in this case and this was due in accordance with the

provisions of Section 12A of the Essential Commodities Act, 1955. Sub-section (1) of this Section provides that in case of summary trial of any offences as mentioned in this sub-section, the provisions of Chapter XXII of the Code of Criminal Procedure shall, as far as may be, apply to such trial. On a reference to Chapter XXII of the Code of Criminal Procedure, it appears that sub-section (1) of Section 262 of this Chapter provides that in cases of summary trials, the procedure prescribed for summons-cases should be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as mentioned in subsequent sections of this Chapter.

Now, an offence under Section 7 of the Essential Commodities Act is punishable with imprisonment for a term upto three years in case of violation of any order made with reference to clauses other than clauses (h) and (i) of sub-section (2) of Section 3. Hence the case relating to the offence in question, which is punishable for a term upto three years, comes within the definition of "warrant case" as embodied in clause (w) of sub-section (1) of Section 4 of the Code of Criminal Procedure. It follows, therefore, that the procedure laid down in the Code of Criminal Procedure for trial of warrant-cases had to be followed in connection with the summary trial of the offence in question in view of the provision of sub-section (1) of Section 262 of the Code subject, of course, to the other provisions as embodied in Chapter XXII.

7. In the present case, the cognizance of the case was taken by the Sub-divisional Magistrate not on the basis of a police report after investigation of the case, but on the basis of the report of the two Magistrates who had been deputed by him to search the premises of the petitioner. Hence, the procedure laid down in Section 252 onwards of Chapter XXI of the Code of Criminal Procedure (which relates to trial of warrant cases) had to be followed in the case. The main features of such a trial are that after examination of the prosecution witnesses the charge has to be framed in accordance with Section 255, and thereafter the accused has to be asked whether he is guilty or has any defence to make. If the accused refuses to plead, or does not plead, or claims to be tried, he is required to state, at the commencement of the next hearing of the case or if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any of the witnesses, and the witnesses have to be recalled for such cross-examination as provided by sub-section (1) of Section 256.

After this, the remaining witnesses of the prosecution, if any, may be examined,

and then the accused has to be called upon to enter upon his defence and to produce his evidence. In the present case, however, instead of following these provisions, the learned Magistrate called upon the accused to bring his witnesses on the very date fixed for examination of the prosecution witnesses, and on that date all the prosecution witnesses were examined and cross-examined and the defence witnesses were also examined and cross-examined. The procedure thus followed was that provided for trial of summons-cases, and not the procedure laid down for trial of warrant-cases.

It has been held in several decisions of various High Courts that if the procedure for trial of summons-cases is followed for the trial of a case which has to be tried in accordance with the procedure for warrant-cases, such trial is altogether illegal and the irregularity is not curable under Section 537 of the Code of Criminal Procedure. As observed by the Privy Council in the case of *Pulukuri Kotayya v. Emperor*, AIR 1947 PC 67, "when a trial is conducted in a manner different from that prescribed by the Code the trial is bad and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537." It follows, therefore, that had the procedure for trial of warrant-cases been followed in this particular case and there had been some irregularity or omission in that connection, that irregularity could have been cured in view of the provision of Sec. 537 of the Code of Criminal Procedure.

8. In the present case, the trial has been conducted by following the procedure laid down for summons-cases, and as such there cannot be any question of the irregularity being cured under Section 537 of the Code of Criminal Procedure. I may add that in such a case prejudice to the accused is writ large as he had to cross-examine the prosecution witnesses immediately after their examination-in-chief, and he was thereby deprived of the opportunity of cross-examining them at a later date after deliberation as to the lines on which he will take up his defence. In the circumstances, as the present trial is vitiated by the above defect, the order as passed by the learned Magistrate cannot be sustained.

9. In the result, this application is allowed and the order as passed by the trial Court convicting and sentencing the petitioner under Section 7 of the Essential Commodities Act and forfeiting the seized foodgrains is hereby set aside and it is directed that a fresh trial shall be

conducted in accordance with the provisions of law.

JRM/D.V.C.

Petition allowed.

AIR 1969 PATNA 107 (V 56 C 29)

B. N. JHA, J.

Siri Chand Prasad and others, Petitioners v. Lakshmi Singh and others, Opposite Party.

Civil Revn. No. 758 of 1967, D/- 30-4-1968, against order of Second Addl. Sub, J., Bihar Sharif, D/- 24-6-1967.

(A) Civil P. C. (1908), Order 41 Rule 25, and Order 14 Rule 1 — Scope of Order 41 Rule 25 — Issue not arising on pleadings — First appellate Court framing such issue and remanding case under Order 41 R. 25 — Remand illegal.

Under O. 14, R. 1, issue can arise only on the pleadings. Therefore, only if the trial court has omitted to frame such an issue and determine it and if in the opinion of the lower appellate Court the decision of that issue is essential for decision of the case on merits, it will frame the issue and remand the case under O. 41, R. 25. As such, the remand order made after framing an issue not arising on the pleadings is illegal. AIR 1968 SC 538, Foll.

(Paras 3 and 5)

(B) Civil P. C. (1908), O. 6, R. 17 — Scope — Power of Court to direct suo motu amendment of pleadings.

There is no provision in the Civil P. C. authorising the Court to direct suo motu a party to amend his pleadings. Hence, where no application under O. 6, R. 17 is made for leave to amend, but the court suo motu directs amendment of written statement to include a new defence not already raised in the pleadings, the direction is erroneous. AIR 1950 PC 68, Foll; AIR 1965 SC 1008, Dist. (Para 5)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 538 (V 55)=
1968 Lab IC 531, Sitaram v. Radha Bai 3

(1965) AIR 1965 SC 1008 (V 52)=
(1965) 1 SCR 542, Municipal Corporation of Greater Bombay v. Lala Pancham 4

(1950) AIR 1950 PC 68 (V 37)=77
Ind App 15, Kanda v. Waghlu 5

Sidheshwar Prasad Singh, for Petitioners; S. C. Ghose and Shyam Kishore Prasad, for Opposite Party.

ORDER :— The lower appellate Court framed the following issue:

"Is the plaintiffs' sale deed dated 8th October, 1955 invalid in view of the provisions of Section 9 of the Bihar Privileged Persons Homestead Tenancy Act 1947 (hereinafter called the Act)" and

remanded the case to the trial court for a finding on the above issue after giving opportunities to the parties to adduce evidence on this issue and to submit its finding to that court under the provisions of Order 41, Rule 25 of the Code of Civil Procedure, by its order dated June 24, 1967 and kept the record of the case in its own file. The parties were also directed to get their pleadings amended on the above issue in the trial court within 15 days of that order. The plaintiff-respondents have come up in this Court against the aforesaid order of remand.

2. The main grievance of the petitioner is that the course adopted by the lower appellate court is wholly without jurisdiction. He submitted that the issue framed by the lower appellate court in this case did not arise on the pleadings of the parties. In this case, the Court below directed the parties to get their pleadings amended on the above issue in the trial court. This clearly shows that even though the lower appellate court was conscious of the fact that the proposed issue to be tried did not arise on the pleadings of the parties and the trial of the issue depended on the amendment of the pleadings of the parties, which the court directed to be done within a fortnight and as such, the remand order was unjustified. In my opinion, there is a good deal of force in this contention of learned counsel for the petitioner.

3. Order 41, Rule 25 of the Code of Civil Procedure reads as follows: "Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the appellate Court together with its findings thereon and the reasons thereof."

The Rule authorises the appellate court to frame an issue if in its opinion the trial court has omitted to frame or try any issue or to determine any question of fact which is essential to the right decision of the suit upon merits. This leads to the consideration whether the trial court has made some omission in framing or trying the issue. Order 14, Rule 1 provides the mode as to how an issue in a suit is to be framed. Under this provision, each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue. Material propositions are defined as those propositions of law or fact which

a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence; when a material proposition of fact or law is affirmed by one party and denied by the other, issues arise.

The Rule further lays down that at the first hearing of the suit, the Court shall after reading the plaint and the written statement, if any, and after such examination of the parties, as may appear necessary, ascertain upon what material propositions of facts or of law the parties are at variance and shall thereupon proceed to frame and record issues on which a right decision of the case appears to depend, and nothing in the Rule requires the court to frame and record issue where the defendants at the first hearing of the suit make no defence. The Rule as well is clear that the issues arise on the pleadings of the parties. If the defendant has not made any defence or has not put forward a particular defence, no issue arises therein.

The Supreme Court in its recent decision in Sitaram v. Radha Bai, AIR 1968 SC 538 has pointed out that the trial Judge should not determine an issue not arising on the pleadings of the parties. Therefore, under the provisions of Order 41, Rule 25 if a particular issue arises on the pleadings of the parties which the trial Court has omitted to frame and determine and if in the opinion of the lower appellate court the decision of that issue is essential for the decision of the case on its merits, the appellate court will proceed to frame an issue and remand the case for trial under the provisions of Order 41, Rule 25 of the Code of Civil Procedure.

4. In this case, apparently no defence was taken by the defendants that plaintiffs' vendor was a privileged tenant within the meaning of the Act and as such, the plaintiffs' sale deed is invalid. Therefore, on the pleadings of the parties this issue did not arise to be tried by the trial court in the suit. At the time of the argument this plea was raised by the lawyer of the defendants. The lower appellate Court observed in its judgment that :—

"It appears that the same was raised for the first time during the argument before the trial court. Because that plea was not taken in the pleadings, therefore, the parties had no opportunity to adduce evidence on that point. Therefore, the learned Munsif should not have accepted any evidence on that point and should not have rejected that plea on the ground of absence of evidence on that point."

The lower appellate Court has criticised the trial court on the ground that since the plea was not raised in the written statement, it should not have allowed this plea to be raised at the time of

the argument. In my judgment, it is right in its criticism but the latter portion of its judgment cannot be sustained. The lower appellate court is not right in holding that the trial court should not have rejected that plea, but should have given an opportunity to adduce evidence on that point. The lower appellate court is conscious of the fact that a point of law which depended on the investigation of facts could not be allowed to be taken for the first time at the appellate stage, and it is also conscious of the fact that the application of the Act in the present case depended on the investigation of facts. But the lower appellate court having criticised the trial court that it should not have allowed the point regarding the validity of the plaintiffs' sale deed by a privileged tenant to be raised as it was not in the pleadings at the time of the argument, itself fell into a serious error in holding that it was just and proper that the trial court should not have disposed of the suit without framing a separate issue on this point which was most necessary for the decision of the suit.

In its opinion, it should have asked the parties to take that plea in writing that is, to get the written statement amended by adding that plea, which was just and proper for the ends of justice to determine that plea legally and finally in a just way. For that, it relied on a decision of the Supreme Court in Municipal Corporation of Greater Bombay v. Lala Pancham, AIR 1965 SC 1008. It came to the conclusion that in the interest of justice it was rather necessary that the trial court before whom this plea was raised to frame an issue on this point and before framing an issue on that point, the plea would have got added in the written statement by way of amendment. In view of that, it framed an issue to be tried by the trial Court after directing the defendants to amend their written statements. In my judgment, the lower appellate Court has taken a peculiar view of the law on this point.

5. The Civil Procedure Code does not authorise the court to ask the parties to amend their pleadings *suo motu* so far as the grounds of attack by the plaintiff or grounds of defence by the defendant are concerned. Of course, Order 1, Rule 10(2) authorises the court either upon or without the application of either party or on such terms as may appear to the court to be just, to order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all

the questions involved in the suit, be added. But so far as the amendments of the pleadings of the parties are concerned, there is no such provision which authorises the court to direct *suo motu* a party to amend his pleadings.

Order 6, Rule 17 makes provision for the amendment of pleadings which provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Hence, for the purpose of amendment, leave to amend his pleading is to be sought from the Court by a party, and thereafter, the Court will determine whether in the circumstances of the case leave should be granted to the party for making proposed amendment in the pleadings or not and in the matter of granting leave discretion is given to the Court to allow amendment or not. But that discretion has to be exercised according to certain well-settled principles.

Admittedly here, there is no application filed on behalf of the defendants for leave to amend the written statement by the insertion of a new ground of defence that the plaintiffs' sale deed is invalid on account of the fact that it was taken from a privileged tenant, who had no right to dispose of his property. The decision of the Supreme Court relied upon by the lower appellate court makes it clear that in that case the amendment should never have been allowed as the plaintiffs were making out a new case of fraud for which there was not the slightest basis in the plea as it originally stood. It was pointed out that the Court wanting to do justice may invite the attention of the parties to defects in the pleadings so that they could be remedied and real issues between the parties tried. It was never held in that case that the court itself would direct the parties to make amendment. There was no harm if the court pointed out the defects and thereafter it was open to a party to file an amendment petition or not.

In this present case, the Court itself has directed the amendment of the written statement by the defendants by inserting a new defence which was never taken in the written statement originally filed. Hence, in my judgment, the order of the court below directing the amendment of the written statement is erroneous in law and without jurisdiction. It follows, therefore, that the order of remand under the provisions of Order 41, Rule 25 of the Code of Civil Procedure by framing an issue which did not arise on the pleadings of the parties could not be sustained in law. Similar

question arose in *Kanda v. Wagh*, AIR 1950 PC 68.

In that case, the lower appellate Court had framed an issue for trial by the trial court in these words: "The land in suit having been found to be non-ancestral, do the collaterals exclude the daughter's son according to the custom of the parties and is the gift, therefore, invalid?" This issue did not arise on the pleadings of that case. The High Court set aside that order. The Privy Council approved the decision of the High Court and observed as follows:—

"The District Court erred in framing new issue and in sending the case back to the trial Court for further hearing. As already indicated the question embodied in the additional issue was not raised in the pleadings. The appellants founded their claim on the ground that the land was ancestral and it was on that ground that they challenged the right of the widow to make the gift. Not once during the proceedings in the trial Court did they suggest that even if the land was found to be non-ancestral, the widow would still be incompetent to dispose of it."

The law on this point has been clearly and succinctly laid down by the Privy Council which applies with equal force to the facts of the present case.

6. For the reasons stated above the application is allowed. The judgment and order of the lower appellate Court remanding the case to the trial court for a finding are hereby set aside, and the case is sent back to it for disposal according to law. Cost will abide the result.

JRM/D.V.C.

Petition allowed.

AIR 1969 PATNA 110 (V 56 C 30)

ANWAR AHMAD AND
SHAMBHU PRASAD SINGH, JJ.

Kailash Chandra Mandal and another, Appellants v. Devendranath Mandal and another, Respondents.

A. F. A. D. No. 161 of 1965, D/- 9-7-1968, from decision of Dist. J., Dhanbad, D/- 23-1-1962.

(A) Contract Act (1872), S. 62 — Partition between brothers effected by registered deed but not by metes and bounds — Mistake in deed corrected by unregistered document resulting in increase of share of one — Other brother selling his share, received under original deed — Purchaser is not affected by the subsequent correction under unregistered deed. (Para 5)

(B) Civil P. C. (1908), Ss. 100-101 — Question of law — Acceptance of evidence given by party against its own pleadings is a mistake of law. (Para 6)

Cases Referred: Chronological Paras (1916) AIR 1916 Mad 795 (1) (V 3) — 3 Mad LW 551, *Kota China Mellayya v. Kannekanti Veeriah* 6

R. S. Chatterji and H. R. Das, for Appellants; Lal Narayan Sinha and S. K. Mazumdar, for Respondents.

SHAMBHU PRASAD SINGH, J.:— This second appeal by the plaintiffs arises out of a suit for partition.

2. One Makhanlal Mandal had three sons, Kalipada, Dharanidhar (defendant No. 2) and Bholanath. Kalipada died leaving a son Devendra Nath (defendant No. 1). According to the plaintiff's case, defendants 1 and 2 and Bholanath had one-third share each in the properties in suit and it was, accordingly, recorded in the survey record of rights. The case of the plaintiffs further was that, in the year 1949, defendants 1 and 2 and Bholanath partitioned their properties by a registered deed of partition. The properties in suit, however, were not partitioned by metes and bounds; but, in the said deed of partition, it was merely stated that all the three brothers had equal shares in these properties. Thereafter, Bholanath died in the state of jointness with defendant No. 2, who inherited his share in the properties. On the 3rd August 1960, defendant No. 2 sold by registered deeds his two-third share in the properties to the plaintiffs. As defendant No. 1 did not agree to their request for immediate partition and thereafter dishonestly misappropriated their share in the standing paddy crops and, subsequently refused to partition the properties by metes and bounds, they were obliged to institute the suit.

3. Defendant No. 2, in a written statement, supported the case of the plaintiffs. Defendant No. 1, however, contested the suit and his case, inter alia, relevant for the purposes of the decision of this appeal was that the properties were not ancestral properties but were purchased by one Chandra Mandalini, who gave the same only to defendant no. 1; but, subsequently, it was agreed upon between the parties that defendant no. 1 would have one-half share in them and defendant no. 2 and Bholanath together would have other half. The entry in the survey record-of-rights was not correctly made. The shares of the parties with regard to the disputed properties were also not correctly shown in the registered deed of partition dated the 26th March 1949 by mistake and, subsequently, Bholanath, by an unregistered deed dated the 4th March 1953, admitted the mistake.

4. The trial Court found in favour of the plaintiffs and decreed the suit, holding that defendant no. 2 and Bholanath had two-third share in the lands in suit

and the plaintiffs acquired this share by virtue of the sale in their favour. The Court of appeal below has held that the share of defendant no. 2 and Bholanath was only half and not two-third. It has, accordingly, modified the decree passed by the trial Court and passed a decree for partition in favour of the plaintiffs to the extent of one-half share only. It has found that the presumption of correctness arising out of the entry in the survey record-of-rights stood rebutted by the evidence on the record and the case of defendant no. 1 that he has one-half share is true. It has further found that the unregistered deed dated the 4th March 1953 was, in fact, executed by Bholanath and was admissible in evidence under proviso 1 to Section 92 of the Indian Evidence Act. Relying on the said document, it has held that the share as stated in the registered deed of partition of the year 1949 in respect of the suit lands was not correct.

5. In my opinion, this appeal has to be allowed on the simple ground that the plaintiffs were not parties to the registered deed of partition of the year 1949 and the document cannot be reformed as against them on the ground of mistake as they did not share the error. They are entitled to rely upon the deed of partition as defining the rights of their predecessor-in-interest and defendant no. 2 is responsible for the reasonable consequences of his act. There is a presumption that purchases are made in good faith and for consideration. There is no material on the record to show that the purchase made by the plaintiffs from defendant no. 2 was not in good faith and not for consideration. The survey record-of-rights as finally published showed that the share of defendant no. 1 was only one-third in it and that of defendant no. 2 and Bholanath together was two-third. The registered deed of partition of the year 1949 also indicated the same position. The deed of 1953 is unregistered. The plaintiffs cannot be supposed to have notice of it.

6. Wigmore in his famous book on Evidence, third edition, Volume 9, in Article 2418, states the law on the subject as follows:—

"The theory of reformation is to make the instrument state, objectively and in appearance to others, what it did subjectively state to the parties themselves. The one party is not bound to the other by the purporting tenor of the act, because the other party shared the error. But as against third persons, who are not sharers of the same supposition, and who are authorised by the substantive law to rely upon the instrument as defining the rights acquired by it the tenor of the instrument controls, as a necessary result of the general principle

that the actor is responsible for the reasonable consequences of his act. In other words, an instrument may be reformable as against one person, but not as against another; the only condition being, in the latter case, that the transaction is one by which subsequent transferees may acquire rights not wholly dependent on the title (i.e. the jural acts) of their transferors."

In *Kota China Mellayya v. Kannekanti Veeriah*, AIR 1916 Mad 795 (1) a decision which was cited on behalf of the respondent (defendant no. 1) while holding that a mutual mistake made, in describing a piece of land in a registered mortgage deed can be proved by oral evidence and that when such a mistake is so established, the deed can be construed by the Courts as if the mistake had been rectified, it was observed that this was, however, subject to the condition that the rights of third persons acquired in good faith and for value should not be prejudiced thereby. Mr. Lal Narayan Sinha, appearing for the respondent (defendant no. 1), however, contended that this plea was not open to the plaintiff-appellants inasmuch as his client was in possession of the properties, as found by the Court of appeal below, which must be deemed to be a notice of his title to the appellants. The trial Court recorded a clear finding in favour of the appellants on the question of possession and disbelieved the witnesses examined on behalf of defendant no. 1.

The Court of appeal below has not discarded the evidence of the plaintiffs' witnesses and believed the evidence of the defendant's witnesses on the question of possession on their evidence itself but has held that, as the evidence of the defendant's witnesses was supported by the statement made in the unregistered deed of the year 1953, that was to be preferred. According to that document even the share of defendant no. 2 and Bholanath was given to defendant no. 1 for cultivation. The defendant's witnesses too have stated in their evidence that the entire disputed lands were in possession of defendant No. 1. In his written statement, defendant no. 1 did not plead that he was in possession of the entire lands; rather, his case was that he was in possession of his share. The trial Court disbelieved the evidence of the defendant's witnesses on this ground. The lower appellate Court has erred in law in discarding the evidence of the plaintiffs' witnesses and accepting that of the defendant's witnesses on the question of possession when the evidence of the defendant's witnesses was against the pleadings, merely on the ground that it was supported by the statement in the unregistered deed of the year 1953. Therefore, the finding of possession recorded by the Court of appeal

below cannot stand in the way of the appellants in getting a decree as claimed by them.

7. It was next contended by Mr. Sinha that, the appellants not having specifically pleaded that their purchase was in good faith and for consideration, they cannot be allowed to raise the plea. As observed earlier, in the circumstances of the case, there is a presumption in their favour that their purchase was in good faith and for consideration and it was for defendant no. 1 to plead that it was not in good faith and not for consideration. Therefore, there appears no substance in this contention of Mr. Sinha either.

8. In the result, the appeal is allowed with costs, the decree of the Court of appeal below is set aside and that of the trial Court is restored.

9. ANWAR AHMAD, J. :— I agree.
EDB/D.V.C. Appeal allowed.

AIR 1969 PATNA 112 (V 56 C 31)

**ANWAR AHMAD AND
K. B. N. SINGH, JJ.**

Satya Narain Dhandhania and another,
Appellants v. Firm Narsing Das Bhudar-
mal and another, Respondents.

A. F. O. O. Nos. 104 and 105 of 1964,
D/- 25-4-1968, from order of Sub J.,
Second Court Monghyr, D/- 4-2-1964.

Civil P. C. (1908), O. 5, R. 20(1), (2) and O. 9, R. 13 — Substituted service ordered — Ex parte decree passed — Application under O. 9, R. 13 not alleging failure to fulfil conditions under O. 5, R. 20(1) — Application not also denying knowledge of suit claim — Substituted service effective.

The words "shall be effectual as if it had been made on the defendant personally" in O. 5, R. 20(2) do not necessarily mean that the summons had been duly served but only that such service is as effectual as personal service for continuing the proceedings. In spite of such service, it is open to the defendant to show that he had no knowledge of the claim. Where an ex parte decree is passed after ordering substituted service and in an application under O. 9, R. 13 the defendant neither alleges failure of fulfilment of conditions under O. 5, R. 20(1) nor denies knowledge of the suit claim despite such service, the service is effectual. AIR 1957 Andhra Pra 1 (FB), Foll.

(Para 9)

Cases Referred: Chronological Paras
(1957) AIR 1957 Andh Pra 1 (V 44)=
> 1956 Andh LT 194 (FB), Shan-
mukhi v. Venkatarami Reddi 10

HL/KL/D397/68

2025 RELEASE UNDER E.O. 14176

B. P. Rajgarhia, Rudra Deo Kumar Sinha and Mrs. Sudha Rani Jayaswal, for Appellants and Respondent No. 2 in M. A. 104/64 and Respondents Nos. 2 and 3 in M. A. 105/64; Ramnandan Sahay Sinha and Lala Sachindra Pd., for Respondent No. 1 (in both the appeals).

ANWAR AHMAD J.:— These two appeals are directed against the common order passed by the Subordinate Judge, Second Court, Monghyr dismissing the applications filed by the appellants under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree passed in Money Suit No. 30 of 1961 in favour of respondent No. 1. The appellant in Miscellaneous appeal No. 105 of 1964 is the mother of the appellants in Miscellaneous Appeal No. 104 of 1964.

2. The learned Subordinate Judge has dismissed both the applications under Order 9 Rule 13 on the grounds (1) that the applications are barred by limitation:

(2) that the appellants had full knowledge of the suit as well as of the date fixed for hearing and (3) that the appellants have not made out sufficient cause for their non-appearance when the suit was taken up for ex parte hearing.

3. The ex parte decree was passed on the 15th May 1963. The applications under Order 9, Rule 13 of the Code giving rise to Miscellaneous Appeals 105 and 104 of 1964 were filed on the 4th July and the 13th July 1963 respectively that is to say, both these applications were filed beyond the period of thirty days from the date of the decree.

4. The case of the appellant in Miscellaneous Appeal No. 105 of 1964 was that she was a pardanashin lady and a permanent resident of Calcutta. Her case was being looked after by her karperdaz who lived in Monghyr. He died on the 2nd May 1963 and, since then no steps could be taken on her behalf. She had no knowledge about the case and only learned about it on the 1st July 1963. Thereafter, she took all necessary steps in the case and got the record of the money suit inspected. Then she came to know that even her lawyer had no information about the date fixed for the hearing of the suit and therefore, could not send any intimation to her. The case of the two appellants in the other appeal was that they had no knowledge of the institution of the money suit and no summons had been served on them. They first came to know on the 5th July 1963 about the suit and the ex parte decree passed therein. They then hastened to get the record of the money suit inspected and, thereafter came to know about the fraud practised upon them by respondent No. 1.

5. Respondent No. 1, filed a rejoinder to the two applications under Order IX

drum in the villages concerned. Under these circumstances, it could not be said that the petitioners were not aware of the issue of that notification. They were required to file objections, if any, within 30 days of the publication of that notification. If they did not do that, they cannot make it a ground for getting the notification under section 6 quashed on that score.

7. It would be clear from the impugned notification that the Government had taken action under section 17 (1) of the Act and authorised the Land Acquisition Collector to take possession of the land on the expiry of 15 days from the publication of the notice under S. 9(1) of the Act and before the award had been made. This notification was challenged by the petitioners on the ground that the powers under section 17 (1) could only be exercised by the Government in respect of waste or arable land. According to the petitioners, the land in question was neither waste nor arable, because they had constructed buildings and installed tube-wells thereon. It appears that the Government was impressed with this objection and, therefore, they categorically stated in the return that they would not take recourse to the provisions of section 17 (1) and take possession before the award was made. As I have said, the Advocate General, Haryana, has stated at the bar that the possessions in the abovementioned three writs had been taken from the petitioners after the awards had been made and compensation deposited in court. As regards this writ also, though possession has not been taken, but award has been made and compensation duly deposited. That being so, the objection raised by the petitioners on this score loses its force, because the grievance of the petitioners has already been satisfied by the State.

8. It was strenuously contended by the learned counsel for the petitioners that the impugned notification in its entirety must go, because admittedly, the notification under section 17 (1) of the Act was bad in law. Reliance for this submission was placed on the Supreme Court decision in Sarju Prasad Saha v. State of U. P., AIR 1965 SC 1763, where-in it was observed—

"If only a part of the land is waste or arable and the rest is not, a notification under section 17 (4) dispensing with compliance with the requirements of Section 5-A would be invalid. It would not be open to the Court to regard the notification as partially good and partially bad."

There is no substance in this contention as well. The part of the notification under section 17 (1) was quite separate and distinct from the one under S. 6 of the Act. These two parts are not inter-

dependent and action could be taken separately under each part. The objectionable part of the notification, namely, under section 17 (1), was quite separable from the other under S. 6. Learned counsel for the petitioners was unable to show as to how his clients were prejudiced by issuing the notification under section 17 (1) of the Act. He submitted that if notification under section 6 was also quashed, the petitioners would be given another chance of filing objections under section 5-A of the Act, because it was only after those objections had been settled that a notification under section 6 could be issued. He argued that, because the petitioners were unaware of the notification under S. 4, they could not, as a matter of fact, file any objections under section 5-A.

9. I have already held above, that the notification under section 4 had been duly published in accordance with the procedure laid down in that section. If then, the petitioners did not file any objections under section 5-A, the State cannot be blamed for that and the mere fact that the petitioners will get another chance of making objections to the said acquisition under section 5-A cannot be a valid ground for setting aside the notification under section 6 of the Act. Moreover, limitation of 30 days had been fixed in the notification under section 4 for the filing of objections by the petitioners. That limitation was long over and even if section 6 notification was quashed at this stage, a question might well arise as to whether the petitioners could, as a matter of right, file objections under section 5-A and whether those objections when filed could be treated within limitation. In any case, the petitioner's own mistake in not making their objections under section 5-A within limitation cannot entitle them to get the notification under section 6 set aside.

10. So far as the Supreme Court decision is concerned, there the facts were entirely different. In that case, the Government had taken action under S. 17 (4) of the Act, with the result that the landowners were deprived of their right to file objections under section 5-A of the Act. The land acquired there was partly waste or arable and partly not. The contention of the counsel appearing for the Municipal Board, Basti, for whom the said acquisition had been made by the State, was that part of the notification, which dealt with the land which was waste or arable, should not be quashed. That contention was repelled by the Supreme Court by saying that it would not be open to the Court to regard the notification as partially good and partially bad, for if the State had no power to dispense with the inquiry in respect

of any part of the land notified under section 4 (1), an inquiry must be held under section 5-A giving an opportunity to persons interested in the land notified to raise their objections to the proposed acquisition and in that inquiry the persons interested could not be restricted to raising objections in respect of land other than waste or arable. As a result the notification under sections 6 and 17 was quashed. No such thing has happened in the instant case. Here, as already mentioned above, the petitioners had been given full opportunity to file objections under section 5-A of the Act, with the result that no fault could be found with the issuance of the notification under S. 6 and the same could not be quashed on any score.

11. It may be mentioned that a similar point was raised in *Tej Bhan Chugh v. State of Haryana*, 1968 Cur LJ 389 (Punj), wherein P. D. Sharma, J. observed:

"It will be seen that the part relevant to section 6 of the Act is separate from the part relevant to section 17 of the Act and the two are not inter-mixed. It is not the petitioner's case that action under Section 6 could not have been taken regarding his land. Keeping in view the rule laid down in *Nandeshwar Prasad v. U. P. Government*, AIR 1964 SC 1217 and 1966 All LJ 1 : (AIR 1965 SC 1763), I hold that the provisions made in section 17 (1) of the Act could not have been utilised in the case because a minor part of the land owned by the petitioner as is evident from plan Annexure 'A' is built over. The notification is thus invalid so far as it invokes the powers under section 17 (1) of the Act . . ."

12. No other point was urged before me.

13. The result is that this petition fails and is dismissed, but with no order as to costs.

SSG/D.V.C.

Petition dismissed.

AIR 1969 PUNJAB AND HARYANA 66 (V 56 C 13)

M. R. MEHAR SINGH, C. J.
AND SHAMSHER BAHADUR, J.
Haryana Co-operative Transport Ltd.
Kaithal, Petitioner v. State of Punjab and
others, Respondents.

Civil Writ No. 1575 of 1966, D/- 26-3-1968.

(A) Industrial Disputes Act (1947). Section 7 (3) (d) — Registrar to Pensions Appeals Tribunal appointed as a Labour Court — Office of Registrar is administrative and not judicial in nature even

if it be assumed that the Tribunal is a judicial or quasi-judicial authority — Hence his appointment was void ab initio. (Para 5)

(B) Constitution of India, Arts. 226 and 227 — Appointment of Labour Court is contravention of statutory provisions — Objection regarding validity of appointment of the person as Labour Court and consequently his award not raised before Labour Court itself — Objection can be allowed in writ petition even though the petitioner had submitted to jurisdiction of the authority — When an authority has no jurisdiction to make an order the omission by a party to raise before that authority relevant facts for deciding that question cannot clothe it with jurisdiction. AIR 1960 SC 1191, Foll. — Industrial Disputes Act (1947), Ss. 7, 15, 18. (Para 6)

(C) Industrial Disputes Act (1947), Section 9 (1) — Constitution of India, Art. 226 — S. 9 cannot in any way affect the powers of High Court under Art. 226 to consider the validity of appointment of a particular person as a Labour Court — Bar under S. 9 (1), however, can relate only to jurisdiction of Civil Courts. (1953-54) 5 F. J. R. 402 and AIR 1951 Raj 161, Foll. (Para 7)

Cases Referred: Chronological Paras (1960) AIR 1960 SC 1191 (V 47) — (1966) 3 SCR 764, Arunachalam Pillai v. Southern Roadways Ltd. 6

(1953-54) (1953-54) 5 F. J. R. 402 (Punj), Khushl Ram Dwarka Nath Weaving Mills, Amritsar v. State of Punjab 7

(1951) AIR 1951 Raj 161 (V 38) — Mewar Textile Mills Ltd. v. Industrial Tribunal 7

(1922) 2 AC 128-91 LJ PC 146, Rex v. Nat Bell Liquors Ltd. 7

N. K. Sodhi, for Petitioner; G. C. Mittal, for Advocate General (Haryana) and L. K. Sood, for Respondents.

SHAMSHER BAHADUR, J.: The award (Annexure 'E') delivered in an industrial dispute by Shri Hans Raj Gupta, the second respondent on April 16, 1966 has been challenged in certiorari proceedings under Articles 226 and 227 of the Constitution at the instance of the Haryana Co-operative Transport Limited, Kaithal on a number of grounds, but the only serious challenge relates to the validity of his appointment as Presiding Officer of the Labour Court, Rohtak.

2. At first the industrial dispute between the petitioner and respondents 3 and 4, who are conductor and driver respectively of the petitioner, was referred under section 10 of the Industrial Disputes Act (hereinafter called the Act) by notification of the State of Punjab of

22nd June, 1964, for the adjudication of Shri Jawala Dass on whose retirement Shri Hans Raj Gupta was appointed on 4th of June, 1965, during the pendency of the reference. The second respondent was Registrar to the Pensions Appeals Tribunal, Jullundur Cantonment, for more than seven years from January 14, 1947 to October 19, 1954. After relinquishing the post of Registrar, he was reverted as Upper Division Clerk-cum-Head Clerk which office he held till February 17, 1957, and was appointed subsequently as Assistant Settlement Officer where he remained till September, 1962.

3. Under Sub-section (1) of section 7 of the Act, the appropriate Government may by notification constitute one or more Labour Courts for the adjudication of industrial disputes and sub-section (3) says that:

"A person shall not be qualified for appointment as the presiding officer of a labour Court, unless

(a) he is, or has been, a Judge of a High Court; or

(b) he has, for a period of not less than three years, been a District Judge or an Additional District Judge; or

(c) he has held the office of the Chairman or any other member of the Labour Appellate Tribunal constituted under the Industrial Disputes (Appellate Tribunal) Act, 1950, or of any Tribunal, for a period of not less than two years; or

(d) he has held any judicial office in India for not less than seven years; or

(e) he has been the Presiding Officer of a Labour Court constituted under any Provincial Act or State Act for not less than five years."

Concededly, the second respondent does not fulfil the qualifications under clauses (a), (b), (c) and (e) of sub-section (3) of section 7. It is claimed on his behalf that he fulfils the qualification of having held judicial office under clause (d) for more than seven years.

4. The petition in the first instance came for hearing before the learned Chief Justice who, by his order of 17th of October, 1967, directed it to be heard before a Division Bench.

5. It is now conceded by Mr. Mittal, appearing for the State of Haryana, that the second respondent did not hold a judicial office for a period of seven years. This is a position which had not been adopted before the learned Chief Justice when the petition was heard for the first time. Manifestly, the office of Registrar to the Pensions Appeals Tribunal is administrative in nature even if it may be assumed that the Pensions Appeals Tribunal is a judicial or quasi-judicial authority. The second respondent, therefore, lacked the fundamental and essential qualification of being ap-

pointed a Presiding Officer of the Labour Court and his appointment, therefore, was void ab initio.

6. Only two points have now been raised before us in support of the appointment and consequentially the award made by him in the industrial dispute between the petitioner and respondents 3 and 4. It is submitted, in the first instance, that the objection with regard to the validity of the appointment of the second respondent was not raised before the Labour Court itself. So far as this matter is concerned, it is now well settled that where an authority, whether judicial or quasi-judicial, has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction. Reference may be made to the Supreme Court decision in Arunachalam Pillai v. M/s. Southern Roadways Ltd. AIR 1960 SC 1191, where Mr. Justice Imam speaking for the Court, observed that though the respondent in that case had submitted to the jurisdiction of the Regional Transport Officer and had in his petition under Article 226 in the High Court taken the objection that that officer had no jurisdiction to vary the conditions of a permit, the High Court acted rightly in allowing the respondent to urge that the Regional Transport Officer had no jurisdiction to vary the conditions of a permit as it was by a decision of the High Court itself after the writ had been filed that this came to be the accepted view. The instant case is on a much surer footing as the appointment was in contravention of the statutory provisions and has been questioned in the writ petition itself.

7. The second ground on which the appointment and the award are defended by Mr. Mittal is based on sub-section (1) of section 9 of the Act which says:

"No order of the appropriate Government or of the Central Government appointing any person as the Chairman or any other member of a Board or Court or as the Presiding Officer of a Labour Court . . . shall be called in question in any manner; and no act or proceeding before any Board or Court shall be called in question in any manner on the ground merely of the existence of any vacancy in, or defect in the constitution of, such Board or Court."

The bar of sub-section (1) of section 9, however, can relate only to the jurisdiction of the Civil Courts. It is only the Civil Courts which would be precluded from entertaining the disputes regarding the validity of the appointment and the proceedings of the presiding officer of the Labour Court. There are two Bench authorities which deal directly with the point in issue. Khushi Ram Dwarka Nath

Weaving Mills, Amritsar v. State of Punjab, (1953-54) 5 F. J. R. 402, (Punjab) decided by Chief Justice Bhandari and Dulat, J., dealt with the appointment of Shri Avtar Narain Gujral as the Industrial Tribunal under section 7 of the Act. The objection regarding his appointment taken in a writ petition under Article 226 was based on the absence of consultation of the appropriate Government with the High Court. As sub-section (3) of section 7 of the Act then stood, a member of the Tribunal had to be an independent person (a) who is or has been a Judge of the High Court or a District Judge or (b) otherwise qualified for appointment as a Judge of a High Court, and provided that "the appointment to a Tribunal of any person not qualified under part (a) shall be made in consultation with High Court of the Province in which the Tribunal has or is intended to have, its usual place of sitting". It transpired that the appointment of Shri Gujral under clause (b) had not been made in consultation with the High Court.

Before the Bench it was conceded by the Advocate General Mr. Sikri (as Mr. Justice Sikri then was) that the provision in section 9 of the Act "which prohibits the order of the appropriate Government appointing any person as a member of a Tribunal, being called in question in any manner" meant that "the validity of an order of appointment cannot be questioned in a civil suit but that it does not bar this Court from considering its validity in proceedings like the present." It would be observed that the relevant provision of section 9 was the same as it is today, and the decision of the Bench reached on the concession of the Advocate-General would apply equally to the facts of the present case. The other Bench decision to the same effect is of the Rajasthan High Court of Chief Justice Wanchoo (later Chief Justice of India) and Bapna J. in Mewar Textile Mills Ltd. v. Industrial Tribunal, AIR 1951 Raj 161. In that case also the appointment of a person under section 7 of the Act was challenged on the ground that it was made without the consultation of the High Court. The appointment was found to be invalid and in discussing the effect of section 9 of the Act it was held by Chief Justice Wanchoo (Bapna J. concurring) that:

"Section 9 of the Industrial Disputes Act even though it may be very widely worded, cannot take away the jurisdiction of the High Court under Article 226 of the Constitution."

Reliance was placed on a decision of the Privy Council in *Rex v. Nat Bell Liquors Ltd.* (1922) 2 A. C. 128, where it is stated that:

"... again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari." Reference may also be made to Halsbury's Laws of England, Simonds Edition, Volume 11, at page 137, para 257, the corresponding passage in Hailsham edition being in para 1445 of Volume 9 cited in the Mewar Textile Mills' case AIR 1951 Raj 161.

"Certiorari can be taken away only by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior court."

As observed by Chief Justice Wanchoo:

"What applies to certiorari applies, in our opinion, to all the writs, orders or directions which can be issued under Article 226 of the Constitution of India with this vital difference. In England the Parliament is supreme and it can take away the right of the superior Court to issue writs of certiorari and so on by express words. In India, however, the Constitution is supreme, and neither the Parliament nor the State Legislature can take away the right conferred on the High Courts under Article 226 of the Constitution. Such rights can only be abridged by an amendment of the Constitution, as provided in Article 368. Section 9, therefore, of the Industrial Disputes Act, even though it may be very widely worded, cannot take away the jurisdiction of this Court under Article 226 of the Constitution, and it is open to this Court, therefore, to consider the validity of the appointment of
.....as the Industrial Tribunal"

Being in respectful agreement with the views expressed by the Benches of the Punjab and Rajasthan High Courts we are of the opinion that the infirmity in the appointment of the second respondent which has been conceded to be in contravention of the statutory provisions, cannot be overlooked on the plea that such a matter cannot be called in question in any manner under sub-section (1) of section 9 of the Act. The powers of certiorari and quo warranto under the plenary powers of Article 226 of the Constitution give ample authority to this Court to grant the relief which has been sought in this Court.

8. We would, accordingly, allow this petition and quash the award of the second respondent whose appointment was not validly made. It would be for the State Government to consider whether the reference in question should now be sent to the Labour Court which has

now been constituted as we understand Shri Hans Raj Gupta is no longer the presiding officer of the Labour Court at Rohtak. In the circumstances of this case, we make no order as to costs.

9. MEHAR SINGH, C. J.:— I agree.

LGC/D.V.C.

Petition allowed.

AIR 1969 PUNJAB AND HARYANA 69
(V 56 C 14)

MEHAR SINGH, C. J. AND
SHAMSER BAHDUR, J.

Daljit Singh Piara Singh, Petitioner v.
Smt. Shamsher Kaur w/o Daljit Singh,
Respondent.

F. A. F. O. No. 31-M of 1965 and L. P.
A. No. 263 of 1966, D/- 8-4-1968.

Hindu Marriage Act (1955), Ss. 23, 28,
10 (1) (a) and 12 — Term 'decree' as used
in the Act is not equivalent to 'decree'
defined in Civil P. C. — Provisions of
O. 41, R. 1, Civil P. C. are not applicable
— Copy of decree need not accompany
memorandum of appeal — L. P. A. 263
of 1966, D/- 1-8-1966 (Punj), Reversed; F.
A. O. No. 54 of 1954, D/- 20-9-56 (Punj)
& F. A. O. No. 95 of 1954, D/- 18-9-1956,
Overruled.

Sections 33 and 62 (2) and (9) of the Civil P. C. have no application so far as decrees under the Hindu Marriage Act are concerned. The Code requires in an ordinary suit that the Judge shall make a judgment and that will be followed by formal expression in the shape of a decree. But no such pattern is to be found in any provision of the Act. Apparently a petition under the Act is not made subject to any limitations in regard to an appeal in the Civil P. C. Consequently the right of appeal in Section 28 of the Act cannot be in any manner circumscribed by O. 41, R. 1 of the Civil P. C. The word decree has been given defined meanings in Section 2 (2) of the Code and that does not necessarily apply to a decree under the Act, because the scope and the nature of a decree under the Act has been sufficiently and specifically defined in the relevant provisions of the Act. The adjudications under Sections 9, 10, 11 and 12 of the Act are stated to be decrees under those provisions when the relief claimed is granted, and as neither Sections 2 (2) and (9) and 33, nor Order 41, Rule 1 of the Civil P. C. apply to such an adjudication, it is not a correct approach that a judgment in such adjudication must be followed by a formal decree as is expressly required by

those provisions of the Code. Consequently a copy of decree need not accompany a memorandum of appeal under the Act. AIR 1961 Guj 202 & AIR 1963 Mad 283 & AIR 1967 Andh Pra 323 (FB) & AIR 1961 Andh Pra 359 & AIR 1966 Guj 139 & AIR 1967 Punj 148 & 1956-58 Pun LR 518 & F. A. No. 223 of 1952, D/- 5-8-1954, Rel. on. F. A. O. No. 95 of 1954, D/- 18-9-1956 (Punj) & F. A. O. No. 54 of 1954, D/- 20-9-56 (Punj), Overruled; L. P. A. No. 263 of 1966, D/- 1-8-1966 (Punj), Reversed. (Para 5)

Further not only Section 10 but also Sections 9, 11, 12 and 13 of the Act speak of the Court making a decree under those provisions when granting relief claimed under any of the same. It follows that when a petition under any one of those sections is dismissed and the relief is denied, in the terms of any one of those sections, there is no occasion for making a decree. The very same conclusion is available from the provisions of sub-section (1) of Section 23. Thus an order dismissing a petition under Section 10 of the Act is not and cannot be described or classed as a decree under the provisions of the Act or for the matter of an appeal under Section 28 of it. Consequently in such a case also no copy of decree need accompany the memorandum of appeal. AIR 1963 Cal 428 & L. P. A. No. 34 of 1954, D/- 18-10-54 (Punj), Rel. on. (Para 6)

Cases Referred:	Chronological Paras	
(1967) AIR 1967 Andh Pra 323 (V 54)	=	
(1967) 2 Andh LT 245 (FB), Kode Kutumba Rao v. Kode Sesharatnamamba		5
(1967) AIR 1967 Punj 148 (V 54)= ILR (1967) 1 Punj 695, Jairath, P. C. v. Amrit Jairath		5
(1966) AIR 1966 Guj 139 (V 53)= ILR (1965) Guj 850, Bai Umiyabhen v. Ambalal		5
(1966) F. A. O. No. 97-M of 1962, D/- 24-2-1966 (Punj), Shiv Ram v. Lilwati		1, 5
(1963) AIR 1963 Cal 428 (V 50)= 67 Cal WN 638, Minarani Majumdar v. Dasarath Majumdar		6
(1963) AIR 1963 Mad 283 (V 50)= ILR (1963) Mad 384, Seshadri D. S. v. Jayalakshmi		5
(1961) AIR 1961 SC 832 (V 48)= (1961) 2 SCR 918, Jagat Dhish Bhargava v. Jawahar Lal Bhargava		5
(1961) AIR 1961 Andh Pra 359 (V 48)=1960 Andh LT 735, Varalakshmi v. Veeraddi		5
(1961) AIR 1961 Guj 202 (V 48), Harilal Purushottam v. Lilavati Gokaldas		5
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- (1956) F. A. O. No. 54 of 1954, D/-
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- (1954) L. P. A. No. 34 of 1954, D/-
18-10-1954 (Punj). Sant Ram v.
Krishan Gopal
- (1954) F. A. No. 223 of 1952, D/-
5-8-1954 (Punj). Narindar Singh
v. Mata Din Ram Narain
- Prakash Chand Jain with G. C. Mittal
and H. L. Sarin with H. S. Awasthy, for
Appellant. D. S. Kang, for Respondent.
- MEHAR SINGH, C. J.:**— This judgment will dispose of reference made in *Daljit Singh v. Sham Kaur*, F. A. O. No. 31-M of 1965, by Kaushal, J., on July 29, 1966, and an appeal under Clause 10 of the Letters Patent, L. P. A. No. 263 of 1966, *Radha v. Promodh Sharma*, against the judgment, dated August 1, 1966, of a learned Single Judge dismissing the appeal as incompetent on the ground that a copy of the decree-sheet had not been filed with the appeal within the period of limitation, the learned Judge following his own previous judgment in *Shiv Ram v. Lilawati*, F. A. O. No. 97-M of 1962, D/- 24-2-1966 (Punj).

2. In the first appeal, the appellant made a petition under Section 10 (1) (a) of the Hindu Marriage Act, 1955 (Act 25 of 1955), for judicial separation from his wife, the respondent, but his petition was dismissed by the learned trial Judge on January 20, 1965. He then filed an appeal in this Court (F. A. O. No. 31-M of 1965) against the order of the trial Judge. When that appeal came for hearing before the learned Single Judge a preliminary objection was raised on behalf of the respondent that the appeal was not competent because it was not accompanied by a decree and the judgment of the Lower Court was not stamped with proper stamp.

3. In the second appeal, the respondent made a petition under Section 12 of Act 25 of 1955 seeking a decree of nullity of marriage with the appellant. On March 6, 1965, the learned trial Judge made a decree in terms of Section 12 of the Act in his favour. Against that there was an appeal to this Court by the appellant which was dismissed on August 1, 1966, by the learned Single Judge on the ground that a copy of the decree was not filed with the appeal within time and so there was no competent appeal before him.

4. A somewhat similar, if not the same, question arises in either of those cases, and, therefore, arguments in the same have been heard together.

5. According to sub-section (1) of Section 9 of the Act, if the Court is satisfied of the truth of the statements made in a petition under Section 9 for restitution of conjugal rights and if there is no

legal ground why the petition should not be granted, it 'may decree restitution of conjugal rights accordingly'; while according to sub-section (1) of Section 10 the Court may make 'a decree for judicial separation' on the grounds stated in that sub-section; and in view of Sections 11 and 12 a marriage may be declared 'by a decree of nullity' null and void if it contravenes any of the conditions specified in clauses (ii), (iv) and (v) of Section 5 and annulled 'by a decree of nullity' on any of the grounds mentioned in sub-section (1) of Section 12. All these sections speak of the Court granting relief, on the grounds having been proved in support of a particular class of petitions, by way of a decree. These sections do not speak separately of a judgment or a decree. Section 21 of the Act says that "Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908." Although some rules in this respect have been made by this Court but those do not concern these two cases.

Sub-section (1) of Section 23 of the Act then reads—

"23 (1) In any proceeding under this Act, whether defended or not, if the Court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of sub-section (1) of Section 10, or in clause (i) of sub-section (1) of Section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the Court shall decree such relief accordingly."

It is clear that this sub-section also says that 'the Court shall decree such relief', and here again reference is only to the making of a decree by the Court. Section 28 of the Act is in these words—

"28. All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil juris-

diction are enforced, and may be appealed from under any law for the time being in force:

Provided that there shall be no appeal on the subject of costs only."

It gives a right of appeal from all decrees and orders made by the Court in any proceeding under the Act. It has been contended on behalf of the respondent in each one of these two cases that as, because of Section 21 of the Act the Code of Civil Procedure regulates the proceedings under the Act, so Order 41, Rule 1 (1) of the Code applies to such an appeal. Order 41, Rule 1 (1) says — "Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded".

Section 33 of the Code reads — "The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow". In Section 2 (9) of the Code 'judgment' is defined to mean the statement given by the Judge of the grounds of a decree or order, and Section 2 (2) of the Code gives the definition of the word 'decree'. The Act, however, only speaks of the Court decreeing a particular type of relief claimed under the provisions of the Act. Appeals lie under Section 28 of the Act from all decrees and orders. What is contended on behalf of the respondent in each case, on reference to Jagat Dhish Bhargava v. Jawahar Lal Bhargava, AIR 1961 SC 832, is that the requirement that the certified copy of the decree-sheet should be filed along with the memorandum of appeal is mandatory, and in the absence of the decree the filing of the appeal would be incomplete, defective and incompetent.

Apparently, the learned Single Judge in his judgment under appeal in L. P. A. No. 263 of 1966 has been of this view. But obviously Section 33 and Section 2 (2) and (9) of the Code have no application so far as decrees under the Act are concerned. The Code requires in an ordinary suit that a Judge shall make a judgment and that will be followed by formal expression in the shape of a decree. But no such pattern is to be found in any provision of the Act. Apparently a petition under the Act is not something in the nature of a suit. No doubt if the Act was not there, any of the reliefs to which reference has already been made would be sought in an ordinary Civil Court, but now that the Act is there, those reliefs can only be sought under the provisions of the Act, and under

those provisions the reliefs are not sought by way of a suit. Whatever right of appeal there is under the Act that has been conferred in the Act itself by Section 28 and any such right obviously thus cannot be made subject to any limitations in regard to an appeal in the Code of Civil Procedure.

As such has been the view in Harilal Purushottam v. Lilavati Gokaldas, AIR 1961 Guj 202, D. S. Seshadri v. Jayalakshmi, AIR 1963 Mad 283 and Kode Kutumba Rao v. Kode Sesharatnamamba, AIR 1967 Andh Pra 323 (FB). So the right of appeal in Section 28 of the Act cannot be in any manner circumscribed by Rule 1 of Order 41 of the Code of Civil Procedure. The word 'decree' has been given defined meanings in Sec. 2(2) of the Code and that does not necessarily apply to a decree under the Act, because the scope and the nature of a decree under the Act has been sufficiently and specifically defined in the relevant provisions of the Act. The adjudications under Sections 9, 10, 11 and 12 of the Act are stated to be decrees under those provisions when the relief claimed is granted. And as neither Sections 2 (2) and (9) and 33, nor Order 41, Rule 1 of the Code apply to such an adjudication, it is not a correct approach that a judgment in such adjudication must be followed by a formal decree as is expressly required by those provisions of the Code.

In Varalakshmi v. Veeraddi, AIR 1961 Andh Pra 359, Bai Umiyabhen v. Ambalal Laxmidas, AIR 1966 Guj 139, and P. C. Jairath v. Amrit Jairath, AIR 1967 Punj 148, on a same view it has been held that a decree made by a Court in a petition under Section 9 or 10 or 12 of the Act is not a decree within the meaning of Section 2 (2) of the Code of Civil Procedure. So the provisions of the Code as referred to above have no application to the adjudication upon a petition under one of the Sections 9, 10 or 11 of the Act. It appears clear that the Legislature intended the judgment or the statement of adjudication itself, where the relief is granted, to be a decree, and has described it as such in the relevant sections where the Court has been given power to make a decree. So no separate decree is necessary in regard to an appeal under Section 28 of the Act, and an appeal from the judgment itself, which is what embodies a decree of the Court where the relief is granted, is what is a competent appeal under Section 28 of the Act. On the side of the respondent in each case attention has been drawn to the Displaced Persons (Debts Adjustment) Act, 1951 (Act 70 of 1951), in which Section 25 says — "Save as otherwise expressly provided in this Act or in any rules made thereunder, all proceedings under this Act shall be regulat-

ed by the provisions contained in the Code of Civil Procedure, 1908 (Act V of 1908)", which is a section, in substance, practical reproduction of Section 21 of the Act.

The learned Counsel on behalf of each one of the respondents has been referred to two decisions of Bishan Narain, J., in Khazan Chand v. Hans Raj, F. A. O. No. 95 of 1954, D/- 18-9-1956 (Punj) and Jagdish Chand v. Vir Singh, F. A. O. No. 54 of 1954, D/- 20-9-1956 (Punj), in which in regard to applications for adjustment of debts of displaced debtors, according to Section 5 or 11 of Act 70 of 1951 and having regard to Section 25 of that Act, the learned Judge accepted an objection on behalf of the respondents in those appeals that the appeals were not competent because the judgments were not accompanied by decrees within the period of limitation in view of Rule 1 of Order 41 of the Code. The learned Counsel for the appellant in each one of these appeals first points out that Sections 27 and 28 in Act 70 of 1951, one about contents of a decree under that Act and the other in regard to execution of decrees, are not to be found in the Act, and, therefore, the position of a decree under that Act was somewhat different. However, those two sections of Act 70 of 1951 do not really make substantial difference.

The learned Counsel has then referred to two Division Bench decisions of this Court taking a contrary view. The first such case is Narindar Singh v. Mata Din Ram Narain, R. F. A. No. 223 of 1952, D/- 5-8-1954 (Punj), in which Khosla and Falshaw, JJ., held that an order of the Tribunal dismissing a petition under the provisions of Act 70 of 1951 is not a decree and an appeal against such an order is properly speaking a first appeal from order. The second case is Union of India v. Tara Rani, 1956-58 Punj LR 518, in which judgment was delivered on April 15, 1956, by Falshaw and Kapur, JJ., holding that a decree under the provisions of Act 70 of 1951 is not a decree as defined in Section 2 (2) of the Code of Civil Procedure. It appears that these two decisions by the Division Benches of this Court were not placed before Bishan Narain, J., when the learned Judge decided the two cases to which reference has already been made. The view taken by the two Division Benches of this Court is consistent with what has been said above that a decree as in the Act is not a decree under Section 2 (2) of the Code of Civil Procedure and the decisions in Narindar Singh's and Tara Rani's cases, R. F. A. No. 223 of 1952, D/- 5-8-1954 (Punj) and 1956-58 Punj LR 518, support this conclusion.

The learned Single Judge in L. P. A. No. 263 of 1966 (Punj) has not referred

to any case in support of his view nor did he refer to any case or argument in support of his opinion in F. A. O. No. 97-M of 1962, D/- 24-2-1966 (Punj). So when the Court under the provisions of the Act makes a decree, it is not a decree under Section 2 (2) or as referred to in Section 33 of the Code of Civil Procedure and to it are not attracted the provisions of sub-rule (1) of Rule 1 of Order 41 of the Code. It means that so far as the judgment of the learned Single Judge in L. P. A. No. 263 of 1966 (Punj), is concerned, it cannot be maintained. It is, therefore, reversed and the appeal of the appellant will now go back to be disposed of according to law on merits.

6. In so far as F. A. O. No. 31-M of 1965 (Punj) is concerned, it is an appeal against the judgment or order of the learned Trial Court dismissing a petition under Section 10 of the Act by the appellant. Now, not only Section 10 but also Sections 9, 11, 12 and 13 of the Act speak of the Court making a decree under those provisions when granting relief claimed under any one of the same. It follows that when a petition under any one of those sections is dismissed and the relief is denied, in the terms of any one of those sections, there is no occasion for making a decree. The very same conclusion is available from the provisions of sub-section (1) of Section 23. Clause (a) of sub-section (1) of this section says that if in any proceeding under the Act, whether defended or not, the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and clause (b) further says that where the ground of the petition is the ground specified in clause (f) of sub-section (1) of S. 10, or clause (i) of sub-sec. (1) of S. 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and then it is satisfied on the three conditions that follow as clauses (c), (d) and (e). In such a case, but not otherwise, the Court shall decree such relief accordingly. Obviously if it is not in law in a position to grant any such relief, then it would be dismissing the petition and no question of decreeing the relief would possibly arise.

In this approach, it is apparent that an order dismissing a petition under Sec. 10 of the Act is not and cannot be described or classed as a decree under the provisions of the Act or for the matter of an appeal under Section 28 of it. In Minarani Majumdar v. Dasarath Majumdar, AIR 1963 Cal 428, Bachawat, J., with

whom Law, J., concurred, held that an order dismissing a petition by husband for divorce under Section 13 is not a decree within the meaning of Section 25 of the Act. In this Court in Sant Ram v. Krishan Gopal, L. P. A. No. 34 of 1954, D/- 18-10-1954 (Punj), Dulat, J., with whom Harnam Singh, J., concurred, came to the same conclusion that by the dismissal of an application under the provisions of Act 70 of 1951 the Tribunal could not be said to have determined the claim one way or the other and in such a case no decree would be passed by the Tribunal. So, as the petition under Section 10 of the Act by the appellant in F. A. O. No. 31-M of 1965 was dismissed, there was to be no decree under Section 10 of the Act from which the appellant in that appeal was filing an appeal. He filed an appeal obviously against the order of the trial Court. No copy of the decree was, therefore, necessary with such an order. And correct amount of court-fee has thus been paid on the copy of the order appealed against. The answer to the question referred to by the learned Single Judge in this appeal is that the appeal of Daljit Singh appellant is competent as against the order of the trial Court. This appeal will also now go back for disposal on merits.

7. In the circumstances of the cases, there is no order in regard to costs, in either case.

8. SHAMSHER BAHADUR, J.:— I agree.
GGM/D.V.C.

Order accordingly.

**AIR 1969 PUNJAB AND HARYANA .73
(V 56 C 15)**

GURDEV SINGH, J.

Surrendra Transport & Engineering Co. (Private) Ltd., Petitioner v. Regional Transport Authority, Ambala and others, Respondents.

Civil Writ No. 374 of 1964, D/- 9-8-1968.

(A) Motor Vehicles Act (1939), S. 57 — Reorganisation of State of Punjab during pendency of application for extension of permit before R. T. A. Ambala — Entire route for which extension of permit sought falling under jurisdiction of R. T. A. Punjab — Absence of any provision either under the Act or Punjab Reorganisation Act (1966) authorising R. T. A. Ambala to grant extension in such situation — R. T. A. Ambala is not competent to grant extension. (Para 6)

(B) Motor Vehicles Act (1939), S. 57 (3) — Rules framed under the Act, R. 4.6 — Notice, published under S. 57 (3), found defective in material respect —

Re-publication with correct particulars is necessary.

There is nothing in S. 57 (3) or R. 4.6 or in the Act itself or the Rules framed thereunder, which debars the authority from ordering fresh publication in case the notices originally published are found to be defective. When the error in the notices is a material one, it is incumbent upon the authorities to re-publish the notices so as to inform all concerned of the correct particulars. (Para 9)

D. S. Nehra with K. S. Nehra, for Petitioner; L. Grover, Joginder Singh Wasu, for Respondent No. 3.

JUDGMENT:— The Surrendra Transport and Engineering Company (Private) Ltd., Kalka, petitioner, has been carrying on its transport business since before the reorganization of the State of Punjab with its headquarters at Kalka. In the year 1958 it was granted regular permits for plying passenger buses on Kalka-Nalagarh route. On 15th April, 1966, one of these permits was extended by the Regional Transport Authority, Patiala, to cover the route between Nalagarh and Rupar, with the result that the petitioner-company started running its regular service from Kalka direct to Rupar.

2. Subsequently, this route fell within the jurisdiction of the Regional Transport Authority, Ambala. The petitioner, Surrendra Transport and Engineering Company (Private) Ltd., applied that its other three route permits from Kalka to Nalagarh be also extended to Rupar on a regular basis. In accordance with the provisions of Section 57 of the Motor Vehicles Act and Rule 4.6 of the Motor Vehicles Rules, notice of this application was ordered to be published by the Secretary, Regional Transport Authority, Ambala, in three different papers in different parts of the country. One of these notices (copy of which is A.1 to the petition) was published on 11th August, 1963, in the Weekly Transport Gazette, Delhi, and another in the Transport Weekly, Jullundur on 8th August, 1963. The third publication appeared in the Motor Transport Gazette, Chandigarh, on 15th August, 1963, copy of which forms Annexure R-1 to the return filed on behalf of respondent No. 3. Unfortunately, in the latter publication (R-1) the route to which the petitioners' application for extension related, was wrongly mentioned as "Kalka-Nalagarh up-to-Kalka" instead of "Kalka-Nalagarh-Rupar". By all these notices, objections to the petitioners' application for extension of their route permits from Kalka to Nalagarh were invited within 30 days from the date of the publication, but curiously enough in none of these notices the date, time and place at which the objections were to be heard were specified or indicated.

The State Transport Commissioner, Punjab, had, however, fixed 31st October, 1963, for consideration of the objections, but this was later postponed to 7th November, 1963. Before these dates, on 10th September, 1963, the State Transport Commissioner received the letter (R 2) from the Ambala Bus Syndicate (Private) Ltd., Rupar (Respondent No. 3), who had been carrying on transport business in Rupar and other areas. This letter referred to the advertisement of the petitioners' application that appeared in the Motor Transport Gazette, Chandigarh, dated 15th August, 1963, and pointed out that there was some obvious mistake in it in describing the route for which the extension was applied for, as "there is no question of extension of Kalka-Nalagarh route up to Kalka". In view of this error in the advertisement that appeared on 15th August, 1963, in the Motor Transport Gazette, Chandigarh, it was considered necessary to have fresh publication in that paper, and the corrected notices appeared in the issue of that paper, dated 22nd January, 1964 (copy of which is marked Ex. 1).

3. Before the petitioners' application could be considered after this advertisement, the petitioners came to this Court with this petition under Art. 226 of the Constitution, with the prayer that the order of the respondent transport authorities directing the publication of the fresh notices and the consequent publication which appeared in the Motor Transport Gazette on 22-1-1964, be quashed, and the petitioners' application for extension of route-permits be disposed of ignoring the impugned publication of notices. This petition has been resisted not only by the Regional Transport Authority, Ambala and the State Transport Commissioner, Punjab (respondents 1 and 2) but also by the Ambala Bus Syndicate (Private) Ltd., Rupar (respondent No. 3) who had pointed out the error in the notices as originally published in the Motor Transport Gazette, Chandigarh, dated 15th August, 1963.

4. Mr. D. S. Nehra, appearing for the petitioners, has argued:—

(1) that the Act provides for inviting objections only once, and the notices having once appeared could not be re-published especially when in two of the papers there was no error in publication;

(2) that the order directing re-publication of the notices in the Motor Transport Gazette, Chandigarh, after necessary correction was not made by the competent authority, and

(3) that the re-publication of notices was ordered merely to enable respondent No. 3 (The Ambala Bus Syndicate (Private) Ltd., Rupar) to file objections, which it did not choose to file within the prescribed period of 30 days from the

date of the first publication, and thus the action of the Transport Authorities in ordering re-publication was mala fide.

5. All these contentions have been vehemently contested by the respondents in their return, and it is asserted by respondents 1 and 2 that they acted bona fide as without proper publication the petitioners' application could not be heard and decided.

6. Before proceeding to consider the contentions referred to above, it is necessary to take note of the Reorganization of the State. At the time the petitioners applied for extension of their route-permits to Rupar, Rupar was within the district of Ambala, and the entire route from Kalka to Rupar fell within the jurisdiction of the Regional Transport Authority, Ambala. Subsequently, on 1st November, 1966, when the State of Punjab was reorganized, the district of Ambala was split up, and Rupar was constituted into a separate district falling within the State of Punjab, while the rest of Ambala district, except for Union Territory of Chandigarh and the areas included in Himachal Pradesh, became a part of the State of Haryana. As a result of this Reorganization, the entire route between Nalagarh and Rupar, being in the district of Rupar, came under the jurisdiction of the State Transport Commissioner, Punjab. It is thus evident that at present the jurisdiction over the route for which the extension of the petitioners' existing permits from Kalka to Nalagarh is applied for is that of the Punjab Transport Authorities and not of the Regional Transport Authority, Ambala, whom the petitioners had approached in the year 1964 for extension of their permits. In this changed situation, I doubt very much if the Regional Transport Authority, Ambala, can extend the permit for a route between Nalagarh and Rupar, which falls entirely within the State of Punjab. Mr. Nehra has not been able to point out any provision in the Punjab State Reorganization Act, 1966, or the Motor Vehicles Act under which the Regional Transport Authority, Ambala, before whom the petitioners' application for extension of permits is pending, is competent at present to grant such extension so as to cover the route between Nalagarh and Rupar.

In these circumstances, this Court will not be justified, even if we assume that the order of re-publication of notices of the petitioners' application is not valid, to issue any writ or direction to the Regional Transport Authority, Ambala, and on this short ground the petition is liable to be rejected.

7. I, however, now proceed to deal with petitioners' case on merits. The plea of mala fides put forward by the peti-

tioners merely proceeds on the fact that within 30 days from the date of the first publication of notices, no objections to the petitioners' application for extension of their route permit were preferred by any one. From this, it is argued that respondent No. 3, a rival transport company, having omitted to put in the objections within the prescribed period of 30 days, had cleverly managed to get the time extended by the re-publication of notices to the detriment of the petitioners. This argument has no basis and does not bear a moment's scrutiny. As has been observed earlier, the notices in the three papers had appeared on 8th, 11th and 15th August, 1963. Admittedly, the objections could be preferred within 30 days from the date of publication of these notices. The letter of respondent No. 3 pointing out the error in publication of the notice in the issue of the Motor Transport Gazette, Chandigarh, dated 15th August, 1963, admittedly reached the Regional Transport Authority, Ambala, on 10th September, 1963. This was clearly within 30 days from the date of the publication of the notices in that paper, and there is no dispute that if respondent No. 3 had filed objections on that day or upto 13th September, 1963, those objections would have been well within time and had to be considered. There is nothing to indicate that respondent No. 3 deliberately avoided filing objections within this period.

It is abundantly clear from their letter to the Regional Transport Authority, Ambala, (Annexure R-1) that they were anxious to contest the petitioners' claim for the extension of their route permits, but they could not do so because the route for which the extension was sought was not correctly described in the advertisement that appeared in the Motor Transport Gazette, Chandigarh, dated 15th August, 1963. In that advertisement, the portion of the route permit for which the extension was sought was not indicated. Under these circumstances, they had no other course open to them except to point out the mistake to the Regional Transport Authority, Ambala, so as to ascertain from it the exact route for which the extension was applied for.

8. The submission of Mr. Nehra that the wrong publication, which appeared in the Motor Transport Gazette, Chandigarh, was manipulated for respondent No. 3, as the Editor of this paper was in league with the Managing Director of respondent No. 3, has no basis. There is no such averment in the petition nor any affidavit in support of it. On the other hand, the course which the Transport Authorities had adopted in ordering re-publication is perfectly understandable, and it was the only course that was open

to the authorities when the defect in publication was brought to their notice.

9. The contention of Mr. Nehra that there is no provision for re-publication of notices in the Motor Vehicles Act or the Rules framed thereunder, and thus the Regional Transport Authority had no power to order re-publication, is clearly untenable. Under sub-section (3) of Section 57 of the Motor Vehicles Act, it is incumbent upon the Regional Transport Authority to publish the application for grant of permit or the substance thereof together with a notice of the date before which the representations in connection therewith may be submitted, and the date, not being less than thirty days from such publication, on which, and the time and place at which, the publication and any representations received will be considered. The manner of publication of notices is laid down in Rule 4.6, which requires inter alia that the publication be made in a newspaper of standing circulation in the region. There is nothing in any of these provisions, or in the Act itself or the Rules framed thereunder, which debars the authority from ordering fresh publication in case the notices originally published are found to be defective. In fact, I cannot imagine that any such provision would be made or that the legislature or the authorities would countenance wrong publications to go unnoticed or unremedied. It cannot be disputed, and in fact Mr. Nehra has conceded, that the notice published in the 15th August, issue of the Motor Transport Gazette, Chandigarh, was not a correct notice, and the error which related to the description of the route to which the application for extension related, was a material one. On the basis of that notice, it was not possible for any one interested in such route to put in his objections. In these circumstances, it was incumbent upon the authorities to re-publish the notices so as to inform all concerned of the correct particulars of the petitioners' application, and this is what has been done in this case.

10. The only other objection of Mr. Nehra, which remains to be dealt with is about the competency of the authority ordering re-publication. The corrected notice which was sent for re-publication in the Motor Transport Gazette, Chandigarh, as its copy (Annexure E-1) goes to show, was published in the name of the Regional Transport Authority, Ambala. The records produced by that Authority further show that this corrected notice was published at the instance of the Secretary, Regional Transport Authority, Ambala, who forwarded the same to the paper concerned. It is the same Authority that had taken steps to have the original notices published. The authority

to order such publication and to take the necessary steps for that purpose clearly vests in the Secretary of the Regional Transport Authority under Rule 4.6 of the Punjab Motor Vehicles Rules. It is true that the Secretary, Regional Transport Authority, was not competent to dispose of the petitioners' application for extension of grant of permit or to deal with the objections raised to such an application, but in the instant case, the Secretary has not in any way dealt with the merits of the petitioners' application. All that he has done is to remedy the defect in the publication of notices, which he under the Rules was required to issue, and thus there is no substance in the complaint that the publication of fresh notice was in excess of his jurisdiction or was not by a competent Authority.

11. In fact, I find that even the other two notices published in the Delhi and Jullundur papers were also defective. As they did not mention the date, time and place at which the objections were to be heard, the omission could be remedied only by ordering fresh publication.

12. For all these reasons, I find no force in this petition and dismiss the same with costs.

YPB/D.V.C.

Petition dismissed.

**AIR 1969 PUNJAB AND HARYANA 76
(V 56 C 16)**

**SHAMSHER BAHADUR AND
R. S. NARULA, JJ.**

National Tobacco Co. Employees' Union (Regd.), Jullundur, Appellant v. Shri Manohar Singh, Presiding Officer, Labour Court, Jullundur and another, Respondents.

Civil Misc. No. 1678 of 1968 In Letters Patent Appeal 243 of 1968, D/- 20-5-1968, from judgment of Pandit, J., reported in AIR 1968 Punj & Haryana 514.

Limitation Act (1963), Ss. 5 and 12 — Condonation of delay — Time requisite for obtaining certified copies of judgment — Exclusion of — Burden of proof.

The Court in exercising its jurisdiction in extending time under Section 5 for sufficient cause has to require distinct proof from the party on whom the burden lies.

The word 'requisite' in S. 12 is a strong word; it may be regarded as meaning something more than the word 'required'. It means 'properly required' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period for obtaining the copy

of the judgment is due to his default. Case law discussed. (Paras 5, 9)

Although there are no rules on the subject, according to the prevailing practice it devolves on the counsel or his clerk or the litigant to keep on making enquiries about the copies of the judgment after the date given by the Copying Department. (Para 7)

Held, that it was not shown that the delay in getting copies of the judgment was due to slipshod or negligent procedure of the Copying Department. It was found from the Records of the Copying Department that they were actually ready for delivery on the due date and in the circumstances no explanation had been adduced to enable the Court to say that sufficient cause existed for delay in filing the appeal. AIR 1968 Punj. & Haryana 514. Affirmed. (Paras 6, 7, 10)

Cases Referred:	Chronological Paras
(1962) 1962-64 Pun LR 276, Daya Chand Sham Lal v. Mohd. Amil	8
(1936) AIR 1936 Lah 120 (V 23)=	
37 Pun LR 510, Labhu Ram v. Bansi Dhar	6
(1928) AIR 1928 PC 103 (V 15)=	
ILR 6 Rang 302, Jijibhoy N. Surty v. T. S. Chettiar Firm	5
(1917) AIR 1917 PC 179 (V 4)=	
ILR 41 Mad 412, Krishnasami Panikondar v. Ramaswami Chettiar	9
(1909) ILR 12 All 461=1890 All WN 149 (FB), Bechi v. Ahsan Ullah Khan	

U. S. Sahni, for Appellant; Bhagirath Dass with S. K. Hiraji, for Respondent No. 2.

SHAMSHER BAHADUR, J.:— Two Letters Patent Appeals, L. P. As. Nos. 243 and 244 of 1968 were filed by the Workmen of Messrs. National Tobacco Company of India (hereinafter called the Company) on 15th of April, 1968, both directed against the judgment of Pandit, J., of 27th February, 1968.* These appeals were admitted by the Motion Bench on 25th of April, 1968. In both appeals applications have been made for extension of time under Section 5 of the Limitation Act. Notice of these applications was directed to be sent to Mr. Bhagirath Dass, Counsel for the respondent-Company for 1st of May, 1968. When the applications under Section 5 came for hearing on 1st of May, 1968, before this Bench, Mr. Bhagirath Dass declined to accept service and consequently fresh notices were issued to the Company itself and now Mr. Bhagirath Dass has appeared to oppose these applications.

2. The date of the judgment appealed from is 27th of February, 1968. Two applications for copies by the applicants were made on 19th of March, 1968. These were ready for delivery on 25th March,

*See AIR 1968 Punj & Haryana 514)

1968. After deducting the requisite time for copies the appeals should have been filed on 4th of April, 1968. As mentioned before, the letters patent appeals were, however, filed on 15th of April, 1968, eleven days after the limitation had expired. According to the affidavits filed with the appeal and the additional affidavit of 20-5-1968 by the learned Counsel for the applicants Mr. Sahni, the certified copies of the judgment of Pandit, J., were applied for on 19th March, 1968, admittedly within the period of limitation. It is stated that the clerk of Mr. Sahni, now no longer in his employment, went to the Copying Department "near-about 26th March, 1968" to make enquiries. One Shri Tharia Ram of the Copying Branch had gone on leave and Mr. Sahni was informed by his substitute that the record of the case had not been received from the Record Room and that "it would take some time for the certified copy to be ready".

Thereafter, Mr. Sahni sent his clerk a number of times to the Copying Department and each time he was told by the person working at the seat of Shri Tharia Ram that "the copy was not yet ready". It was on 8th of April, 1968, according to the affidavit filed with the appeal, that a formal notice from the Superintendent, Copying Branch, was affixed in the Bar Association Library about these copies. Presumably, in this notice the applicants' Counsel was called upon to make the payment of balance of the copying fee. Mr. Sahni states that he was taken aback when he read this notice on 8th of April, 1968, and immediately went to the Copying Branch where the date of the preparation of the copy had been put as 25th March, 1968, in the certified copies. According to the Counsel, he told the Superintendent of the Copying Branch that he had been informed by the substitute of Shri Tharia Ram that the copies were not ready on the date when they purport to have been ready for delivery.

3. According to the first affidavit of Mr. Sahni filed with the appeal, he sent a telegram to his clients on the morning of 9th of April, 1968, to this effect—

"Reach immediately for filing appeal". The telegram having been received late in the evening of 9th of April, 1968, Shri Arora, Secretary of the applicant-Union, came to see Mr. Sahni on 9th April, 1968, when the Court had closed for five days, and it is correct according to the High Court Calendar that the Court was closed between 10th and 14th of April, 1968, both days inclusive.

4. Two questions arise for determination: whether, in the first place, the period between 19th March and 9th April, 1968, can be regarded as "the time re-

quisite for obtaining a copy of the judgment on which the decree or order is founded" under sub-section (3) of Sec. 12 of both the old and the new Limitation Acts, and secondly, whether the applicant has been able to establish sufficient cause under Section 5 of the Limitation Act to justify the extension of time under this provision.

5. So far as the first point is concerned, the principle was settled by the Privy Council in *Jijibhoy N. Surty v. T. S. Chettiar Firm*. AIR 1928 PC 103, that "the word 'requisite' is a strong word, it may be regarded as meaning something more than the word required. It means 'properly required' and it throws upon the pleader or Counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default". That the period between 19th and 25th March, 1968, was the time requisite for obtaining the copies is clearly beyond dispute. On this computation the appeals should have been filed on 4th of April, 1968. The burden which is thrown on the applicants' Counsel to show that no part of the delay beyond this permissible period is due to his default has not been discharged. It is vaguely suggested that the clerk of the Counsel — an assertion which has not been established — had visited the Copying Branch on or about 26th March, 1968 to make enquiries about the copies. The copies, as is shown by the endorsement, were ready for delivery on 25th of March, 1968. Indeed, there is intrinsic evidence to show that the date has been correctly recorded in the certified copies. Mr. Bhagirath Dass was able to show that he had applied for copies in the earlier part of March and had actually obtained them before the applicants had applied for their copies on 19th March, 1968.

The opposing party was furnished with cyclostyled copy of the judgment and there is no reason why the cyclostyled copies which are prepared by the office could not have been made readily available for delivery to the applicants on 25-3-1968. Mr. Bhagirath Dass, the counsel for the respondent, has invited our attention to an old decision of the Allahabad High Court delivered by a Full Bench presided over by Chief Justice Sir John Edge in *Bechi v. Ahsan-Ullah Khan*, (1890) ILR 12 All 461 (FB). It was pointed out by the Chief Justice that

"a Court in computing under Section 12 of the Indian Limitation Act, 1877, the time requisite for obtaining a copy of a decree or of a judgment has no discretion, and is confined to ascertaining for the purposes of such computation the time occupied by the office, after application made, in preparing the estimate, and, after payment of the amount of the

estimate has been made, the time occupied by the office in preparing the copy or copies ready to be delivered to the party who has applied for them..... If the party applying for a copy of a decree or judgment failed to inform himself of the time when such copy would be ready and thereby did not obtain it when it was ready to be delivered to him, it appears to me that the period of such delay could not be allowed in computing the time which was requisite for obtaining the copy."

6. Mr. Sahni has placed very strong reliance on a Single Bench decision of Coldstream, J., in Labhu Ram v. Bansi Dhar, AIR 1936 Lah 120, in which it was said that—

"When there has been no mistake of Counsel no negligence, nor inaction, nor want of bona fides imputable to the applicant applying for the copies of a judgment and decree, but the delay in giving copies is due to the slipshod and negligent procedure of the copying department, the time which the department itself notes as having elapsed between the application and the completion of the copy is to be regarded as the 'time requisite' within the meaning of Sec. 12(2)."

None of the conditions mentioned by Coldstream, J., has been fulfilled in this case. In the first place, the Counsel has not been able to absolve himself or his clerk from the charge of negligence or inaction. It must be taken as correct that the copy was ready for delivery on 25th March, 1968, and the vague allegation that the Counsel's clerk visited the Copying Department about the 26th of March, 1968, and was told that the copy was not ready is a statement which can hardly be believed. The clerk of the Counsel has not given an affidavit for he has left the employment of Mr. Sahni. The affidavit of the Counsel himself is vague on the point. Nor is it shown that the delay in getting copies was due to slipshod or negligent procedure of the Copying Department. We have seen the records of the Copying Department and find that the copies were actually ready for delivery on 25th of March, 1968, as the endorsement purports to convey. As in Labhu Ram's case, AIR 1936 Lah 120 we do not find any endorsement by the office itself to show that any unexplained delay had occurred as a result of its procedure.

7. Regarding the sufficiency of cause, it has to be emphasised that the defaulter has to explain each day's delay. Judged by this test, it has to be seen whether the delay which occurred between 4th to 9th of April, 1968, has been sufficiently explained. No attempt has been made

to prove that a telegram was despatched by the Counsel on learning on 8th of April, 1968, that the certified copies were ready for delivery. Apart from a mere assertion vaguely made, it has not been established that enquiries in fact had been made between 26th March and 8th April, 1968. The probabilities are against this assertion because the copies are shown to have been ready for delivery on 25th of March, 1968. There is no reason why the office should have reported to the clerk of the Counsel, whose affidavit has not been filed, that the copies could not be furnished when in fact they are stated to have been ready for delivery. True, there are no rules on the subject but according to the prevailing practice, it devolved on the counsel or his clerk or the litigant to keep on making enquiries about the copies after the 26th of March, 1968. No satisfactory reason again has been adduced why the delay between 4th and 9th of April, 1968, should be excused.

8. It has been contended by Mr. Sahni on basis of a decision given by me in the Circuit Bench at Delhi in Daya Chand Sham Lal v. Mohd. Amil, 1962-64 Pun LR 276, that the enquiry made by his clerk on or about the 26th of March, 1968, entitled him to an extension of time under Section 5 of the Limitation Act for the delay which occurred between 4th and 9th of April, 1968. In Daya Chand Sham Lal's case, 1962-64 Pun LR 276, exceptional circumstances existed and time was granted under Section 5. The memorandum of appeal in that case had been filed with an uncertified copy of the judgment on 28th of October, 1959, and the certified copies when they were delivered to the appellants on 2nd of February, 1960, were immediately filed in Court. An urgent application had been given for supply of copies of the judgment and decree on 18th of September, 1959. The certified copy of the judgment was ready for delivery almost three months later on 16th of December, 1959, while the certified copy of the decree was not ready for delivery till 12 days thereafter on 28th of December, 1959. The appeal should have been filed after reckoning the requisite time for obtaining the copies on 27th of January, 1960.

I said in that case that though it was true that the appellant had not established that he made any further enquiries about the certified copies from the Copying Department, this negligence on his part "pales into insignificance as compared to the appalling delay which has been occasioned in the preparation of the certified copies by the Copying Department. While the judgment of the Court was delivered on 17th of September, 1959, the copies were not ready for delivery

by the Copying Department till the 28th of December, 1959." I said in that case that:—

"It would be placing an intolerable burden on the litigants to expect them to make day-to-day enquiries for certified copies from the Copying Department for such a protracted period."

It is worthy of note that after this judgment, copying rules have been framed by the Delhi High Court to remedy this defect. No such plea, in my opinion, can be raised in the present case where the allegation made by the applicants' Counsel that his clerk had made enquiries from the office has not been established. In fact, the copy was ready when the enquiry is said to have been made.

9. It is indisputable that the Court in exercising its jurisdiction in extending time under Section 5 for sufficient cause has to require distinct proof from the party on whom the burden lies. In the words of Sir Lawrence Jenkins, speaking for the Board in the Privy Council decision of Krishnasami Panikondar v. Rama-sami Chettiar, ILR 41 Mad 412 at p. 417 = (AIR 1917 PC 179 at p. 181):—

"It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in Section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies."

10. In view of the affidavits filed before us we must hold that explanation has not been adduced to enable us to say that sufficient cause existed for the delay in filing the appeals. We will, therefore, decline to extend time under Section 5 of the Limitation Act. We would, however, make no order as to costs of these applications.

11. R. S. NARULA, J.:— I agree.

MVJ/D.V.C Applications dismissed.

AIR 1969 PUNJAB AND HARYANA 79 (V 56 C 17)

SHAMSHER BAHADUR AND
GURDEV SINGH, JJ.

Dr. Shanti Saroop Sharma and another, Petitioners v. State of Punjab and others, Respondents.

Civil Writ No. 2198 of 1966, D/- 20-5-1968.

(A) Constitution of India, Arts. 226 and 227 — Disputed questions of facts — High Court acting under Arts. 226, 227 is not the proper forum for deciding such questions. (Paras 12, 72, 78)

(B) Mines and Minerals (Regulation and Development) Act (1957), S. 15 — Punjab Minor Mineral Concession Rules, 1964, R. 20 — Imposition of royalty — Nature of — It can neither be classed as tax nor fee, but is more akin to rent — AIR 1965 Pat 491 & Civil Rule No. 433-W of 1963, D/- 8-7-1964 (Cal), Dissent. from — R. 20 is intra vires powers of State Legislature — Constitution of India, Arts. 265, 366, 245.

Royalty under Punjab Minor Mineral Concession Rules, 1964 is levied on the minor minerals extracted by the holder of a mining lease. So, if a person is merely in occupation of land which contains minor minerals, he is not liable to pay any royalty, but it is only when he holds a mining lease and by virtue of that extracts one or more minor minerals that he is called upon to pay royalty to the Government where the lease is in respect of the land in which minor minerals vest in the Government. Royalty thus has its basis in the contract between the grantor and the holder of a mining lease, and it is not a compulsory charge for holding such lease but payment to the owner of the minerals for the privilege of extracting the minor minerals computed on the basis of the quantity actually extracted and removed from the leased area. Accordingly royalty is not of the same nature as a tax or a fee. It is true that it is not a fee as it is not payment for the services rendered, but if we exclude it from that category, it does not follow that it must be classed as tax. It is in essence the consideration which the owner of a property may receive from those whom he allows the use of his property or entrusts his property for exploitation of the mineral resources contained therein. In that view of the matter, it is more akin to rent or compensation payable to an owner by the occupier or lessee of land for its use or exploitation of the resources contained therein. Merely because the provision with regard to royalty is made by virtue of the rules relating to the regulation of the mining leases and a uniform rate is prescribed, it does not follow that it is a compulsory exaction in the nature of tax or impost: AIR 1965 Pat 491 & Civil Rule No. 433-W of 1963 D/- 8-7-1964 (Cal), Dissent. from. (Para 45)

By virtue of clause (i) of R. 37, the provisions with regard to the royalty contained in R. 20 and R. 21, have been made applicable to mining leases granted by persons other than the Government. The royalty in respect of such mining leases for extracting minor minerals has to be paid not to the Government, but to the person granting the lease in whom the minor minerals vest. It thus cannot be said that so far as such leases are concerned, there is any

charge or impost levied by the Government. All that the Government has done by framing Rules contained in Chapter III is to lay down certain statutory conditions for the grant of mining leases, to provide for the payment of Royalty to persons in whom such minor minerals vest and to fix a uniform rate for such payments. Obviously, it is not a compulsory levy by the Government as it is based on a condition in the mining lease.

(Para 47)

Compulsion in the payment of royalty arises out of the conditions of mining leases and is because of the contract between the grantor of the lease and the lessee, though a condition of payment of royalty is prescribed by the rules framed by the State to regulate the grant of mining leases. Because of this compulsion only, royalty cannot be termed as a tax.

(Para 50)

Royalty due to the Government, no doubt, can be recovered as arrears of land revenue under R. 53 of the Punjab Rules, but that does not suffice to give it the character of a tax as under that rule even contract money, fees and other sums due to the Government under these Rules can be recovered in the same manner.

(Para 55)

In view of the fact that in the legislation concerning the regulation and grant of mining leases (vide S. 8 — The Mines and Minerals (Regulation and Development) Act, 1948, R. 4, Mineral Concession Rules, 1949), provision for royalty like that of rent has always existed, and the condition regarding payment of royalty is a common and usual term of mining leases, it cannot be said that the Parliament did not intend to authorise the State Government to make provision for royalty on minor minerals in exercise of its rule-making power under S. 15 (1) of the Act. This coupled with the finding that the royalty demanded under the Punjab Minor Mineral Concession Rules, 1964, is not a tax, the R. 20 thereof, cannot but be declared as perfectly valid. Thus the State of Punjab has the authority to charge royalty on minor minerals extracted from lands in which the minor mineral rights vest in it: ILR 1966 (1) Punj 166 & AIR 1965 Pat 491, Foll.

(Para 71)

Cases Referred: Chronological Paras
 (1967) AIR 1967 SC 1895 (V 54)=
 1968-20 STC 430, Devidas Gopal-
 krishnan v. State of Punjab 63
 (1967) Civil Appeal No. 667 of 1964,
 D/- 20-3-1967 (SC), Brijmohan
 Nayyar v. State of U. P. 57
 (1966) ILR (1966) 1 Punj 166, Khus-
 hal Singh v. State of Punjab 12, 69, 78
 (1965) AIR 1965 SC 1107 (V 52)=
 1965-2 SCR 477, Calcutta Corpo-
 ration v. Liberty Cinema 63, 64

(1965) AIR 1965 Pat 491 (V 52), Laddu Mal v. State of Bihar 27, 56, 70, 77	56
(1964) Civil Rule No. 433-W of 1963 and connected Petns., D/- 8- 7-1964 (Cal), Ajit Kumar v. State of Bengal 27, 29, 33, 56	56
(1963) 1963-14 STC 476 (Punj), Gangaram Surajpurkash v. State of Punjab	63
(1962) AIR 1962 SC 594 (V 49)= 1962-3 SCR 230, R. M. D. C. (Mysore) Private Ltd. v. State of Mysore	69
(1961) AIR 1961 SC 4 (V 48)= 1961-1 SCR 341, Vasantil Magan- bhai v. State of Bombay	64
(1961) AIR 1961 SC 459 (V 48)= (1961) 2 SCR 537, Hingir-Rampur Coal Co. Ltd. v. State of Orissa	53
(1960) AIR 1960 Ker 58 (V 47)= ILR (1959) Ker 749, Damodaran v. State	62
(1960) AIR 1960 Madh. Pra 129 (V 47)=1960 MPLJ 39, Surajdin v. State of M. P., Nagpur	19, 26
(1958) AIR 1958 SC 296 (V 45)= 1958 SCJ 614, State of Kerala v. P. J. Joseph	61
(1958) AIR 1958 Raj 138 (V 45)= ILR (1957) 7 Raj 850, Mrs. K. K. Wadhwani v. State of Rajasthan	57
(1958) AIR 1958 Raj 140 (V 45)= ILR (1958) 8 Raj 311, Sethi Marble Stone Industries v. State of Ra- jasthan	25
(1957) AIR 1957 All 136 (V 44), Anand Kumar Bindal v. Employ- ees State Insurance Corporation	58
(1957) AIR 1957 All 159 (V 44), Murli Manohar v. State of U. P.	62
(1957) AIR 1957 Andh. Pra 1042 (V 44), H. R. Rama Rao v. The Collector, Chittoor	19
(1956) AIR 1956 Raj 161 (V 43), Bheru Lal v. State of Rajasthan	18, 24
(1955) AIR 1955 SC 25 (V 42)= 1955 SCR 735, Edward Mills Co. Ltd., Beawar v. State of Ajmer	65
(1954) AIR 1954 SC 282 (V 41)= 1954 SCR 1005, Commr. Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swa- mier of Sri Shirur Mutt	50, 79
(1954) AIR 1954 SC 400 (V 41)= 1954 SCR 1046, Sri Jagannath Ramauji Dass v. State of Orissa	52
(1953) AIR 1953 Trav Co 146 (V 40)=ILR (1952) Trav Co 960, P. J. Joseph v. Asst. Excise Commissioner	61
(1948) AIR 1948 Mad 197 (V 35)= 1947-2 Mad LJ 296, Kumara Sri Ramulu Pantulu v. Province of Madras	19
(1941) AIR 1941 Mad 414 (V 28)= ILR (1941) Mad 747, Venkata Ramayya Appa Rao v. Secy. of State	19

(1933) 1933 AC 168=102 LJPC 17, Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.	58
(1922) 127 LT 822=91 LJKB 897, Attorney-General v. Wilts United Dairies	68
(1900) 1900 AC 83=69 LJPC 3, Heron Greville Nugent v. Mackenzie	16
(1883) 8 AC 767=52 LJPC 89, Attorney-General Ontario v. Mercer	16
(1858) 9 Ir CLR 223=11 Ir Jur 64, Listowel v. Gibbons	16
(1848) 5 Moo PC 434=13 ER 557, Dyke v. Walford	16

R. Sachar, for Petitioners; Anand Sarup Advocate-General, Haryana, for Respondents.

GURDEV SINGH, J.:— This order will dispose of 14 petitions under Articles 226 and 227 of the Constitution (Civil Writ Nos. 2198 of 1966 and 159, 206, 416, 438, 439, 443, 484, 517, 518, 636, 2547 and 2720 of 1967), in which common questions of law have been raised. Dr. Shanti Saroop Sharma and other petitioners have been engaging in and carrying on the business of manufacture and sale of bricks in various parts of the State of Punjab, as it stood before its reorganization in the year 1966. All of them hold valid licences to carry on this trade in accordance with the provisions of the Punjab Control of Bricks Supplies Order, 1956, and they are running brick-kilns for manufacture of bricks in the lands, of which some of the petitioners are owners, and the other lessees.

2. In the year 1957 the Parliament enacted the Mines and Minerals (Regulation and Development) Act LXVII of 1957 (hereinafter called the Act) for regulation of mines and development of minerals under the control of the Union. In Section 3 of the Act "minerals" are defined to include all minerals except mineral oils. Provisions regarding the prospecting licences and mining leases are contained in Sections 4 to 12. Section 13 empowers the Central Government to make rules for regulating grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith. By Section 14 prospecting licences and mining leases in respect of minor minerals have been excluded from the operation of Sections 4 to 13 and the authority to make rules in respect of minor minerals has been given to the State Governments under Section 18 of the Act, which is in these words:—

"15 (1) The State Government may, by notification in the Official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith.

(2) Until rules are made under subsection (1), any rules made by a State Government regulating the grant of prospecting licences and mining leases in respect of minor minerals which are in force immediately before the commencement of this Act shall continue in force."

3. The expression "minor minerals" is defined in Section 3 of the Act in these words:—

"3(e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral."

4. Availing of the powers delegated under Section 15, the Governor of the Punjab promulgated the Punjab Minor Minerals Concession Rules, 1964 (hereinafter referred to as the Rules), published in the Punjab Gazette on 2nd May, 1964. Rule 2 (b) thereof defined the "Minor Minerals" in the same words as in the Central Act LXVII of 1957. The Central Government by its notification, dated 1st June, 1958 (Annexure R-1) had, however, extended the definition of the "Minor Minerals" so as to include brick-earth and several other items.

5. Provision for charging royalty was made in Rule 20 and payment of royalty was made one of the conditions of mining leases under Rules 21 and 37, providing inter alia that the lessee shall pay royalty on minor minerals despatched from the leased area at the rates specified in the First Schedule. Availing of these provisions, the Punjab Government decided to charge from the brick kiln owners royalty on brick-earth with effect from the 22nd April, 1965, at the rates prescribed in the First Schedule to the rules which came to 0.87 N. P. per thousand bricks. Instructions were, accordingly, issued by the Director of Industries to all District Industries Officers and Assistant District Industries Officers to recover royalty at that rate from the various brick-kiln owners. These instructions are contained in the letter of the Director of Industries, Punjab, dated 25th June, 1965 (marked Annexure R-2 in Civil Writ No. 2198 of 1966), relevant portion of which is reproduced below:—

"A representation was submitted by the Punjab Brick Kiln Owners' Association, Hoshiarpur, to the Chief Minister, Punjab, and others, representing against charging of arrears of royalty on clay from them with retrospective effect from 2nd May, 1964, the date from which the Punjab Minor Mineral Concession Rules, 1964, came into force. On a reference made by this office, it has now been intimated by the Director, Food and Supplies, Punjab, that the recovery of royal-

ty on clay should be made from the brick-kiln owners with effect from 22nd April, 1965, from which date the rates on bricks have been enhanced by Government in each district and that, while enhancing the rates of bricks, the element of royalty has been reckoned and placed at Rs 0.87 per thousand bricks.

According to the provisions of the Punjab Minor Mineral Concession Rules, 1964. Government is entitled to charge royalty only on that clay which is found in the land wherein mineral rights vest in the Government.

You are now requested please to reassess arrears of royalty from all the brick-kiln owners of your district, those who have extracted clay from the land wherein mineral rights in respect of clay vest in the Government according to Wajib-ul-arz entries, read with Section 42 (2) of the Punjab Land Revenue Act, 1887, for the period from 22nd April, 1965, up-to-date. Each brick-kiln owner should also be asked to put in formal application on Court-fee Stamp of Re. 1/- and deposit application fee of Rs. 10/- into Government Treasury under Head "XXIV Industries Receipts from Minor Minerals" for the quantity of clay excavated by them during the period from 22nd April, 1965 up-to-date. For their future requirements of clay, they should be asked to obtain short term permits in accordance with the provisions of the Punjab Minor Mineral Concession Rules, 1964. For obtaining the list of brick-kiln owners of your district, you should contact the District Food and Supplies Officer concerned at personal level. It may also please be ensured that the arrears of royalty for the period from 22nd April, 1965, onwards are realized from the brick-kiln owners of your district at the earliest. The Director, Food and Supplies, Punjab, is being requested to issue instructions to all the District Food and Supplies Officers in the State to afford all the possible assistance to you in this behalf.

For ascertaining the mineral rights in respect of clay, you should obtain an attested copy of the relevant Shariat Wajib-ul-arz, Section 42 (2) of the Punjab Land Revenue Act, 1887."

6. Prior to these instructions of the Government the various District Industries Officers wrote to the brick-kiln owners within their jurisdiction pointing out that the extraction of clay and sand by them for manufacture of bricks without obtaining valid permits constituted infringement of the Punjab Minor Mineral Concession Rules, 1964, and asked them to produce their records for assessment of the royalty. One of such letters constitutes Annexure A to Civil Writ No. 2198 of 1966, calling upon the brick-kiln owners to produce their records be-

fore the District Industries Officers for assessment of the royalty. Subsequently, various brick-kiln owners were called upon to put in applications for grant of permits in accordance with the provisions of Punjab Minor Minerals Concessions Rules, 1964, for their future requirements of brick-earth. As there was persistent default, the Director, Food and Supplies by his letter, dated 24th September, 1966, wrote to the Circle Officers of his Department in the State, as follows:—

"As the Industries Department had been experiencing considerable difficulty to effect recoveries of the royalty amount due to be paid by various brick-kiln owners under the Punjab Minor Mineral Concession Rules, 1964, it is advised that you may henceforth insist on the brick-kiln owners applying for renewal of brick-kiln licences to furnish to you a clearance certificate from the District Industries Officers concerned in that regard before effecting renewal of the subject licences."

7. In fact, in some of the cases, one of which has given rise to Civil Writ No. 2720 of 1967, threat of more stringent action against the brick-kiln owners was held out and the brick-kiln owners concerned were directed to stop further extraction of clay and warned that on their failure to pay royalty from 22nd April, 1965, "the matter will be reported to the police for registration of cases under Section 379 of the Indian Penal Code." Being aggrieved by this demand of royalty on brick-earth required for the manufacture of bricks and threat of non-renewal of their licences to carry on the business of brick-making and prosecution, the various petitioners, who are brick-kiln owners, have approached this Court under Articles 226 and 227 of the Constitution challenging the legality of the demand for royalty and praying for grant of appropriate writs declaring Rule 20 of the Punjab Minor Mineral Concession Rules, 1964, as ultra vires, and directing the respondents and their subordinates not to take any steps to recover the royalty or refuse the renewal of their licences for non-payment of the royalty.

8. The contentions raised before us by the learned Counsel for the various petitioners in challenging the validity of the imposition and demand of royalty by the State on the brick-earth used by them in the course of their business of manufacturing bricks are as follows:—

1. Brick-earth is not a minor mineral and is thus outside the purview of the Punjab Minor Mineral Concession Rules, 1964.

2. Royalty demanded from the petitioners is, in fact a tax which cannot be

imposed by a rule-making authority but only by the legislature making an express provision for the same.

3. Section 15 of the Act which permits the States to make Rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals cannot be deemed to authorize the rule-making authority to levy the tax in the nature of royalty, as is being done by the respondent-States.

4. It is well settled that imposition of tax is essentially a legislative function, and the same cannot thus be delegated to the Executive. In this view, the imposition of royalty by Rule 20 of the Punjab Rules is unconstitutional and ultra vires.

5. The power to frame rules for regulation cannot cover within its ambit the substantive power to impose a tax like the royalty, which is demanded from the petitioners.

6. The Rules with regard to the imposition of royalty do not apply to the petitioners as they are either the owners or lessees from private parties of lands from which they are excavating brick-earth for manufacture of bricks, and no royalty can be charged from them, by the State.

7. In any case, royalty can be demanded only in respect of minor minerals which vest in the State, and since the minor minerals found in the land held by the petitioners for manufacture of bricks do not vest in the State, the demand for royalty is illegal.

8. Even if Rule 20 is held to be valid, no demand for royalty can be made from the petitioners as none of them holds any mining lease or licence from the Government.

9. The Shariat Wajab-ul-Arz do not vest in the Government the minor minerals rights pertaining to the lands belonging to or taken on lease by the petitioners from the various private parties on which they have set up their brick-kilns.

10. In view of the fact that Section 14 of the Act specifically provides that Sections 4 to 13 of the Act, which include Section 9 relating to royalty, would not apply to minor minerals, no demand for royalty can be made from the petitioners.

9. In contesting the petitions, the Advocate-Generals for the respondent-States of Haryana and Punjab have urged:

1. That royalty is not a tax but a charge made by the owner of the property for exploitation or excavation of the mineral wealth contained therein;

2. That the power to regulate given to the States under Section 15 of the Act includes the power to charge royalty, and thus Rule 20 of the Punjab Minor

Mineral Concession Rules, 1964, is perfectly valid;

3. That since the power to regulate minor minerals has been delegated to the State by the Parliament and it has been authorized to frame the necessary Rules thereon, the Rules, including Rule 20 have been made in valid exercise of that power by the State;

4. That the fact that the petitioners are the owners or the lessees of the land in no way makes them the owners of the minerals contained therein, and the property in the minerals, including the minor minerals, found in the land acquired by them vests in the State, and for exploitation of the same it can issue leases and licences and charge the necessary royalty;

5. That the Shariat Wajab-ul-Arz relating to the petitioners land clearly go to prove that the minor minerals rights in those lands belong to the State;

6. Even if there be any dispute with regard to such minor minerals rights in the land owned or obtained on lease by the petitioners, that dispute cannot be settled in these proceedings under Arts. 226 and 227 of the Constitution and the petitioners be directed to have recourse to their ordinary remedy in a Civil Court to establish that they were the owners of the minor minerals.

7. In any case, even if the minor mineral rights vest in the petitioners, the State Government has the authority and power to regulate the exploitation or excavation of those minor minerals and in exercise of that authority, it is competent to grant permits and licences and to charge the necessary fee, rent and royalty for the same.

10. The contention that brick-earth is not a minor mineral to which the Act and the Punjab Rules apply is clearly untenable in view of the Central Government notification No. MII-159(18)54-A-II, dated 1st June, 1958, declaring it minor mineral in exercise of its powers under Section 3 (e) of the Act.

11. The demand of royalty has been made from the petitioners on the assertion that the minor minerals, including brick-earth, in the land under occupation of the petitioners vest in the State notwithstanding the fact that these lands are owned by private individuals. This right in the minerals claimed by the State is, however, vehemently denied by all the petitioners and they assert that not only the surface of the land occupied by them but also everything contained therein, including minor minerals, vests in the owners of those lands, and thus no royalty can be charged by the State. In support of the claim that the minor minerals rights vest in it, the State has placed on record copies of Shariat Wajib-

ul-Arz relating to different villages in which the petitioners are running their brick-kilns, and have also relied on Sections 41 and 42 of the Punjab Land Revenue Act 17 of 1887, which are reproduced below:—

"41. Rights of the Government in mines and minerals.—All mines of metal and coal, and all earth-oil and gold washings, shall be deemed to be the property of the Government for the purposes of the State and the State Government shall have all powers necessary for the proper enjoyment of the Government's rights thereto.

42. Presumption as to ownership of forests, quarries and waste lands.—(1) When in any record-of-rights completed before the eighteenth day of November, 1871, it is not expressly provided that any forest, quarry, unclaimed, unoccupied, deserted or waste land, spontaneous produce or other accessory interest in land belongs to the land-owners, it shall be presumed to belong to the Government.

(2) When in any record-of-rights completed after that date it is not expressly provided that any forest or quarry or any such land or interest belong to the Government it shall be presumed to belong to the landowners.

(3) The presumption created by subsection (1) may be rebutted by showing—

(a) from the record or report made by the assessing officer at the time of assessment, or (b) if the record or report is silent, then from a comparison between the assessment of villages in which there existed, and the assessment of villages of similar character in which there did not exist, any forest or quarry, or any such land or interest,

that the forest, quarry, land or interest was taken into account in the assessment of the land revenue.

(4) Until the presumption is so rebutted, the forest, quarry, land or interest shall be held to belong to the Government."

12. Section 41 is not of any assistance to the State as brick-earth is not mentioned therein as one of the minerals that vest in the State. No entry from the record of rights prior to 18th November, 1871, has been produced in respect of the land occupied by any of the petitioners and the copies of Shariat Wajib-ul-Arz, which have been produced, all relate to the recent years. On perusal of these documents, we, however, find that brick-earth is not specifically mentioned therein as among the minerals that belong to the Government, and it has been urged on behalf of the petitioners that in absence of such a specific mention under sub-section (2) of Section 42, brick-earth and other such minerals

have to be presumed to belong to the land-owners. The question with regard to the ownership rights of minor minerals in the lands occupied by the petitioners is a disputed question of fact. Apart from the fact that no sufficient material has been placed before us to enable us to decide that question, this Court is not the proper forum for going into such questions in exercise of its jurisdiction under Articles 226 and 227 of the Constitution. As has been observed recently by this Court in Khushal Singh v. State of Punjab, ILR 1966 (1) Punj 166 the jurisdiction of the Civil Court to decide the rival claims of the parties relating to ownership of the mineral rights in the land does not appear to be barred by any provision of law and any party wanting a decision on this point can institute a suitable action in Court according to law. Since in the cases before us the State has not claimed royalty on the minor minerals which do not vest in it and its demand relates to excavation of brick-earth which it claims to vest in itself, I now proceed to examine whether it is legally competent to demand royalty on the brick-earth used by the petitioners in the course of their business of manufacturing bricks, assuming that notwithstanding the fact that the land is owned by the petitioners or their lessors, the minor mineral rights in them vest in the State.

13. It is argued on behalf of the petitioners that the royalty imposed by the State under the Punjab Rules is, in fact, a tax, that the State in exercise of its power to regulate minor minerals by framing necessary rules under Section 15 of the Act has no authority to charge royalty, that the royalty being a tax cannot be levied or imposed except by a specific legislation enacted by the State legislature as it is essentially a legislative function that cannot be delegated to the Executive or exercised by the rule-making authority, and that Rule 20 of the Punjab Rules, which empowers the State to charge royalty, is unconstitutional and ultra vires. For proper appreciation of the petitioners' contention, it is necessary to first ascertain the nature of the demand of royalty made from the petitioners.

14. Royalty is not defined either in the Act or the Rules framed thereunder by the Central or the State Government. The meaning of this word has been considered in some judicial decisions, but they are mostly based on different dictionaries. In Roland Burrows' Words and Phrases Judicially defined, Volume IV (1944 edition) at page 605, it is stated:

"It is a sound maxim of law, that every word ought, prima facie, to be construed in its primary and natural sense, unless

a secondary or more limited sense is required by the subject or the context. In its primary and natural sense 'royalties' is merely the English translation or equivalent of 'regalitates', 'Jura regalia', jura regia, '.....'. The subject was discussed, with much fullness of learning in Dyke v. Walford, (1848) 5 Moo PC 434, (P. C.) where a Crown grant of jura regalia, belonging to the County Palatine of Lancaster, was held to pass the right to bona vacantia, It stands on the same footing as the right to escheats, to the land between high and low water mark, to felons' goods, to treasure-trove, and other analogous rights.' With this statement of the law their Lordships agree, and they consider it to have been, in substance, affirmed by the judgment of Her Majesty in Council in that case."

15. In Wharton's Law Lexicon (14th edition), it is stated at page 893:—

"Royalty, payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold; or to the owner of minerals for the right of working the same on every ton or other weight raised."

16. Stroud's Judicial Dictionary of Words and Phrases (3rd Edition), while dealing with royalties at page 2631, after referring to the Privy Council decision in Dyke v. Walford, (1848) 5 Moo PC 434 (PC) (*supra*), states:—

"In its secondary sense the word "royalties" signifies, in mining leases, that part of the reddendum, which is variable, and depends upon the quantity of minerals gotten (*Att. Gen. Ontario v. Mercer, (1883-8 AC 767) Sup.; see Hereon Greville Nugent v. Mackenzie, (1900) AC 83, cited RENT; Listowel v. Gibbings, (1858-9 Ir CLR 223) Sup.*); or the agreed payment to a patentee on every article made according to the patent."

17. The meaning given to royalty in Mozley And Whiteley's Law Dictionary (7th Edition) page 328 is:—

"A pro rata payment to a grantor or lessor on the working of the property leased, or otherwise on the profits of the grant or lease. The word is specially used in reference to mines patents and copyrights."

18. According to Prem's Judicial Dictionary (Volume IV), 1964 Edition, page 1457:—

"Royalty is inter alia, a charge by the owner of minerals from those to whom he gives the concession to remove them, and the charge is on production, the rate being fixed according to weight: Behru Lal v. State of Rajasthan, AIR 1956 Raj 161."

19. After noticing the meaning given to this word in Wharton's Law Lexicon

and Mozley and Whiteley's Law Dictionary, Prem goes on to say:—

"It, therefore, appears that royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government. Two important features of royalty have to be noticed, they are, that the payment made for the privilege of removing the articles is in proportion to the quantity removed, and the basis of the payment is an agreement. Surajdin v. State, AIR 1960 Madh Pra 129. If land is occupied by a person with a right to quarry on payment of royalty such payment being related to the beneficial occupation of the land within the meaning of the term rent, land cess is payable under clause (iii) of Section 74-B. H. R. Rama Rao v. The Collector, Chittoor, AIR 1957 Andh Pra 1042, AIR 1948 Mad 197, AIR 1941 Mad 414."

20. Reference may now be made to Corpus Juris Secundum, Volume 77. At page 542 of that book, it is stated:

"Royalty or Royalties. The word "royalty" is one of varying meanings, and in its primary and natural sense, is merely the English translation or equivalent of "regalitates", "Jura regalia", "jura regia".

The term originated in England, where it was used to designate the share in production reserved by the Crown from those to whom the right to work mines and quarries was granted, and the most common use of the term today in this country is with respect to mining leases, conveyances, and reservations, and in this connection is treated in Mines and Minerals.

Defined generally, the word "royalty" means a share of the product or profit reserved by the owner for permitting another to use the property; the share of the production or profit paid to the owner, a share of the product or proceeds therefrom reserved to the owner for permitting another to use the property; the share of the produce reserved to the owner for permitting another to exploit and use the property; a share of the profit, reserved by the owner for permitting another to use the property, the amount reserved or the rental to be paid to the original owner of the whole estate."

In the Shorter Oxford English Dictionary, Volume II, at page 1761, royalty is stated to mean:—

"A payment made to the landowner by the lessee of a mine in return for the privilege of working it. A sum paid to the proprietor of a patented invention for the use of it. A payment made to an author, editor, or composer for each copy of a book, piece of music, etc., sold by the publisher, or for the representation of a play."

21. The subject of royalty has been dealt with exhaustively in Words and Phrases (Permanent Edition) Volume 37A at page 600, where it is stated as follows:- "A royalty is an interest in real estate entitling the royalty-owner to a share in the production of oil, gas or other minerals therefrom—

A royalty proper is a share of the product of profits reserved by the owner for permitting another to use or develop his property, and both in theory and in practice pre-supposes a lease or production under a lease in order to obtain that profit.

Defined as portion reserved to owner of minerals after another brings the mineral to the surface

The word "royalty" as used in contract whereby plaintiff sold mineral interest for a cash consideration and an undivided interest in profits, if any, to be derived from sale of or from royalty received under the lease, would be construed as referring to the mineral interest itself.

The word "royalty" as originally conceived was portion of mineral extracted or payment for privilege of extracting minerals, or for use of a mine or of land for that purpose and embodies basic idea of payment for use of mine or of premises with acquisition of title to severed mineral as incidental.

The word "royalty" as used in mining and oil operations, means a share of produce or profits paid to owner of land for granted privilege of producing minerals therefrom and excludes the concept of fee-simple title to minerals in place.

It is common knowledge that the word "royalty" is frequently used to denote an interest in mineral rights (Melton v. Sheed). The words "bonus", "rental" and "royalty" used in connection with oil and gas leases are to be construed in the ordinary and popular sense; "bonus" meaning the cash consideration paid or agreed to be paid for the execution of the lease, "rental" being the consideration for the delaying drilling operations, and "royalty" being a share of the product or proceeds therefrom reserved to the owner for permitting another to use the property.

The word "royalty" originated in England where it was used to designate the share in production reserved by the Crown from those to whom the right to work mines and quarries was granted. Such is its proper use today in mineral contracts. It is the price paid for the privilege of exercising the right to explore. If that right is granted by lease-contract it is the whole or part of the consideration for the lease. If that right is granted or reserved by a sale, it is the consideration in part or whole of the

sale. Royalty in itself cannot be used to designate the fundamental right which is being dealt with but only to indicate the percentage, the price, the rent, the consideration attached to or proceeding out of the right or that may proceed from it during its existence. The royalty depends upon the continued existence of the right to which it is an appendage. It cannot have a life of its own any more than could interest exist apart from the note or debt to which it is attached. If a party to a contract sells royalty under an existent lease, he is selling a part or the whole of his rent due from the lease upon which his royalty depends. If he sells royalty under an existing servitude, he is selling a part of the produce to issue from the use of that servitude and the royalty sale is dependent upon the life and use of the servitude. If a land-owner sells royalty he is selling the proceeds that may issue from his right to explore for minerals on his own land, which is an inherent part of his ownership of the land. If the land-owner sells his land and the right to explore inherent in the land and reserves royalty, he is reserving a share in the anticipated production to result if and when successful exploration ensues upon the land sold in full ownership.

The legal nature of royalty must be grounded upon the contract in which it appears. If it be used within the understanding of the parties to indicate a sale or reservation of the right to extract oil and gas, then it is a servitude by whatever name it may be called, and the established rules connected with this type of servitude apply. If it is used in a lease-contract to indicate a proportionate share of the production going to the land-owner or to the lessor of a servitude or to his lessee, the law of lease and sub-lease will be applied. If the word is used in the contract to indicate a passive interest in possible production, without the leasing or production privilege usually inherent in the right, then a new and as yet uninterpreted situation appears, upon which the Court has not declared itself fully."

22. From all this it is abundantly clear that the word 'royalty' has a well-recognised and defined meaning. As used in Mineral and Oil Operations it means share of produce or profit paid to the owner of the land for granted privilege of producing minerals therefrom and excludes the concept of fee-simple title to minerals in place. In Words and Phrases (Permanent Edition), Volume 37A at page 600, royalty as originally conceived was portion of mineral extracted or payment for privilege of extracting minerals, or for use of a mine or of land for that purpose and embodies basic idea of payment for use of mine or of premises with

acquisition of title to severed mineral as incidental.

23. Here we may advert to some of the Indian decisions, where the word 'royalty' has come up for interpretation.

24. In AIR 1956 Raj 161, Wanchoo, C. J., (as he then was) while delivering the judgment of the Division Bench observed:—

"Royalty is inter alia, a charge by the owner of minerals from those to whom he gives the concession to remove them, and the charge is on production, the rate being fixed according to weight —".

25. This was a case under the Rajasthan Minor Minerals Concession Rules 1955. This meaning was accepted by another Division Bench of that Court in Sethi Marble Stone Industries v. State of Rajasthan, AIR 1958 Raj 140 and royalty was stated to mean a payment made to the owner for the right to exploit his property and it was observed:—

"It is, therefore, indisputable that it would be open to the State as being the owner of the minerals to charge a royalty whether directly by itself or through a contractor. It further seems to us that a royalty may be charged as so much per weight or on the value of the produce."

26. It was held that Rajasthan State could charge royalty at the rates fixed by it. In AIR 1960 Madh Pra 129, after referring to the Wharton's Law Lexicon, which was relied upon in the two Rajasthan cases referred to above, it was observed:—

"It, therefore, appears that royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government. Two important features of royalty have to be noticed: they are, that the payment made for the privilege of removing the articles is in proportion to the quantity removed, and the basis of the payment is an agreement."

On this basis it was held that a compulsory levy by the Government on all liquor contractors irrespective of the fact whether they availed of the privilege of removing fuel from the protected forest or not, would amount to a 'tax' or a 'cess' which can only be imposed under the authority of law as provided in Article 265 of the Constitution.

27. The validity of imposition of royalty under the Bihar Minor Minerals Concession Rules, 1964, recently came up for consideration before a Division Bench of Patna High Court in Laddu Mal v. State of Bihar, AIR 1965 Pat 491. While dealing with the question whether royalty is a tax or a fee, Mohapatra, J., briefly referred to the nature of the demand for royalty in these words:

"Royalty is used in secondary sense to signify that part of the reddendum which is variable and depends upon the quantity of minerals taken out. It is a payment made to the land-owner by the lessee of the mine in return of the privilege of working it. It is different from rent and is a kind of levy in proportion to the minerals worked. Though its origin was riveted in the concept of royal prerogative and sovereignty, in the present context of things, it is an impost by the Government."

28. Obviously, in characterizing royalty as "impost by the Government", the learned Judge was referring to the demand for royalty payable to the Government under the Bihar Minor Minerals Concession Rules, 1964. This observation cannot be taken to apply to royalty payable to a person other than the Government in whom the minor mineral rights may vest. It is on this assumption that royalty was an imposition by the Government that the learned Judge proceeded on to consider whether it was a fee or tax, and held that it was not a fee as distinguished from a tax. In coming to that conclusion it was pointed out that the royalty demanded was not for services accepted by individuals willingly or unwillingly, and the amounts recovered as royalty were merged in the general revenue of the State to be spent for general public purposes.

29. In Ajit Kumar Gurey v. State of Bengal, (Civil Rule No. 433-W of 1963 and connected petitions), decided on 8th July, 1964, by the Calcutta High Court, Durga Das Basu, J., dealt with the validity of the demand for royalty made under the West Bengal Minor Minerals Rules, 1959. The decision of that case depended upon the determination of the question whether royalty is a tax or an impost within the meaning of Article 265 read with Article 366 (28) of the Constitution. Without advertting to the real meaning or particular nature of the payment demanded on account of royalty, the learned Judge held that it was a tax or an impost. After referring to the Articles 265 and 366 (28) of the Constitution, his Lordship observed:—

"I have no doubt that the royalty which is recoverable from the lessee of a mining lease, under Rule 17 (1) (i) of the Rules, before me is an impost, compulsorily leviable by the State Government on all persons liable to obtain a mining lease with respect to minor minerals and would, accordingly, come within the meaning of a 'tax', under Article 265. The question is whether the Act has authorised this imposition specifically. The answer is clearly in the negative. For Section 9, which authorises the imposition of a royalty from the holder of a mining lease, does not extend to min-

ing relating to minor minerals, by reason of Section 14.

Section 15 (1) which empowers the State Government to make rules, 'for regulating the grant of prospecting licence, and mining leases in respect of minor minerals, says nothing about the imposition of royalty and there is nothing else in the Act which provides that the holder of a mining lease shall be liable to pay a royalty. Without more, it must be held that Rule 17 (1) (i) together with Schedule I is not only ultra vires because of want of statutory authority but also unconstitutional on account of contravention of Article 265 and the petitioners are not liable to pay it, so long as valid legislative authority for the imposition is not available to the State Government."

30. Rule 17 (1) (i) to which reference is made by Basu, J., provides:

"Every mining lease shall include and be subject to the following conditions:—

"The lessee shall pay royalty on all minerals despatched from the leased area at such rate as may be fixed by the State Government within the limits given in Schedule I."

31. The peculiar nature of royalty, as distinguished from other demands made by the Government, was not noticed in that case, and there is no indication in the judgment whether the demand for royalty, with which Basu, J., was dealing, was in respect of minor minerals vesting in the Government or in persons other than the Government. In coming to the conclusion that it was a tax, the learned Judge was mainly influenced by the fact that royalty was payable to the Government by all persons obtaining mining leases with respect to minor minerals and Section 15 (1) of the Mines and Minerals (Regulation and Development) Act, 1957, did not specifically empower the State Government to impose royalty.

32. Though a Division Bench of the Patna High Court had also come to the conclusion that the imposition of royalty by the State Government concerned under the Bihar Minor Minerals Concession Rules, 1964, was a tax and not fee, it, however, held that the imposition was valid and did not offend against the provisions of Article 265 of the Constitution or Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957.

33. The petitioner's learned Counsel has vehemently argued before us that though the Patna High Court was right in holding that royalty demanded was in pith and substance a tax, its decision with regard to the validity of the demand is open to challenge, and the rule laid down by Basu, J., in the unreported decision in Civil Rule No. 433-W of 1963 and connected Petns. D/- 8-7-1964 (Cal)

(supra) is correct and should commend itself to this Court.

34. In order to appreciate the various contentions raised before us and for proper decision thereon, it is necessary to refer to the relevant provisions of the Punjab Minor Minerals Concession Rules, 1964. These rules, as their Preamble shows, were admittedly framed by the State Government in exercise of the powers conferred on it under sub-section (1) of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957. The Parliament while enacting the Act in exercise of the powers vesting in it under item 54 of the Union List in the Seventh Schedule of the Constitution, however, considered it expedient to leave the grant of prospecting licences and mining leases in respect of minor minerals to the State Governments. Accordingly, Section 14 of the Act provides:

"The provisions of Sections 4 to 13 (inclusive) shall not apply to prospecting licences and mining leases in respect of minor minerals."

35. Having thus excluded the minor minerals from the operation of Sections 4 to 13 of the Act, by Section 15 (reproduced earlier), the Parliament authorized the State Governments to make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith, and specifically laid down that until such rules were framed by the State Government, the rules immediately in force before the commencement of the Act would continue in force.

36. It is in exercise of this power that the Punjab Minor Minerals Concession Rules, 1964, have been framed repealing the Punjab Minor Minerals Rules, 1934, and all corresponding rules that had hitherto been in force.

37. Under these Rules, in clause (g) of Rule 2, "Mining lease" is defined to mean:—

"A lease to mine, quarry, bore, dig and search for win, work and carry away any minor mineral specified therein."

38. Clause (i) in the same rule defines "short term permit" as meaning "a permit granted by the Director to extract a certain quantity of mineral for the period specified in the permit."

39. The provisions with regard to the grant of mining leases, contracts, and short term permits in respect of minor minerals are contained in Chapters II and III of these rules. Chapter II, which bears the heading "Grant of mining leases/contracts/short term permits in respect of land in which the minerals vest in the Government", contains detailed procedure for making applications for such grants, the manner in which those

applications are to be dealt with, the terms and conditions on which the leases and permits are to be granted and the obligations and rights of the persons to whom the grants are made. All these provisions from Rule 5 to Rule 33, however, apply only to permits, contracts and mining leases in respect of lands in which minor mineral rights vest in the Government.

40. Chapter III bears the heading "Grant of mineral concessions in respect of minor minerals in respect of the land in which minor minerals vest in a person other than the Government". Rule 34 with which this chapter opens is in these words:—

"34. Applicability of this Chapter. The provisions of this chapter shall only apply to the grant of mining lease in respect of the land in which the minor minerals vest exclusively in a person other than the Government."

41. Though the mining leases under this Chapter are to be granted by the person in whom the minor minerals vest, provision has been made in Rules 35 to 45 occurring in this Chapter prescribing certain conditions to which every mining lease shall be subject. To enable the Government to keep itself informed of the mining operations in such private property in which the minor minerals do not vest in the Government, the Rules make provisions for submission of certain returns, statements and copies of leases to the Government. Rule 45, with which this Chapter III concludes provides penalty by way of imprisonment and fine for failure of the lessee to furnish documents, information and returns called for by the Government. Sub-rule (2) thereof then lays down:—

45 (2) "If any person grants or transfers or obtains a mining lease or any right, title or interest therein in contravention of any of the provisions of this Chapter, he shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both."

42. Rule 53 authorises the Government to recover any rent, royalty, fee, contract money or other sum due to it under these Rules as arrears of land revenue. Rule 54 prohibits the mining operations in any area except under and in accordance with the terms and conditions of the mining lease, contract or permit granted under these rules and contravention thereof is made punishable.

43. The provisions regarding royalty are contained in Rules 20 and 21 of the Punjab Minor Mineral Concession Rules, 1964. Rule 20, which applies only to the mining leases granted before the com-

mencement of these rules, is in these words:—

"20. Royalties in respect of mining leases.—

(1) The holder of a mining lease granted before the commencement of these rules, shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed by him from the leased area after such commencement, at the rates for the time being specified in the First Schedule in respect of that minor mineral.

(2) The Government may, by notification in the Official Gazette, amend the First and Third Schedules so as to enhance or reduce the rate at which the royalty shall be payable in respect of any minor mineral with effect from such date as may be specified in the notification, either in respect of the whole State or any specified area:

Provided that the rate of royalty in respect of any minor mineral shall not be revised more than once during any period of four years."

44. Rule 21 lays down the conditions on which mining leases are to be granted. Since this rule occurs in Chapter II relating to mining leases, contracts or short term permits in respect of land in which the minerals vest in the Government, the conditions laid down in R. 21 apply to mining leases in respect of land in which the minor minerals vest in the Government. Clause (i) of sub-rule (1) of R. 21 is reproduced below:

"21(1). Conditions of mining lease. — Every mining lease shall be subject to the following conditions:—

(i) (a) The lessee shall pay royalty on minor minerals despatched from the leased area at the rate specified in the First Schedule:

Provided that the lessee shall pay royalty at such revised rates as may be notified from time to time.

(b) For calculating the royalty the lessee shall submit half-yearly returns for periods ending 30th September, and 31st March, in Form 'G'.

(ii) The lessee shall pay for the surface area occupied by him at such rates not exceeding land revenue, water charges and cesses assessable on the land as may be fixed by the Government and specified in the lease deed.

(iii) The lessee shall also pay for every year, such yearly dead rent within the limits specified in Second Schedule as may be fixed by the Government and if the lease permits the working of more than one minor mineral in the same area the Government may charge separate dead rent in respect of each minor mineral.

Provided that the mining of one minor mineral does not involve the mining of another minor mineral:

Provided further that the lessee shall be liable to pay the dead rent or royalty in respect of each minor mineral whichever is higher in amount but not both."

45. From Rules 20 and 21 set out above, it will be evident that the payment of the royalty to the Government for removing a minor mineral is made a condition of a mining lease and the royalty is to be paid by the lessee or the holder of the mining lease in respect of any minor mineral removed by him from the land leased out to him at the rate specified in the First Schedule to the Rules, which can be revised by the Government under the provisions of sub-rule (2) of Rule 20 from time to time. It is thus not a charge or impost on the occupier of the land but consideration payable by a holder of mining lease from the Government for the privilege of extracting minor minerals from the land leased out to him. It may further be noticed that the amount demanded as royalty does not become payable merely for the grant of privilege of extracting minor minerals but on actual extraction or taking out such minerals. This is evident from the wording of Rule 20 itself as it says that the royalty is to be paid "in respect of any mineral removed by him (holder of a mining lease) from the lease area."

The matter becomes further clear on reference to the First Schedule to the Rules, wherein the rates of royalty payable on various minor minerals are stated in terms of quantity extracted. Under Item 5 of this Schedule, royalty payable on brick-earth is Rs. 0.25 Np. per tonne or Rs. 0.35 Np. per cubic meter. From this it is abundantly clear that royalty under these rules is levied on the minor minerals extracted by the holder of a mining lease. So, if a person is merely in occupation of land which contains minor minerals, he is not liable to pay any royalty, but it is only when he holds a mining lease and by virtue of that extracts one or more minor minerals that he is called upon to pay royalty to the Government where the lease is in respect of the land in which minor minerals vest in the Government. Royalty thus has its basis in the contract between the grantor and the holder of a mining lease, and it is not a compulsory charge for holding such lease but payment to the owner of the minerals for the privilege of extracting the minor minerals computed on the basis of the quantity actually extracted and removed from the leased area. Accordingly royalty is not of the same nature as a tax or a fee. It is true that it is not a fee as it is not payment for the services rendered, but if we exclude it from that category, it

does not follow that it must be classed as tax. It is in essence the consideration which the owner of a property may receive from those whom he allows the use of his property or entrusts his property for exploitation of the mineral resources contained therein. In that view of the matter, it is more akin to rent or compensation payable to an owner by the occupier or lessee of land for its use or exploitation of the resources contained therein. Merely because the provision with regard to royalty is made by virtue of the rules relating to the regulation of the mining leases and a uniform rate is prescribed, it does not follow that it is a compulsory exaction in the nature of tax or impost.

46. The Punjab Minor Mineral Concession Rules, 1964, also make provision for grant of mineral concessions in respect of minor minerals found in the lands in which the minor minerals vest in persons other than the Government. These provisions are contained in Rules 34 to 45 of Chapter III. Rule 34, with which this Chapter opens, clearly provides that this chapter shall apply only to grant of mining leases in respect of the land in which the minor minerals vest exclusively in a person other than the Government. Rule 37 lays down the conditions for such mining leases. The relevant clauses of this Rule may be reproduced below:—

"37. Conditions of mining lease.— Every mining lease shall be subject to the following conditions:—

(i) The provisions of Rules 15, 18 (3), 20, clauses (ii) to (xv), (xvii) and (xviii) of Rule 21 (1) and 21 (2) shall apply to such leases with the modification that the word "Government" occurring in clauses (ii) to (iv) and (xviii) of sub-rule (1) of Rule 21 shall be substituted by the word "lessor".

(ii)

(iii)

(iv) If the lessee makes any default in payment of royalty as required by Rule 21 (1) (i) or commits a breach of any of the conditions of the lease, the lessor shall give notice to the lessee requiring him to pay the royalty or remedy the breach, as the case may be, within thirty days from the date of receipt of the notice and if the royalty is not paid or the breach is not remedied within such period the lessor without prejudice to any proceeding that may be taken against the lessee, determine the lease"

47. By virtue of clause (ii) of this Rule the provisions with regard to the royalty contained in Rule 20 and Rule 21, to which reference has been made earlier, have been made applicable to mining leases granted by persons other than the Government. It will be noticed that

the royalty in respect of such mining leases for extracting minor minerals has to be paid not to the Government, but to the person granting the lease in whom the minor minerals vest. It thus cannot be said that so far such leases are concerned, there is any charge or impost levied by the Government. All that the Government has done by framing Rules contained in Chapter III is to lay down certain statutory conditions for the grant of mining leases, to provide for the payment of Royalty to persons in whom such minor minerals vest and to fix a uniform rate for such payments. Obviously, it is not a compulsory levy by the Government as it is based on a condition in the mining lease.

48. In fact, in the course of arguments before us, the Advocates-General of both the States have stated that the royalty demanded was only in respect of lands in which the minor minerals vest in the Government and not for land in which the minor minerals vest in persons other than the Government. Even in the various notices demanding such royalty it is made clear that the royalty is being charged for minor minerals extracted from the lands in which such minor minerals vest in the Government. It is true that the petitioners have denied that the Government has any minor mineral rights in the land on which they have set up brick-kilns, but the fact remains that the demand for royalty, by which the petitioners feel aggrieved, is made only in respect of the minor minerals which vest in the Government. Most of the contentions raised on behalf of the petitioners are based on the assumption that royalty is tax and not a fee forgetting that all payments due to the Government cannot be classed under these two heads, and there may be quite a number of demands and payments due to the Government, which are of an entirely different character. For example, rents payable to the Government in respect of leases of its property can neither be classed as tax nor fee. Royalty is more akin to rent. As has been observed earlier, it is charge made by the owner of minerals for granting the privilege of extracting minerals. The distinction between a tax and other charges has been stated by Hugh Dalton in his Public Finance, 4th Edition (1957) thus:-

"A tax is a compulsory charge imposed by a public authority and, as Taussig puts it. 'The essence of a tax, as distinguished from other charges by Government is the absence of a direct quid pro quo between the tax-payer and the public authority.' We have, on the other hand, as an important source of public income, the prices charged by a public authority for specific services and commodities supplied by it, including the prices charg-

ed for the use of public property. Generally speaking, these prices are paid voluntarily by private persons, who enter into contracts, express or implied, with public authorities, whereas taxes are paid compulsorily."

49. The matter has been discussed in greater detail by Taussig in his Principles of Economics, 4th Edition, Vol. II (1939) page 139, wherein dealing with royalty he states as follows:-

"The owner of a mine when he leases it to another for working usually gets as royalty a fixed payment of so much per ton. Royalties naturally vary with the quality of the minerals and the ease of their extraction. They are a rough-and-ready way of carving out the economic rent. They are not necessarily in the nature of rent; for where a mine has been found by "prospecting", with all the risk of possible failure, the payment may stand for no real surplus. But where royalties are paid in well-explored countries on minerals whose quality and value are reasonably well known, they are simply rent. Such seems to be the case with the royalties on English coal mines.

It is argued by some distinguished economists that a royalty is in any case different from rent; or rather that there is on every mine some sort of payment to the owner some revenue for him, and that even the poorest mine will yield a return in the nature of a royalty. The better mines yield in addition a true rent disguised as a further or ampler royalty payment. The ground for this distinction is that a mine contains a fixed store, and that the owner will not consent to its partial exhaustion unless he receives some recompense."

50. Compulsion in the payment of royalty arises out of the conditions of mining leases and is because of the contract between the grantor of the lease and the lessee, though a condition of payment of royalty is prescribed by the rules framed by the State to regulate the grant of mining leases. Because of this compulsion only, royalty cannot be termed as a tax. While considering the distinction between a 'fee' and a 'tax' in Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 382, B. K. Mukherjea, J., observed:-

"We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees."

51. Proceeding further his Lordship said:-

"The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example, in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest, vide, Findlay Shirras on 'Science of Public Finance', Volume I, page 202. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action, vide Seligman's Essays on Taxation, p. 408."

52. In Sri Jagannath Ramanuj Dass v. State of Orissa, AIR 1954 SC 400, advertising again to this matter, B. K. Mukherjea, J., observed:—

"A tax is undoubtedly in the nature of a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. But the essential thing in a tax is that the imposition is made for public purposes to meet the general expenses of the State without reference to any special benefit to be conferred upon the payers of the tax. The taxes collected are all merged in the general revenue of the State to be applied for general public purposes. Thus, tax is a common burden and the only return which the tax-payer gets is the participation in the common benefits of the State. Fees, on the other hand, are payments primarily in the public interest but for some special service rendered or some special work done for the benefit of those from whom payments are demanded."

53. In Hindustan-Rampur Coal Co., Ltd. v. The State of Orissa, AIR 1961 SC 459, Gajendragadkar, J., (as he then was) while considering distinction between tax, fee and cess, and noticing that there is element of quid pro quo between the tax payer and the public authority in case of fee, said:—

"It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of

the levy as fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy."

54. Applying this test to the royalty demanded under the Punjab Rules, I am of the opinion, that it cannot be classed as a 'tax'. Though the rates for royalty are prescribed by Rules and payment of royalty is made a condition of the mining leases, the basis for the demand is still the contract or agreement of lease between the parties; royalty for all mining leases is not to be paid to the Government as such but to the person in whom the minor mineral rights vest; the payment is to the owner of the minor minerals for the grant of privilege to extract minor minerals, the liability being that of the person to whom such privilege is granted and computed on the actual quantity of the mineral extracted. All these characteristics of the impugned demand, in my opinion, clearly take it out of the category of 'tax' or 'impost' and thus not hit by Article 265 of the Constitution. The petitioners' contention that the royalty was nothing but a tax as it goes to the general revenues of the State is without any basis, as a copy of the memorandum addressed by the Block Development and Panchayat Officer, Virka to some brick-kiln owners, a copy of which forms Annexure R-5 to Civil Writ 443 of 1967 clearly states that the royalty is to be credited to the head:

"XXXIX — Industries — Miscellaneous — Other items — Receipts from minor minerals."

55. Royalty due to the Government, no doubt, can be recovered as arrears of land revenue under Rule 53 of the Punjab Rules, but that does not suffice to give it the character of a tax as under that rule even contract money, fees and other sums due to the Government under these Rules can be recovered in the same manner. It may be pointed out that this Rule 53 does not apply to royalty due to persons other than the Government, and in case of default of payment of such royalty the grantor of the mining lease is left to pursue the ordinary remedy though under the conditions of such lease specified in clause (iv) of Rule 37 he has also the right to determine the lease after the requisite notice.

56. The peculiar nature of royalty and the distinction between it and the

tax that I have pointed out above does not seem to have been brought to the notice of the learned Judge either in AIR 1965 Pat 491 or in the unreported decision of Basu, J., in Civil Rule No. 433-W of 1963 and connected Petns. D/-8-7-1964 (Cal) (*supra*), and it is because of this basic difference between royalty and tax that I am not inclined to accept the dictum that what is being charged by way of royalty on minor minerals is a tax, and in exercise of its rule-making power under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, the State Government has no authority to levy it. Here the cases cited on behalf of the petitioners, in which some levies were held to be taxes, may be noticed.

57. The latest is the decision of their Lordships of the Supreme Court in *Brij Mohan Nayyar v. State of U. P.*, Civil Appeal No. 867 of 1964, D/- 20-3-1967 (SC). In that case, the export duty levied by the Government of Uttar Pradesh on molasses exported to Punjab was held to be without authority, as no provision in any statute empowering such levy could be cited on behalf of the State. In *Mrs. K. K. Wadhwan v. State of Rajasthan*, AIR 1958 Raj 138 toll levied by Government on passing and re-passing of motor vehicles over a bridge was held to be a tax or impost without authority. The real basis on which that demand for toll was struck down was that it was not authorized under Section 20 of the Rajasthan Motor Vehicles Taxation Act, and even the proposal to levy it did not seem to have been squarely laid before His Highness the Nawab of Tonk, who was then the sovereign authority.

58. In *Anand Kumar Bindal v. Employees' State Insurance Corporation*, AIR 1957 All 136, special contribution payable by an employer under Chapter V-A of the Employees' State Insurance Act was considered to be a tax on the ground that it was a compulsory exaction recoverable in the event of non-payment as arrears of land revenue, levied by public authority for public purposes and was not payment for services rendered. In *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd.*, 1933 AC 168 payments made to the Adjustment Committee by the farmers selling fluid milk, which were to be apportioned by the Committee among the farmers who had sold milk products, were held to be indirect taxes. All these cases are clearly distinguishable, and the only rule that emerges from these decisions is that no tax can be levied without the authority of law, the very principle which is embodied in Article 265 of the Constitution.

59. In view of my opinion that royalty payable under the Punjab Minor

Minerals Concession Rules, 1964, is not a tax, the argument raised on behalf of the respondents that the State Government had no power to levy the tax in exercise of its rule-making powers under Section 15 of the Act does not arise. I would, however, like to notice the arguments that have been advanced with regard to the competency of the State legislature to levy such royalty. On behalf of the petitioners, it has been contended that the levy is contrary to the provisions of Article 265 read with Article 366 of the Constitution as there can be no taxation without the authority of law, that a tax cannot be imposed by a rule-making authority or by the executive that the power to tax is a legislative function, and it cannot be delegated to a subordinate authority, that power to make rules to regulate a certain matter does not include power to levy tax, and that, in any case, since the Act under which power has been conferred on the State to make rules does not contain any guiding factor for the impost, the demand for royalty is not valid. Article 265 of the Constitution of India provides:—

"No tax shall be levied or collected except by authority of law."

60. In Article 366 (Definitions) "taxation" is defined as including:—

"The imposition of any tax or impost, whether general or local or special."

61. The word "impost" has not been defined in the Constitution, but its accepted meaning is a compulsory levy. Thus, it cannot be disputed that a tax or an impost can be levied or collected only by the authority of law. In *P. J. Joseph v. Assistant Excise Commissioner*, AIR 1953 Trav-Co 146, it has been held that law in the context in which it is used in Article 265 of the Constitution means an act of the Legislature and cannot comprise an executive order or a rule without express statutory authority. This decision was affirmed by their Lordships of the Supreme Court in appeal in *State of Kerala v. P. J. Joseph*, AIR 1958 SC 296, where it was observed that an impost by an executive order which had no authority of law to support it was an illegal imposition. In that case, where in pursuance of an endorsement made by the Government on the reference made to it by the Board of Revenue, the excise authorities demanded an additional payment of a commission of 20 per cent on the sale of liquor from a licensee to whom the licences in question had already been granted under the Cochin Akbari Act, and the rules framed thereunder in force on the date of the issue of those licences on his paying the annual fee prescribed, it was held that the imposition of a further duty under Section 17 read with Section 18 on the licence for sale obvious-

ly amounted to an amendment of the provisions of Rule 7 and as a rule or a notification prescribing the levy was not published in the Official Gazette as required by Section 69, it could not be taken to be an order having the force of law. This case is no authority for the proposition that the word 'law' as used in Article 265 means only an act of legislature and not a rule or regulation made by a competent authority.

62. In *Damodaran v. State*, AIR 1960 Ker 58, it was held that as essential powers of legislation cannot be delegated, the legislature cannot delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct, but it must declare the policy of the law and the legal principles, which are to control any given case and must provide a standard to guide the officials or the body in power to execute the law. It was further observed in that case that the essential legislative function consists in the determination or choice of the legislative policy, and of formally enacting that policy into a binding rule of conduct. Adverting to the provisions of Article 265, it was observed in that case as follows:

"It is indisputable, that the imposition or the levy of a tax, is an essential legislative function; this is implied in Article 265 of the Constitution and has been held to be so in *Murli Manohar v. State of Uttar Pradesh*, AIR 1957 All 159. The chief characteristics of a tax are of course, its quantum, its incidence meaning the person or class of persons on whom it is imposed, and the mode of its recovery or collection. Thus, in matters of taxation, it is a vital policy, and one in which the legislature is keenly interested from the standpoint of the taxpayer and of the Revenue alike, to fix the per capita tax-burden at a suitable level. To this end, the legislature may formulate a policy, either by itself prescribing the rate of taxation or a ceiling to it beyond which it cannot rise or by delegating to an extraneous body in which it has confidence, the power to ascertain and determine the appropriate tax level, by applying principles and standards which may be settled by it. It is obvious, that to support a delegation of that kind, the policy or the principles or the standards evolved must bear an intimate relation to the nature and scope of the power delegated. In testing the validity of the delegation, the attempt must, therefore, be to discover what the legislature has purported to do, and how it has discharged its own responsibility."

63. In *Gangaram Surajparkash v. State of Punjab*, 1963-14 STC 475 (Punj), my learned brother Shamsher Bahadur,

J., with whom Mehar Singh, J., (as he then was) agreed, held that Section 5 of the East Punjab General Sales Tax Act 1948 which gave an unlimited power to the executive to levy sales tax at the rate it thought best, was void and unconstitutional. This decision was upheld by their Lordships of the Supreme Court in *Devidass Gopalkrishnan v. State of Punjab*, 1968-20 STC 430=(AIR 1967 SC 1895). After referring to the earlier decision of that Court in *Calcutta Corporation v. Liberty Cinema*, (1965) 2 SCR 477=(AIR 1965 SC 1107), Subba Rao, C.J., speaking for the Court, observed thus:

"If this decision is an authority for the position that the Legislature can delegate its power to a statutory authority to levy taxes and fix the rates in regard thereto, it is equally an authority for the position that the said statute to be valid must give a guidance to the said authority for fixing the said rates and that guidance cannot be judged by stereotyped rules but would depend upon the provisions of a particular Act. To that extent this judgment is binding on us. But we cannot go further and hold, as the learned Counsel for the respondents asked us to do, that whenever a statute defines the purpose or purposes for which a statutory authority is constituted and empowers it to levy a tax that statute necessarily contains a guidance to fix the rates; it depends upon the provisions of each statute."

64. Their Lordships repelled the argument that the doctrine of constitutional and statutory needs would afford reasonable guidelines for the Government to fix the rate and that the principles laid down by the Court in *Calcutta Corporation's case*, 1965-2 SCR 477=(AIR 1965 SC 1107) (*supra*), would apply. Dealing with the question of delegation, they quoted from their earlier judgment in *Vasantlal Maganbhai v. State of Bombay*, (1961) 1 SCR 341=(AIR 1961 SC 4) (at pages 356 and 357) (sic) and observed (at page 439 of 20 STC)=(at p. 1901 of AIR):

"The minimum we expect of the legislature is to lay down in the Act conferring such a power of fixation of rates clear legislative policy or guidelines in that regard."

65. In *Edward Mills Co. Ltd Beawar v. State of Ajmer*, AIR 1955 SC 25 it was laid down that the primary duty of law-making has to be discharged by the legislature itself, but delegation may be resorted to as a subsidiary or an ancillary measure and a legislature cannot certainly strip itself of essential functions and vest the same in an extraneous authority.

66. From the various authorities that have been referred to above, it is abundantly clear that though the power of

taxation vests in the legislature, under certain circumstances it can delegate the same to a subordinate authority, but it must indicate the policy and guideline for fixation of rates or at any rate the ceilings beyond which the taxation is not to proceed.

67. The learned Advocate-General of Haryana has, however, contended that there is ample guidance on this matter in the Act itself. In this connection, he has referred to Section 9 of the Act, which makes a specific provision for royalty, and points out that the rates of royalty being specified in the Second Schedule to the Act, they furnish guidance for the State of fixing rates at which royalty is to be charged on minor minerals.

68. It has then been argued by the petitioner's Counsel that the authority given to the State under Section 15 of the Act is "to make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith," and this power does not and cannot embrace the power to levy any tax or impose royalty. Some decisions have been cited in support of the contention that the authority to regulate does not include the power to impose tax or levy any payment. In *Attorney-General v. Wilts United Dairies*, (1922) 127 LT 822 it was held that the levy of money for use of the Crown without the sanction of the Parliament, and which amounted to a tax, could not be made by the Food Controller. Under the statute of 1916 the Food Controller was authorized to regulate the supply and consumption of food and to take necessary steps for maintaining a proper supply of food. Construing the extent of the powers thus conferred on the Food Controller, Lord Buckmaster said:—

"The powers so given are no doubt very extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes. However, the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

69. In *R. M. D. C. (Mysore) Private Ltd. v. State of Mysore*, AIR 1962 SC 594, a case arising out of the Mysore Lot-

teries and Prize Competitions Control and Tax Act, 1951, it was held that by passing a resolution as to control and regulation of prize competitions, the Mysore Legislature had not surrendered to the Parliament the power to tax. These decisions, in my opinion, do not warrant the conclusion that the authority given by the Parliament to the State Government under Section 15 of the Act does not entitle them to make provision for royalty. The power conferred on the State Government under this section came up for consideration of this Court in ILR 1966 (1) Punj 166. Dealing with the contention that the State can make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and not for any purpose other than regulating the grant of such licences or leases, R. S. Narula, J., delivering the judgment of the Division Bench, observed:—

"Nor do I find any merit in the first contention of Mr. Doabia in this behalf as Section 15 authorises making of rules by the State Government not only for the purpose of regulating the grant of prospecting licences and mining leases, but also for the purposes connected therewith. This can include the making of rules for giving a mining lease by whatever name it may be called or by a contract, the consideration of which is determined by a process of a public action."

70. In this view of the matter, it was held that the Punjab Minor Minerals Concession Rules, 1964, and in particular Rules 28, 33 and 61 of these Rules were intra vires Section 15 (1) of the Act. As has been pointed in AIR 1965 Pat 491, stipulations regarding rent and royalty are integral parts of a mining lease and ordinarily form one of the conditions of such a lease. Since it is not disputed that under Section 15 (1) of the Act in exercise of its powers to regulate mining leases the State is entitled to lay down the conditions for such leases, its authority to provide for the payment of royalty and to lay down a uniform rate of royalty for a particular mineral cannot be questioned. The fact that in Section 9 of the Act the Parliament has itself made provision for payment of royalty by the holder of a mining lease in exercise of its authority to regulate "mines and minerals development" by virtue of the power vesting in it under item No. 54 of List I of Seventh Schedule of the Constitution, clearly indicates that it never intended to exclude the authority to provide for payment of royalty while conferring power on the State Government under Section 15 (1) of the Act to make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith. This conclusion is

further strengthened by the fact that the Punjab Minor Mineral Rules, 1934, which also contained a provision for payment of royalty were kept alive by sub-section (1) of Section 15 till the Punjab Minor Mineral Concession Rules, 1964, could be framed. This question was considered at length in AIR 1965 Pat 491 (supra), where Mahapatra, J., observed as follows:-

"Admittedly, before 1957, when the Mines and Minerals (Regulation and Development) Act was enacted, the State Government had the power to prescribe rules for regulating the extraction of minor minerals, vide Section 8, The Mines and Minerals (Regulation and Development) Act, 1948, Rule 4, Mineral Concession Rules, 1949. Royalty was being collected for minor minerals also. So was the position before the Constitution came in 1950. In that context, if the Act of 1957 did not specifically express anywhere the intention to abolish imposition of royalty in respect of minor minerals, it has to be taken that the Parliament took appraisal of the existing law and usage and delegated all powers in that connection to the State Government in respect of minor minerals under Section 15. If the Parliament would have wanted really to exclude minor minerals from payment of royalty, it would have so expressed in Section 9, which specifically provides for payment of royalties on all minerals. The exclusion of Sections 4 to 13 as mentioned in Section 14, in respect of minor minerals appears to be for the sole purpose of conferring all such powers, as covered by those sections."

71. In view of the fact that in the legislation concerning the regulation and grant of mining leases provision for royalty like that of rent has always existed, and the condition regarding payment of royalty is a common and usual term of mining leases, I do not find it possible to accept the contention that the Parliament did not intend to authorise the State Government to make provision for royalty on minor minerals in exercise of its rule-making power under Section 15 (1) of the Act. This coupled with my earlier finding that the royalty demanded under the Punjab Minor Minerals Concession Rules, 1964, is not a tax, the Rule 20 thereof, which alone has been attacked in these petitions, cannot but be declared as perfectly valid. I thus find that the State of Punjab has the authority to charge royalty on minor minerals extracted from lands in which the minor minerals rights vest in it. The respondent-State has not claimed any right to charge royalty in respect of minor minerals that vest in persons other than the Government nor is it entitled to demand royalty

in respect of minor minerals extracted from such lands.

72. As has been noticed earlier, there has been a serious dispute in all the petitions before us regarding the ownership of the rights in minor minerals found in the land occupied by the petitioners, and that dispute cannot be settled in these proceedings as this Court is not the proper forum for going into such disputed questions of fact under Articles 226 and 227 of the Constitution. The rival claims of the parties to the ownership of the minor minerals in question can be settled by appropriate proceedings in a Court of law.

73. As a result of the foregoing discussion, I find that all the petitions must fail, and I would, accordingly, dismiss the same, leaving the parties to bear their own costs.

74. SHAMSHER BAHADUR, J.:— I agree generally with my learned brother and would like to add a few words of my own.

75. The objection raised by all the learned Counsel for the different petitioners that Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter called the Act) does not empower the State Government to ask for royalties is hardly tenable. Under Entry No. 54 of List I in Seventh Schedule of the Constitution it is the Parliament which has the power to make legislation for "regulation of mines and minerals development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest." Under clause (e) of Section 3 "minor minerals" means "building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral". By a notification of the Central Government of 1st of June, 1958, 'brick earth' has been declared to be a 'Minor Mineral' and under Section 15 of the Act, it is the State Government which may "by notification in the Official Gazette, make rules for regulating the grant of prospecting licences and mining leases in respect of minor minerals and for purposes connected therewith". Sections 4 to 9 deal with the general restrictions on undertaking prospecting and mining operations. These provisions generally deal with minerals and under sub-section (1) of Section 9:-

"The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral

AIR 1969 RAJASTHAN 65 (V 56 C 14)

V. P. TYAGI, J.

State, Applicant v. Parasmal and others,
Respondents.Criminal Revn. No. 186 of 1967, D/-
24-8-1968, from order of S. J., Jodhpur,
D/- 1-12-1966.Penal Code (1860), S. 511 — "Attempt"
— Act towards attempt need not be the
penultimate act towards commission of
offence — It can fall at any stage during
series of acts which go to constitute of-
fence.

When a person intends to commit a particular offence and then conducts himself in such a manner which clearly indicates his desire to translate that intention into action, and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence. It is not necessary that the act which falls under the definition of an attempt should in all circumstances be a penultimate act towards the commission of that offence. That act may fall at any stage during the series of acts which go to constitute an offence under S. 511.

Thus, in a case the act of S inviting P to come next day to purchase diesel from his pump which did not contain sufficient quantity to fulfil the demand of P and the act of the other accused persons of mixing Kerosene with the diesel to deliver that admixture to P is sufficient to attract the application of S. 511 in which the word "attempt" has been used in a larger sense so as to include any one or the series of acts committed by the accused persons which may go to complete the offence as described in Section 511. (1893) ILR 15 All 173, Rel. on, AIR 1961 SC 1698, Foll.

(Para 8)

Cases Referred: Chronological Paras (1961) AIR 1961 SC 1698 (V 48)=
1961 (2) Cri LJ 822, Abhayananand
Mishra v. State of Bihar 6, 8
(1893) ILR 15 All 173=1893 All
WN 71, In the Matter of R.
Maccrea 7

G. M. Mehta, Deputy Govt. Advocate, for the State; S. K. Jindal and Champa-
lal, for Respondents.

ORDER: This is a revision application filed by the State against the order of the learned Sessions Judge, Jodhpur, dated 1st December, 1966, whereby, the learned Judge dismissed the revision application of the State which was filed to challenge the order of the Munsiff Magistrate, Bilara, dated 27th June, 1966 discharging accused Purasmal, Shantilal, Durga Ram and Rooparam of the charges

JL/KL/E662/68

under section 420 read with section 511 and section 23 (c) of the Petroleum Act 1934.

2. The facts giving rise to this litiga-
tion are as follows:

Pukhraj, father of accused Shantilal and Parasmal, had a diesel pump at Bilara. Prahlad Ram, resident of Lamba village went to purchase diesel from that pump on 22nd July, 1965. He was told by Shantilal that the diesel was not available as the tank was empty, but he asked Prahlad Ram to come next day when he would make a supply of diesel to him. It appears that Prahlad Ram suspected a foul play to be practised by the dealers and, therefore, he chose to sleep at the diesel pump. At about 10 in the night Prahlad Ram saw that the four accused persons came to the diesel tank with the tins containing kerosene oil and started pouring that oil in the tank. Prahlad Ram got up and asked the accused persons not to mix kerosene oil as it was likely to damage the vehicles but they did not pay any heed to the advice given by Prahlad Ram. Prahlad Ram then made a report of this incident to the Pradhan of the Panchayat Samiti, Bilara who referred the matter to the Station House Officer, Police Station, Bilara. The Station House Officer went to the spot and sealed empty tins of kerosene near the diesel tank. He sealed the pump as the owner was not available on the spot and on 24th July, 1965 he took a sample from the diesel tank and sent the same for examination to the Central Forensic Science Laboratory, Calcutta. The result of the examination of the sample, as reported by the Director of the said Laboratory, was that the sample was an admixture of diesel and Kerosene oil. After investigation, all the four accused persons were challaned in the court of the Munsiff Magistrate, Bilara to be tried under section 420 read with section 511, Indian Penal Code and also section 23 (c) of the Petroleum Act, 1934.

3. The learned Magistrate after examining the accused persons discharged them on the ground that the act of the accused falls within the definition of 'preparation' and not 'attempt' and therefore no case was found to have been made out against them. A revision was filed against that order, but the learned Judge also endorsed the view of the learned Magistrate and dismissed the revision application. It is in this manner that this second revision has been filed before this Court by the State.

4. The facts as mentioned above have not been disputed by learned counsel appearing on behalf of the accused persons. The contention of the learned Deputy Government Advocate is that the circumstances of this case go to show

that an attempt to commit an offence was complete no sooner the kerosene oil was mixed with the diesel in the tank because the accused had already extended an invitation to Prahlad Ram to come to their pump next morning to buy diesel from them. Learned counsel appearing on behalf of the accused, however, urged that an attempt to commit an offence can be made only when the preparation is complete and therefore simply by asking Prahlad Ram to come to the tank next morning to purchase diesel cannot be said to be an attempt unless the preparation to commit an offence was complete when the invitation was extended to Prahlad Ram by the accused for making a purchase of diesel from them next morning.

5. These rival contentions of learned counsel for the parties raise an important question whether in the circumstances of this case can it be said that by extending invitation to Prahlad Ram, the accused attempted to commit an offence though by that time kerosene oil was not mixed with the diesel in the tank.

6. Before a crime is committed, the criminal has to undergo the three stages (1) intention to commit a crime, (2) preparation to commit that crime, and (3) attempt to commit that crime, and when the attempt is successful the crime is complete. There is a difference between the preparation to commit a crime and an attempt to commit a crime. The preparation consists in devising or arranging means or measures necessary for the commission of the offence while the attempt is doing of certain act towards the commission of that offence. The Supreme Court in *Abhayananand Mishra v. State of Bihar*, AIR 1961 SC 1698 has held that

"there is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, then he is said to have committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence."

7. Learned counsel for the accused opposite parties urged that in this case an invitation was given to Prahlad Ram to come to the tank next morning to purchase the diesel before the kerosene

oil was actually mixed by the accused persons with the diesel, and therefore, it cannot be said that by extending that invitation an attempt was made by the culprits to commit an offence because at that time the diesel was not available in the tank and it was possible that the culprits might have received a fresh supply of diesel and if Prahlad Ram had gone next morning to the tank, they would have supplied him pure diesel or refused to make a supply. In other words, he argued that attempt cannot start before the preparation was complete and since preparation was complete only after mixing the oil with the diesel extending of an invitation to Prahlad Ram cannot be said to be an act which may be termed as an attempt to commit an offence.

Whether any given act or series of acts amounted to an attempt which the law would take notice of or merely such act or series of acts fall within the ambit of preparation is a question of fact in each case and as is observed in the Matter of the petition of R. MacCrea, (1893) ILR 15 All 173, section 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and are done with the intent to commit it and done towards its commission. Knox J. in the above referred Allahabad case said at p. 179:

"Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series"

Blair J. at p. 181 said like this:

"It seems to me that that section used the word 'attempt' in a very large sense, it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself

punishable, and, though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, & c., shall be punishable. The term 'any act' excludes the notion that the final act short of actual commission is alone punishable."

8. In the instant case, it is true that at the time when Prahlad Ram was asked by accused Shantilal to come next day to take the delivery of diesel, the tank was empty and it is not the case of the accused persons that they had extended that invitation to Prahlad Ram in a hope to get a fresh supply of the diesel by the next morning. After inviting Prahlad Ram to purchase diesel from his tank that the kerosene oil was mixed with the diesel oil which was in the tank but before Prahlad Ram could go to purchase that admixture of diesel and kerosene oil which was prepared by the accused persons in the night their action was detected by Prahlad Ram himself and he raised a hue and cry about it. It is also true that by the time Prahlad Ram was asked to make a purchase of diesel oil from the tank next morning, the preparation for the commission of an offence by mixing kerosene oil was not complete, but all these facts go to show that the accused persons had mentally prepared themselves to commit that offence by mixing the kerosene oil with the diesel at a convenient time and that is why they completed that work at the night time when they would not be detected by others though they had mentally prepared themselves to do that job at the time when invitation was being extended to Prahlad Ram to purchase diesel from the tank which really did not contain that much of diesel which was required by Prahlad Ram. In my opinion, the attempt to commit an offence in this case is made up of a series of acts and the first of those acts is to invite Prahlad Ram to come next morning to take the delivery of the diesel oil from the tank which did not contain it. The second of the acts is the mixing of kerosene oil with the diesel in order to deliver the admixture to Prahlad Ram next morning. If without inviting Prahlad Ram to take the delivery of the diesel from that pump Shantilal and other accused persons had mixed the kerosene oil with the diesel in the tank, then this act of the accused persons of mixing kerosene oil would not have gone beyond making a preparation for the commission of an offence, but since the invitation had been issued to

Prahlad Ram with alleged criminal intention to deliver the admixture, it changes the complexion of the case and in these circumstances it is difficult for me to accept the contention of Mr. Jindal that the act of Shantilal of inviting Prahlad Ram to take the delivery of the diesel from the pump which undoubtedly did not contain sufficient quantity of diesel was also one in the series of the acts which went to complete the preparation. The act of extending invitation to Prahlad Ram to take the diesel from the pump cannot in any circumstance, be said to fall within the term "preparation for the commission of the offence." It is no doubt true that in this particular case the preparation was actually completed by mixing the kerosene oil at the night time after the invitation was already given to Prahlad Ram but this fact hardly makes any difference. It is not necessary that in every case the preparation must precede the penultimate act in the series of the acts which go to constitute the offence which falls within the mischief of the term "attempt to commit the offence." If Shantilal had mentally prepared himself before extending an invitation to Prahlad Ram to deliver the admixture of diesel and kerosene, then in that event the act of inviting Prahlad Ram before mixing kerosene with whatever little quantity of diesel was left in the pump would certainly go beyond the stage of preparation for the commission of an offence. When a person intends to commit a particular offence and then he conducts himself in such a manner which clearly indicates his desire to translate that intention into action, and in pursuance of such an intention if he does something which may help him to accomplish that desire, then it can safely be held that he committed an offence of attempt to commit a particular offence. It is not necessary that the act which falls under the definition of an attempt should in all circumstances be a penultimate act towards the commission of that offence. That act may fall at any stage during the series of acts which go to constitute an offence under Section 511 of the Indian Penal Code. In the present case, it can safely be said on the basis of the circumstances found during the investigation that Shantilal had intended to deliver an admixture of oil and diesel to Prahlad Ram at the time when he extended the invitation to Prahlad Ram to take the delivery of the diesel from his pump which did not contain sufficient quantity to meet the demand of Prahlad Ram. In these circumstances, the act of the accused persons of mixing kerosene oil in the night with a view to deliver the admixture to Prahlad Ram in pursuance of the invitation already

extended completes the requirements of Section 511, I. P. C. Therefore, with that intention and with that mental equipment the extension of invitation to Prahlad Ram to make a purchase of diesel from the tank was an attempt to commit an offence though the preparation to commit that offence was actually completed after the invitation was extended. The Supreme Court has laid down in AIR 1961 SC 1698 that it is not the penultimate act towards the commission of the offence which may be made punishable but that act may be any act during the course of the series of acts that go to constitute an offence under section 511 of the Indian Penal Code. In my opinion, the act of Shantilal inviting Prahlad Ram to purchase diesel from his pump which did not contain sufficient quantity to fulfil the demand of Prahlad Ram and the act of the other accused persons of mixing kerosene with the diesel to deliver that admixture to Prahlad Ram do attract the application of section 511 of the Indian Penal Code in which the word 'attempt' has been used in a larger sense so as to include any one or the series of acts committed by the accused persons which may go to complete the offence as described in Section 511, Indian Penal Code.

9. In this view of the matter, I am inclined to accept the revision of the State and send the case back to the trial court for further proceedings. The revision is accordingly allowed.

DGB/D.V.C.

Revision allowed.

**AIR 1969 RAJASTHAN 68 (V 56 C 15)
KAN SINGH, J.**

Kailash Chandra Jain and another, Petitioners v. The State of Rajasthan, Respondent.

Civil Writ Petn. Nos. 592 and 578 of 1967, D/- 23-3-1968.

(A) Constitution of India, Article 226 — Complicated questions of fact cannot be determined — Employees of Government of Rajasthan Transport Department on formation of State Roadways Transport Corporation claiming to be employees of the Corporation and hence claiming to be not amenable to orders of transfer by State Government — Question whether such employees were workmen employed in the industry namely of providing transport or whether they continued to be Government servants, held, could not be decided in writ proceedings — Proper forum was Tribunal under Industrial Disputes Act — AIR 1967 SC 1857, Dist. (Para 16)

(B) Rajasthan Civil Service Rules, 1951, Rule 20 — Applicability — Workmen employed in an industry run by State cannot

be transferred to a department not an industry.

Rule 20 of Rajasthan Service Rules may empower the State Government to transfer a workman employed in one industry to another industry of the State where he may have almost the identical conditions of service on which he initially joined the employment. But Rule 20 of the Rajasthan Service Rules cannot be utilised to put an employee in an industrial undertaking in a position where he stands to lose the several benefits available to him under the various Acts of Parliament. Rule 20 of the Rajasthan Service Rules has to be so utilised in such a manner that it does not trench upon the provisions of other statutes. (Para 17)

(C) Industrial Disputes Act (1947), Section 2 (j) — 'Industry' — Determination.

In order to determine whether a particular activity is or is not an industry within the meaning of the various enactments applicable, the dominant character of the activity under examination has to be ascertained. (Para 17)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 1857 (V 54) =

1967-3 SCR 377, Rajasthan State Electricity Board, Jaipur v. Mohan Lal

(1966) AIR 1966 Raj 1 (V 53) = ILR (1965) 15 Raj 707, Mohan Lal v. State 15, 16

M. Mridul, for Petitioners; M. M. Vyas, for the State of Rajasthan.

ORDER: These are two identical writ petitions under Article 226 of the Constitution. Writ Petition No. 592 of 1967 is by one Kailash Chandra Jain. Writ Petition No. 578 of 1967 is by the State Roadways Workers Union, Jaipur. They concern the legality of certain orders of transfer in respect of certain employees of what was the Roadways Department of the State Government. The employees came to be transferred by the impugned orders to other departments of the State Government. The petitioners pray for appropriate writs, directions or orders in these matters.

2. It will be convenient to narrate the facts with reference to Kailash Chandra Jain's writ petition.

3. Kailash Chandra Jain came to be appointed as a Conductor on 7-4-1960 in what was then the State Roadways Department of the Government of Rajasthan. With effect from 1st October, 1964, Rajasthan State Roadways Corporation was constituted in pursuance of Road Transport Corporation Act, 1950. The Corporation was a body corporate under the Act. It appears that with the establishment of the Corporation the management of the Road Transport business hitherto run by the State Roadways Department was taken over by the Corporation. So far as the employees of the State Roadways Department were concerned, by

a Notification of the State Government dated 18-11-64, their services came to be placed at the disposal of the Corporation. I will have occasion to refer to that Notification a little later. The petitioner claims that after the transfer of the transport business of the State Roadways to the Corporation, he became an employee of the Corporation.

This position is controverted by the respondents. According to the respondents the petitioner was only on deputation with the Corporation for a limited period and he never became a servant or employee of the Corporation. The petitioner continued to work as a Conductor with the Corporation for sometime after its formation. The petitioner like other employees was served with an option form and was asked to intimate whether he would like to serve the Corporation as its employee or would opt for the service of the State. The petitioner thought that the option sent to him suffered from vagueness. He, therefore, sought clarifications so that he could exercise his choice properly.

According to the petitioner a fresh option form was issued to him by the State Government, but the petitioner took the position that he had become the employee of the Corporation and thus there could be no question of his opting for State service as according to him there was no corresponding or analogous department of the State Government to which the petitioner could be appointed. On 11-9-67 an order was served on the petitioner that he had been declared surplus by the General Manager Rajasthan State Roadways Corporation and that he has been absorbed to the post of Surveillance Worker in the National Malaria Eradication Prevention Unit, Barmer against a vacancy and the petitioner was directed to report himself for duty at Barmer. In pursuance of the order dated 11-9-67, the petitioner was relieved from the post of Conductor. The grievance of the petitioner is that by the way the petitioner was dealt with the respondents sought to retrench him.

4. The petitioner contends that he was a workman in an industry viz., that of providing transport service and was governed by the Industrial Disputes Act, 1947, the Standing Orders framed by the State Roadways, the Workmen's Compensation Act and several other pieces of legislation to which detailed reference need not be made at this stage and therefore, according to the petitioner it was not open to the respondents to transfer him to a department of the State Government which was not an industrial establishment of the kind he was employed in and thereby to deprive him of all the benefits to which he was entitled. The petitioner has raised a two-fold contention by his writ petition.

5. The first contention is that he was in full sense of the term an employee of the Corporation, and, therefore, the Government

had no power to transfer him to its own department. The second contention is that even if the petitioner be not taken to be an employee of the Corporation, the Government had no power to transfer the petitioner from a department which was having the dominant character of an industrial establishment to another department of the State which was not industrial in character as this was bound to materially alter the service conditions of the petitioner under which he joined service in the erstwhile State Roadways Department of the State Government.

6. The second writ petition, as already observed, has been moved by the State Roadways Workers Union and seeks to question the validity of orders of the Government (Exs. 14 to 18 on record). Exhibit 18 in this case is the order relating to Kailash Chandra which is the subject matter of the first writ petition. The Union has challenged the validity of these orders on the same grounds as have been taken by Kailash Chandra.

7. Both the writ petitions have been opposed on behalf of the respondents.

8. It is contended on behalf of the State that the Government could transfer the employees of the erstwhile State Roadways Department to the departments and places to which they have been transferred by the impugned orders. It is denied by the respondents that Kailash Chandra petitioner and other employees had become the employees of the Corporation. It is urged by them that these employees were the employees of State when they first entered service in the State Roadways Department and continued to be so till after the formation of the Corporation. It is stated that when the Corporation was formed and the transport business run by the State Roadways Department taken over by the Corporation the services of these employees were temporarily placed at the disposal of the Corporation on deputation. They maintained that the deputation of these employees was initially for a period of three months, but the period was subsequently extended from time to time.

Eventually these employees were given the option to say whether they would like to be absorbed in the service of the Corporation or would like to continue in Government service. According to the respondents when the first option was given the petitioners Kailash Chandra and other employees gave evasive replies and, therefore, second time they like others were served with fresh option notices and as they did not exercise the option for joining the service of the Corporation, the Corporation had to declare them surplus for their own requirements. Thereafter the State Government according to the respondents could deal with them like other Government servants and could

post them to other departments as the Government had no State Roadways Department any more with them.

Further according to the respondents at the time these employees came to be deputed with the Corporation certain supernumerary posts were created in the Directorate of Transport and the lien of these employees like others was kept in the Directorate of Transport of the State. For this reason it is urged that at all times the petitioners continued to be the employees of the State Government and they could be transferred like other civil servants to other departments. There is one additional plea raised by the respondents in the writ petition filed by the Workers Union that such a writ petition was not maintainable because according to the respondents it is only the aggrieved persons who could have filed such a writ petition.

9. From the above narration it will be evident that two questions arise for determination;

1. Whether petitioner Kailash Chandra and the other employees whose cause has been espoused by the Union had become employees of the Corporation so that neither the corporation could have declared them surplus nor would the State Government be left with any power to transfer them on posts in other departments.

2. Whether the State Government was competent to transfer Kailash Chandra and other employees who had been employed in the State Roadways Department to other departments of the State.

10. The plea raised by the respondents regarding the non-maintainability of the writ petition moved by the Workers Union need not detain me long because even if this writ petition is thrown out on the sole ground that the party affected by the impugned orders has not chosen to come before this court, the points raised in Kailash Chandra's writ petition will still have to be dealt with and disposed of. The writ petition filed by Kailash Chandra or by the Workers Union for that matter appears to be test cases and decision of the question raised in Kailash Chandra's writ petition, should, in my view, settle the controversy. It is not expected of the State Government or the Corporation for that matter that they are interested in multiplying cases in court. Whatever way the controversy is settled it is expected that the respondents will deal with the matter accordingly even in respect of other employees who may have been similarly dealt with.

11. Before I may address myself to the points formulated above, it will be convenient to refer to the relevant statutory provisions. The conditions of service of the servants of the State are laid down in the Rajasthan Service Rules, 1951. These rules had been made by the Raj Pramukh of

Rajasthan in 1951 in exercise of the powers under Article 309 of the Constitution and now by the constitutional changes intervening they are deemed to be rules made by the Governor. Rule 2 provides that:

"2. Extent of application.— These rules apply—

(i) to all persons appointed by the Government of Rajasthan to posts or services under its administrative control or in connection with the affairs of the State of Rajasthan on or after the seventh day of April, 1949.

(ii) to all persons appointed on or after the said day to such posts or services as a result of integration of the services of the Covenanting States, and

(iii) to all persons appointed to such posts or services on the basis of contracts entered into by the Government of Rajasthan or by the Government of a Covenanting State in respect of such matters covered by these Rules as are not specially provided for in their contracts for appointment.

This rule is subject to certain provisos which are not material for the present purpose. Rule 20 provides for transfer of a Government servant and I may read it:-

"20. Transfer of a Government servant;

(a) Government may transfer a Government servant from one post to another, provided that except—

(i) on account of inefficiency or misbehaviour, or

(ii) on his written request, a Government servant shall not be transferred substantially to, or, except in a case covered by Rule 50 appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien or could hold a lien had his lien not been suspended under Rule 17.

Rule 141 provides that an employee cannot be transferred to foreign service without his consent. The term 'foreign service' has been defined under these rules to mean a service in which a Government servant receives his substantive pay with the sanction of the Government from a source other than the consolidated fund. Rule 141 is however, inapplicable in the case of a transfer of a Government servant to the service of a body incorporated or not which is wholly or substantially owned or controlled by the Government. In other words R. 141 contemplates that a Government servant can be transferred even without his consent to a corporation like the one in the present case.

For matters relating to classification and control of civil servants in the State there are the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958. These rules make provision for the classification of civil servants in various categories and for certain disciplinary matters. The term 'Government Servant' has been defined in these rules to mean:-

"a person who is a member of a service or who holds a civil post under the Government of Rajasthan and includes any such person on foreign service or whose services are temporarily placed at the disposal of a local or other authority and also any person in the service of a local or other authority whose services are temporarily placed at the disposal of the Government of Rajasthan or a person in service on a contract or a person who has retired from Government service elsewhere and is re-employed under the Government of Rajasthan."

This term does not include certain civil servants on deputation in Rajasthan and with that I am not concerned. These rules apply to all Government servants except persons of certain categories mentioned in Rule 3. But I am not concerned with the persons except the categories of civil servants mentioned therein. However, the provisions of Rule 3 (1) (b) may be noticed. Persons who are employed in such Industrial Organizations of Government as may be notified from time to time and who are workmen within the meaning of Industrial Disputes Act, will not be governed by these rules. It follows that it is such workmen within the meaning of the Industrial Disputes Act about whose Industrial Organisation the Government had issued the notification that the provisions of these rules will cease to apply.

Industrial Disputes Act, 1947, confers a number of benefits on workmen in an industry and this Act applies equally to industries run by the State Government. The term 'Industries' according to Section 2 (j) of this Act means:

"Any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

The term 'workmen' has been defined by the Act as follows:

"Workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled, manual, supervisory, technical or clerical work for hire or reward whether the terms of employment be expressed or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934, or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

The avowed object of this Act is to maintain industrial peace and it provides a machinery for the settlement of industrial disputes and some of the provisions of the Act are designed to ensure security of tenure and for this it confers certain benefits on workmen. It makes provision in this regard for lay off, strikes and lock-outs. Section 25-C gives a right to a workman laid off for compensation. Section 25-F describes the conditions to be fulfilled before a workman could be retrenched. Likewise Sec. 25-FF makes provisions for compensation to workmen in case of transfer of undertakings. This section runs as follows:

"Compensation to workmen in case of transfer of undertakings—

Where the ownership or management of an undertaking is transferred, whether by agreement or by operation of law, from the employer in relation to that undertaking to a new employer, every workman who has been in continuous service for not less than one year in that undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of section 25-F, as if the workman had been retrenched:

Provided that nothing in this section shall apply to a workman in any case where there has been a change of employers by reason of the transfer, if—

(a) the service of the workman has not been interrupted by such transfer;

(b) the terms and conditions of service applicable to the workman after such transfer are not in any way less favourable to the workman than those applicable to him immediately before the transfer; and

(c) the new employer is, under the terms of such transfer or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by the transfer."

There are other provisions like Ss. 25-G & 25-H which provide for the procedure for retrenchment. Then there are a number of other statutes like the Workmen's Compensation Act, the Bonus Act, the Payment of Wages Act, Minimum Wages Act which confer a number of benefits on workmen. Since these are statutory benefits conferred on a workman, it can legitimately be predicated that a workman has a right to these benefits under the stated conditions and these statutory provisions are thereby assimilated to the conditions of service of a workman employed in an industrial undertaking.

12. I may now turn to the Industrial Employment (Standing Orders) Act, 1946.

This Act was made to require employers in industrial establishments to define with sufficient precision the conditions of employment under them and to make the said conditions known to workmen employed by them. As the learned counsel for the petitioner argued that it is the Standing Orders made under this Act which were the conditions of service on which the petitioner came to be employed. I may read the relevant provisions of the Act. Section 3 of this Act makes it obligatory for an employer to submit a draft of the standing orders proposed by him for adoption in his industrial establishment within six months from the date on which the Act becomes applicable to an industrial establishment. It runs as follows:

"3. Submission of draft standing orders:—(1) Within six months from the date on which this Act becomes applicable to an industrial establishment, the employer shall submit to the Certifying Officer five copies of the draft standing orders proposed by him for adoption in his industrial establishment.

(2) Provision shall be made in such draft for every matter set out in the Schedule which may be applicable to the industrial establishment, and where model standing orders have been prescribed shall be, so far as is practicable, in conformity with such model.

(3) The draft standing orders submitted under this section shall be accompanied by a statement giving prescribed particulars of the workmen employed in the industrial establishment including the name of the trade union, if any, to which they belong.

(4) Subject to such conditions as may be prescribed, a group of employers in similar industrial establishments may submit a joint draft of standing orders under this section."

Section 4 lays down the conditions for certification of the standing orders and it reads as under:—

"4. Conditions for certification of standing orders. Standing Orders shall be certifiable under this Act if—

(a) provision is made therein for every matter set out in the schedule which is applicable to the industrial establishment, and

(b) the standing orders or otherwise in conformity with the provisions of this Act, and it shall be the function of the Certifying officer or appellate authority to adjudicate upon the fairness or reasonableness of the provisions of any standing orders."

Section 5 lays down the procedure for the certification of the standing orders and it is as follows:—

"5. On receipt of the draft under Sec. 3, the Certifying Officer shall forward a copy thereof to the trade union, if any, of the workmen, or where there is no such trade union, to the workmen in such manner as may be prescribed, together with a notice in the prescribed form requiring objections,

if any which the workmen may desire to make to the draft standing orders to be submitted to him within fifteen days from the receipt of the notice.

(2) After giving the employer and the trade union or such other representatives of the workmen as may be prescribed an opportunity of being heard, the Certifying Officer shall decide whether or not any modification of or addition to the draft submitted by the employer is necessary to render the draft standing orders certifiable under this Act, and shall make an order in writing accordingly.

(3) The Certifying Officer shall thereupon certify the draft standing orders. After making any modifications therein which his order under sub-section (2) may require and shall within seven days thereafter send copies of the certified standing orders authenticated in the prescribed manner and of his order under sub-section (2) to the employer and to the trade union or other prescribed representatives of the workmen."

Section 6 provides that any person aggrieved of the order of the Certifying Officer under sub-section (2) of Section 5 may file an appeal before the appellate authority. Sections 7, 8, 9 and 10 provide for various matters relating to the date of operation of the standing orders, maintaining register for standing orders, posting of standing orders and for duration and modification of standing orders. Under Section 11 of the Act Certifying Officers and the appellate authorities have been given certain powers of civil courts. Section 13 lays down that any employer who fails to submit the draft standing orders as required by Section 3 shall be punishable with fine which may extend to Rs. 5000. He will be liable to a further fine if the offence continues. I may then notice section 13-B which runs as follows:—

"13-B. Act not to apply to certain industrial establishments.—

Nothing in this Act shall apply to an industrial establishment in so far as the workmen employed therein are persons to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Service Regulations, Civilians in Defence Service (Classification, Control and Appeal) Rules or the Indian Railway Establishment Code or any other rules or regulations that may be notified in this behalf by the appropriate Government in the Official Gazette, apply."

As the learned Additional Advocate General placed reliance on this section for showing that the petitioner was not governed by the standing orders and he also went to the length of saying that the Roadways Department had unnecessarily made and then applied for certification of the standing orders which according to the learned Additional

Advocate General was a meaningless superfluity.

13. It is in the light of the various provisions that I have noticed that I may deal with the two questions formulated by me above.

14. For showing how the petitioner and the other workmen should be taken to have been appointed in the service of the Corporation learned counsel for the petitioner referred me to the notification issued by the Governor on 18th November, 1964 which is at page 50 of the paper book in the writ petition filed by the Workmen Union. This notification was issued by the Governor in exercise of his powers under section 34 of the Road Transport Corporations Act, 1950 and thereby he made the administrative arrangements stated therein. Clause (1) of the Notification on which reliance was placed was as follows:—

"Clause (1). The Rajasthan State Road Transport Corporation (hereinafter referred to as the Corporation) shall take over the management of the existing Roadways Department of the Government of Rajasthan. Next clause on which reliance was placed is in the following terms:

Clause (6). The services of all Government employees holding whole or part time posts in the Roadways Department shall be temporarily placed at the disposal of the said Corporation on deputation for a period of three months or for the period as may be extended from time to time by the Government on the terms and conditions governing them at present till the Corporation frames its own regulations in respect of services of their employees which shall not be less advantageous than the terms and conditions applicable to them at present including provision for absorption in the services of the Corporation of Government employees of the Roadways Department.

Provided that no deputation allowance will be given to the Government employees for the deputation period. Leave salary and pension contribution shall be regularly paid by the Corporation in respect of all Government Servants.

Provided further that in respect of disciplinary proceedings or appeals, arising therefrom, pending immediately before the 1st October, 1964, the State Government shall exercise all powers, although they will be under the administrative control of the Corporation."

15. Shri Mridul also referred to Exts. 5, 8, 17 and 18. Exhibit 5 is a copy of a reply filed on behalf of the Corporation in a dispute between one Laluram and the Corporation. Exhibit 8 is an award of an arbitrator about certain disputes between the workmen represented by the State Roadways Workers' Union and the Rajasthan State Roadways. Exhibits 17 and 18 are the orders passed by the Director of Medical and Health Services, Rajasthan for posting

certain workmen to certain departments as they were declared surplus by the Rajasthan State Roadways Transport Corporation Department. From the tenor of these two orders Exs. 17 and 18 it is sought to be argued that the Director of Medical and Health Services who passed the orders of absorption, was treating the Corporation as a department of the State. Learned counsel for the petitioner realised that there was no express order appointing these workmen in the service of the Corporation. Even so he attempted to argue that from the facts and circumstances placed before the Court by him, it should be inferred that petitioner Kailash Chandra and other workmen came to be appointed in the service of the Corporation. For this he placed reliance on a bench decision of this court in Mohan Lal v. State, AIR 1966 Raj 1 which was affirmed in appeal by the Supreme Court in Rajasthan State Electricity Board, Jaipur v. Mohanlal, AIR 1967 SC 1857.

16. I have considered the various documents to which my attention was invited. But on the material before me I find it difficult to come to the conclusion that the petitioner Kailash Chandra as also the other workmen represented by the Union in the second writ petition came to be appointed in the service of the Corporation. The fate of Mohanlal's case, AIR 1966 Raj 1 decided by this court turned on its own facts. There were definite orders passed by the Rajasthan Electricity Board from which it could be inferred that Mohanlal had been appointed in the service of the Rajasthan State Electricity Board. The most important fact relied upon by the learned Judges was that the Rajasthan Electricity Board itself had sent Mohanlal on deputation with the Public Works Department and he could have been so sent on deputation only if he were in the service of the Rajasthan Electricity Board. The present case is not a case of that type. In the circumstances I find it exceedingly difficult to determine, in the exercise of the extraordinary jurisdiction of this court under Article 226 of the Constitution, whether the petitioner or the workmen represented by the Union in the other case had really been appointed in the service of the Corporation. This is a matter which can more appropriately be raised either in a civil suit if it is open to these workmen to file one or by raising a dispute before an Industrial Tribunal. Such a Tribunal can go into the entire evidence and then reach the conclusion whether petitioner Kailash Chandra and other workmen could be said to have been appointed in the service of the Corporation.

17. I now turn to the consideration of the second question. I need not in the present case decide whether the conditions of service of the petitioner would be governed by the Standing Orders made by the erst-

while Rajasthan State Roadways, nor need I decide whether the Standing Orders could not have been framed in view of the provisions of Section 13 (b) of the Industrial Employment (Standing Orders) Act, 1946. I will assume for the purposes of this case that it is the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 and the Rajasthan Service Rules, 1951 which apply to the employees of the erstwhile State Roadways Department. Even so, the question will have to be examined whether the provisions of Industrial Disputes Act, 1947, the Bonus Act, the Workmen's Compensation Act, Payment of Wages Act, Minimum Wages Act and a number of other statutes that apply to workmen.

There is no dispute that these Acts do apply to workmen even in an industry run by the State Government. It has also not been rightly disputed before me that the running of transport business as a departmental undertaking by the State Government was an industry in the fullest sense of the term. It has also not been questioned that the petitioner Kailash Chandra and the workmen represented by the Union in the other case joined service for the first time in the State Roadways Department i.e., these were persons who came to be governed by whatever statutory conditions that would be applicable to workmen in an industry.

I am not called upon to consider the case of a person who joined service in some other department of the State Government and came to be transferred to the erstwhile State Roadways Department and retained his lien in other departments. In the case of those workmen who join service for the first time in an industrial establishment of the State Government I have no manner of doubt that the conditions of service will include the statutory conditions and benefits to which a workman is entitled under the Industrial Disputes Act and various other Acts enumerated above.

Parties have not set down to draw up any formal agreement embodying the contract of service between them. In the circumstances the contract of service between them will be taken to be based on the Rajasthan service Rules and the Rajasthan Civil Services (Classification, Control and Appeal) Rules and several other statutes enumerated above. It is in this background that the powers of the Government under Rule 20 of the Rajasthan Service Rules have to be ascertained. The question is whether the Government will be competent to so exercise its powers under Rule 20 of the Rajasthan Service Rules that a person who is a workman and is employed in an industry run by the Government could be transferred to another department which is not an industry assuming he may be called upon in the department to which he is sought to be transferred to discharge similar duties.

There is no manner of doubt that a workman employed in an industry has certain statutory benefits conferred by various Acts of Parliament. The Rajasthan Service Rules, 1951 have been made by the Governor in exercise of his powers under Art. 309 of the Constitution. Art. 309 itself provides that conditions of service are to be laid down by an Act of the Legislature and it is only till such conditions are laid down by the Act of the Legislature that the Governor is competent to lay down the conditions of service by rules under Art. 309 of the Constitution, now it is not the nature of the work that an individual employee or workman may be discharging that alone is the criterion for determining whether a particular department is or is not an industry.

For seeing that a particular activity is or is not an industry within the meaning of the various enactments applicable, the dominant character of the activity under examination has to be ascertained. Rule 20 of the Rajasthan Service Rules may empower the State Government to transfer a workman employed in one industry to another industry of the State where he may have almost the identical conditions of service on which he initially joined the employment. But in my view Rule 20 of the Rajasthan Service Rules cannot be utilised to put an employee in an industrial undertaking in a position where he stands to lose the several benefits available to him under the various Acts of Parliament. Rule 20 of the Rajasthan Service Rules has to be so utilised that it does not trench upon the provisions of other statutes. Therefore, assuming that petitioner Kailash Chandra had not become the employee of the Corporation and consequently he could be posted by the State Government to any department under its control.

I do not think that Rule 20 of the Rajasthan Service Rules can empower the State to post such a workman or an employee to a department which is not industry at all. It may be that with the transfer of the transport business run by the Government through the agency of its department viz., the Rajasthan State Roadways, the Government are not left with any industrial activity on which a particular workman can be gainfully employed.

But that would not be a justification for the State Government to transfer an employee or a workman in an industry to a department which is not an industry, without his consent. It is always open to parties to arrive at an arrangement by agreement. That is not a question before me. It is nobody's case that the petitioner Kailash Chandra or other workman represented by the Union had agreed to their transfer to the departments which were not industries within the meaning of several statutes. That being so, the impugned orders, to my mind, have

been passed without any legal basis. I am unable to hold that transfer of a workman employed in an industry to another department of the State which is not an industry, is just an incident of service. It is a different matter as observed earlier if it is a case of transfer of an employee or a workman in one industry to another industry of the State where the conditions of service may be almost identical and I am not dealing with such a case. But in the case like the present one I have no doubt that the State Government cannot be said to be clothed with any power to transfer an employee in an industrial undertaking like the one engaged in by the erstwhile State Roadways Department to a department which is not an industry.

18. I have already noticed the difficulty that the second writ petition has been filed by the Union and not by the workers who have been affected by the orders of transfer made by the State Government. But Kailash Chandra's case as I have already observed is a test case and it is to be expected that Government being interested in the correct interpretation of the law are not interested in multiplying cases. Therefore, though technically the Union cannot be permitted to maintain the writ petition on behalf of the others I do express the hope that the State Government will accord the other workmen the treatment that has to be given to Kailash Chandra in pursuance of the order that I am going to pass.

19. In the result I allow Kailash Chandra's writ petition and hereby quash the order Ex. I dated 11-9-67 and restrain the respondents from giving effect to it. In the light of the observations made above, I dismiss the second writ petition filed by the State Roadways Workers Union. The parties are left to bear their own costs.

GGM/D.V.C.

Order accordingly.

AIR 1969 RAJASTHAN 75 (V 56 C 16)

L. N. CHHANGANI, J.

Keshari Lal Kavi and another, Petitioners v. Narain Prakash and others, Respondents.

Civil Misc. Restoration Appln. No. 93 of 1967, D./ 19-4-1968.

(A) Representation of the People Act (1951), S. 87 — Civil P. C. (1908), O. 17, R. 3 — Dismissal of election petition — Mere fact that case did not fall under O. 17, R. 3 does not mean that decision was not on merits.

O. 17, R. 3 of the Code permits decision on merits in cases of certain defaults. It has no relevance when the trial is otherwise concluded without any default by either side. In that case there could be decision on merits without invoking O. 17,

R. 3 of the Code. One can easily imagine the parties producing their evidence and concluding the trial on one day and it will be ridiculous to state that there was no decision on merits since O. 17, R. 3 of the Code could not be invoked as name of the parties had committed any default.

(Para 14)

Where, on the date fixed for hearing in the ordinary course, the election petitioner's counsel did not examine the two witnesses present in Court and closed the election petitioner's evidence and the respondent also closed his evidence and both the counsel then addressed the Court and eventually the Court held that the allegations in the petition remained unsubstantiated and dismissed the election petition:

Held, that the decision was clearly on merits.

(Para 14)

(B) Representation of the People Act (1951), S. 87 — Civil P. C. (1908), O. 9, R. 8 — High Court has power to dismiss election petition on non-appearance of election petitioner. AIR 1958 Madh Pra 260 and AIR 1965 Pat 378 and AIR 1968 Punj 152 (FB), Foll.; AIR 1960 J and K 25 (FB) and AIR 1964 All 181, Dissent. from.

(Para 18)

Cases Referred:	Chronological Paras	
(1968) AIR 1968 Punj 152 (V 55) = (1967) Ele. Petn. No. 9 of 1967, D/- 1-9-1967 (FB), Jugal Kishore v. Doctor Baldev Prakash	18	
(1965) AIR 1965 Pat 378 (V 52) = 1966 BLJR 588, Sasawalia Behari Lall Verma v. Tribikram Deo	18	
Narain Singh	18	
(1964) AIR 1964 All 181 (V 51), Vishwanath Prasad v. Malkhan Singh	17	
(1960) AIR 1960 J and K 25 (V 47) (FB), Dina Nath Kaul v. Elec- tion Tribunal Jammu and Kashmir	17	
(1958) AIR 1958 SC 698 (V 45) = 1959 SCR 611, Mallappa Basappa v. Basavaraj Ayyappa	16	
(1958) AIR 1958 SC 687 (V 45) = 1958 SCJ 680, Kamaraja Nadar v. Kunju Thevar	16	
(1958) AIR 1958 Madh Pra 260 (V 45) = 1958 Jab LJ 232, Sunderlal Mannalal v. Nandramdas Dwarka- das	15, 17, 18	
(1954) AIR 1954 SC 210 (V 41) = 1954 SCR 892, Jagan Nath v. Jas- want Singh	16	
(1953) 5 Ele. LR 327 (Ele. Tri. Jaipur), Roop Chandra Sogani v. Rawat Man Singh	19, 21	
(1953) 3 Ele. LR 403 (Ele. Tri. Patiala), Lahri Singh v. Attar Singh	19	
(1949) AIR 1949 E. P. 86 (V 36) = Sm. Ruprani Devi v. Christopher Southern Lewis	12	
C. K. Garg, for Petitioner No. 1; R. K. Rastogi and M. C. Bhoot, for Respondent No. 2.		

ORDER: This is a miscellaneous petition by Shri Keshar Lal Kavi and Shri Radha Kishan Goyal (who shall hereafter be referred to as applicants Nos. 1 and 2 respectively) under Order 9, Rule 8 read with Section 151, Civil Procedure Code (which shall hereafter be referred to as the Code) and Section 87 of the Representation of the People Act, 1951 (which shall hereafter be referred to as the Act) containing a prayer in the following terms:—

"It is therefore prayed that the applicant No. 1's absence may kindly be excused and the order of taking proceedings ex parte against him may be set aside and further restore the petition to its original number and allow the applicants to be substituted in place of the petitioner and be allowed to prosecute the petition."

2. The material and relevant facts under which this application has arisen may be given as follows:—

In the fourth general election for the Lok Sabha that is, House of People, held in February, 1967, six persons including the applicant No. 1 and the five non-applicants contested for the Lok Sabha seat from the scheduled caste Parliamentary Constituency of Tonk. The non-applicant No. 2 Shri Jamna Lal and two others indicated in their nomination papers first preference in favour of allotment of symbol "star" which was the officially approved symbol of the Swatantra party. As no authorised person on behalf of the Swatantra party had intimated to the Returning Officer either the name of its approved or substituted candidate by 3 P. M. on 23-1-1967 the Returning Officer while allotting symbols to the various candidates allotted the symbol of "horse" to the non-applicant No. 2 and supplied to all the contesting candidates a list of the contesting candidates along with the symbols allotted to them. The non-applicant No. 2 moved an application before the Election Commission on 24-1-1967 for revising the order of the Returning Officer and allotting the symbol of "star" to him. The Election Commission, after making queries, from the Returning Officer on the application of the non-applicant No. 2 assigned to him the official symbol "star" of the Swatantra party. It may be mentioned that the decision of the Election Commission was given without notice to the non-applicant No. 1 or to the applicant No. 1. Eventually, as a result of the polling the non-applicant No. 2 Jamna Lal was declared elected to the Lok Sabha.

3. The non-applicant No. 1 thereupon submitted an election petition in this Court on 8th April, 1967. In that election petition the non-applicant No. 1 made no reference to the details of the results of the election but challenged the election of the non-applicant No. 2 Shri Jamna Lal on only one ground. According to the non-applicant No. 1 the ex parte decision of the Election

Commission cancelling the free symbol "horse" assigned to the non-applicant No. 2 by the Returning Officer and substituting the same by the official symbol "star" of the Swatantra party was wholly illegal, arbitrary, without jurisdiction and ultra vires of the powers of the Election Commission. It was further the non-applicant's case that consequently, the results of the election were materially affected to the great detriment and prejudice of the non-applicant No. 1 and other contesting candidates. The non-applicant No. 1 prayed for a declaration that the election of the non-applicant No. 2 was void.

In that election petition the applicant No. 1 was impleaded as respondent No. 2. The election petition was contested by non-applicant No. 2 Jamna Lal. The applicant No. 1, who was respondent No. 2 in that petition, did not contest the election petition and allowed the case to proceed ex parte against him. Issues were framed on 7-7-1967 and the case was fixed on 16-8-1967 for recording evidence. On 16-8-1967 the election petitioner Narain Prakash, who is non-applicant No. 1 in the present petition, did not appear in Court and, therefore, his statement could not be recorded. Two witnesses were present but the counsel for the petitioner (non-applicant No. 1) did not examine them with a statement that he could not examine them in the absence of any instructions from his client. The two witnesses were thus discharged. No other witness was present in Court and the counsel for the election petitioner closed his evidence. The respondent No. 1 Jamna Lal's counsel led no evidence. Arguments were heard and eventually the election petition was dismissed on 16-8-1967 on the ground that the allegations made in the election petition remained unsubstantiated and unproved.

4. On 15-9-1967 the applicants filed the present application with the prayer which has already been reproduced in the earlier part of the judgment.

5. In this application the applicants put forward their case as follows:

In the first instance, the applicants referring to the non-examination by the counsel for the non-applicant No. 2 of the two witnesses present in Court stated in para 3 of the application as follows:

"But surprisingly enough the said witnesses had not been examined by the petitioner's counsel on the ground that he had not received instructions from the petitioner. No fresh instructions were necessary. That he should be presumed to have continued to represent his client under the authority and instructions already given to him."

In para 4 the applicants referred to the facts, (i) that the non-applicant No. 2 was elected as Member of Parliament from Tonk Constituency of Parliament on Swatantra Party Ticket; (ii) that he crossed the floor of

Parliament by resigning from the party and joined Congress; and that (iii) the non-applicant No. 2 addressed a letter dated 21-7-1967 to the President, Swatantra Party, Rajasthan, Jaipur, giving certain reasons for his resignation from the Swatantra Party. The applicants' further case is that the non-applicant No. 2 advanced absolutely false reasons for his resignation from the Swatantra Party in order to cover his own weaknesses and the bargain that he could strike between himself and the non-applicant No. 1 for the withdrawing of the election petition and his joining Congress. Proceeding further the applicants stated in para 5 that

"the non-appearance of the non-applicant No. 1 on 16-8-1967 and the non-examination of the witnesses on that date by his counsel was a deliberate act." According to them, "it was taken recourse to for the purposes of shutting out the evidence from being brought on record and circumvent the provisions of withdrawal of the election petition and at the same time getting it dismissed for non-prosecution. This deliberate act on his part was a result of the collusion between him and the non-applicant No. 2, and the bargain that the latter could strike between himself and the non-applicant No. 1 and the influential persons in the Congress." The applicants then gave a number of facts in sub-paras of para (5) in support of the above statement. In para (6) the applicants averred that

"the election petition is not a mere contest between the parties only but brings about a situation in which the whole constituency is interested."

After referring to the provisions relating to the withdrawal of the election petition and relating to the substitution of parties in consequence of the death of the petitioner or the respondent the applicants pointed out that the election petition cannot be allowed to be defeated by the collusion of the parties. The applicants then stated that

"the non-applicant No. 1 adopted a method by which he has tried to circumvent the provisions of withdrawal by not appearing himself and further by seeing that the evidence was shut out from being brought on record." In para (7) the applicants averred that had they known that the non-applicant No. 1 was likely not to pursue and prosecute the election petition and that he would abandon the same as a result of some bargain or collusion, the applicant No. 1 would have himself appeared on all the dates of hearings and not remained absent and would have seen that the petition was duly prosecuted upto the conclusion of the full trial. The applicants thereafter enumerated various grounds on which the application was based. The applicant No. 1 Kesar Lal swore an affidavit in support of the application and presented a few documents.

6. Notions of the application were issued to the various non-applicants includ-

ing Shri Jamnalal non-applicant No. 2. Only Shri Jamna Lal appeared and contested the application. Others put in no appearance.

7. Shri Jamnalal in his written reply took the following defences:-

1. "That Shri Keshar Lal applicant No. 1 was served with a summons to appear as a witness on 16-8-67. He could and should have appeared on 16-8-67 in the capacity of a party and also of a witness. At the stage at which the case was on 16-8-67 he did not perform his duty in helping the Court in doing justice. He should have been present in Court to watch the proceedings as a party and should have appeared as a witness to find out the truth, but he failed to do either. He defied the summons of the Court and did not do what he could have done at the proper stage and has now appeared in this Hon'ble Court to set aside the dismissal and reopen the case. His conduct shows that he wants to abuse the process of the Court. The application is motivated to harass the answering respondent and to put undue pressure on him to have gains in party politics."

2. "Correctly speaking there was no evidence with the election petitioner to prove the material effect on the election even if the irregularity, if any, within the meaning of section, would have been proved. According to the law as laid down by the Supreme Court it was almost impossible to prove the material effect."

3. "That the applicants want to reopen the case so as to change the witnesses and multiply their number and start afresh so as to put pressure on the answering respondent for fear of that and to act according to their dictates in party politics."

4. Referring to the non-examination of the two witnesses the non-applicant No. 2 averred as follows:-

"The examination of those witnesses who were present would have served no useful purpose in absence of other evidence. In the absence, the stand taken by the Collector was not accepted by the Election Commission in the matter of the allotment of the symbol. What he reported in writing to the Election Commission was not agreed upon by the Election Commission, hence his report became disputable. The examination of the Collector and the answers elicited in the examination would have thrown light on the alleged irregularities and that might have gone in favour of or against the election petition. Hence the Advocate for the election petitioner was to decide whether to remain satisfied with the report of the Collector or to examine him and probably he wanted to seek instructions from his client. The answering non-applicant can only submit the probabilities. The Advocate for election petitioner might have acted in the best of his judgment on the circumstances as they presented themselves to him.

Simply because he did not act in a manner which according to the present applicants was more proper, it cannot be said that his action was *mala fide* or collusive. The advocate for the election petitioner did not represent that he had no instructions to appear in the case for his client or to conduct the case and probably he did not like to take the risk of examining the Collector in the absence of instruction for fear of reducing the effect of written report which was already in his favour. The other official witness was formal one. The advocate for the election petitioner argued the case on the material on the record".

The non-applicant No. 2 denied the allegations relating to the crossing of the floor of the Parliament by him. Referring to his resignation from the Swatantra Party, he averred that it was an internal matter of the party and had no relevance in the proceedings. The non-applicant No. 2 emphatically denied the allegations in paras 4 (a) and (5) relating to bargain and collusion between the non-applicant No. 1 and non-applicant No. 2 for the withdrawal of the election petition. He also denied the allegations in para (6) relating to the circumvention of the provisions of law relating to the withdrawal of the election petition. In this connection the non-applicant No. 2 specifically observed as follows:-

"The applicant No. 1 failed in his duty as a party and a witness. The least which he should have known was that he was to appear as a witness and help in expediting the disposal of the petition. His conduct in not appearing on 18-8-67 so lightly according to him amounts to the contempt of the authority of the court. The reason given by the applicant No. 1 for not appearing on 18-8-67 cannot be a sufficient cause."

The non-applicant No. 2 also gave a detailed reply to the various grounds relied upon by the applicants in para (7). The non-applicant No. 2 in his additional pleas averred that the applicants had no locus standi to present the application and that the application was not maintainable under any provisions of law.

8. I heard counsel for the parties at length.

9. In support of the application the counsel put forward some alternative contentions. In connection with the first contention the applicant's counsel formulated the following propositions:-

1. That the decision of this Court dated 18-8-67 cannot be treated as a decision on merits so as to fall within the language of Section 98 of the Act.

2. That this Court could not have dismissed the election petition in default on non-appearance of the petitioner as the dismissal of election petition on the ground of non-appearance of the petitioner is contrary to law and causes injustice and denies the

rights of the entire electorate who are unquestionably interested in the proceeding.

3. That as the non-applicant No. 1 though not openly withdrawing the petition was trying collusively to keep back the available evidence for sustaining the grounds taken in the petition. The applicant No. 1 was entitled to support the grounds by leading evidence to prove them.

10. Elaborating his contention, the counsel contended that the decision of this Court being not a decision on merits but being a mere dismissal of election petition on non-appearance is legally inoperative and that the election petition should be treated as being pending and that the applicant No. 1 as one of the respondents to the election petition, is entitled to lead evidence in support of the petition.

11. In support of the first proposition, the counsel relied upon two premises:-

(1) That although the non-applicant No. 1's witnesses were present his counsel did not examine them on account of absence of instructions from his client. According to him, the counsel as per his own showing, had no instructions in the case and, therefore, his presence in the case was of no avail and it was a case where the non-applicant No. 1 should be treated to have committed default in appearing in the Court which could attract the provisions of Order 17 Rule 2 of the Code in the cases of suits.

(2) That 18-8-67 was fixed for recording evidence in the ordinary course of things and was not got fixed on an adjournment sought by the non-applicant No. 1 and at his instance. According to him, the necessary conditions to attract the applicability of Order 17, Rule 3 of Code, for a decision on merits were not satisfied.

12. After giving my careful consideration to the facts of the case and the relevant law bearing on the point I have no hesitation in concluding that the petitioner has not been successful in establishing the first premise. It is true that the non-applicant No. 1's counsel did not examine the two witnesses present in Court with a statement that he could not examine them in the absence of instructions from the petitioner. But, from this, it will not be legally justified to jump to the conclusion that the counsel had no instructions to appear. The counsel while expressing his inability to examine the witnesses cannot be taken to mean that he had no instructions to appear in the case. The proper interpretation of the counsel's conduct is that although there was no withdrawal of his authority and instructions to appear and act on behalf of the non-applicant No. 1 he was disabled from examining the witnesses on account of the absence of necessary and reasonable assistance from the client in properly examining the witnesses. In support of this view, I may refer to the observations made by a

Division Bench of the East Punjab High Court in Sm. Ruprani Devi v. V. Christopher Southern Lewis, AIR 1949 E. P. 86. After referring to the counsel's arguments that a case of a counsel who says that he is unable to act on his client's behalf is analogous to that of one who states that he has no instructions the learned judge speaking on behalf of the Court observed as follows:—

"In my opinion the two cases are wholly distinct from each other. The scope of the authority of a counsel who is engaged by his client to represent him in a case is limited to the instructions given to him. These instructions may be either to put in appearance on his client's behalf or to act for him. When a counsel asserts that he has no instructions, the inference is that he has no instructions even to appear on his client's behalf, so his appearance is considered as tantamount to no appearance. But when a counsel appears and states that he is not able to do a particular act, he cannot be taken to mean that he has no instructions to perform that act. On the other hand, I would take him to mean that though he had been instructed to perform that act, something has happened which has disabled him from doing it, or he has otherwise failed in his duty in spite of the instructions."

That the non-applicant No. 1's counsel in the election petition had instructions to conduct the case is amply established by his act of closing the non-applicant No. 1's evidence and arguing the case. It may be also significantly pointed out that the applicants themselves have unambiguously stated in the petition that

"the non-appearance of the non-applicant No. 1 on 16-8-67 and the non-examination of the witnesses on that day was a deliberate act and it was taken recourse to for the purposes of shutting out the evidence from being brought on record and circumvent the provisions of withdrawal of the election petition and at the same time getting it dismissed for non-prosecution. This deliberate act on his part was the result of the collusion between him and the non-applicant No. 2."

It was also stated in the petition that the counsel for the non-applicant No. 1 could examine the witnesses as no fresh instructions were necessary and that he should be presumed to have represented the client under the instructions and authority already given to him.

13. Having regard to these facts relied upon by the applicant and the circumstances of the case, I am wholly unable to accept the applicant's contention that it was a case of non-appearance of the non-applicant No. 1 in court on 16-8-67 and that the petition could not have been consequently disposed of on merits. On the other hand, I am very clear that the petitioner was fully represented by his counsel who permitted the

trial of the election petition to be concluded and the case disposed of on merits.

14. As for the second premise, I agree with the counsel for the applicants that the provisions of Order 17, Rule 3 of the Code could not be invoked in the present case. Order 17, Rule 3 of the Code enables a Court to dispose of the case on merits when a party had been granted time to do one or other of the three things mentioned in the rule viz. to produce evidence or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit when the default has been committed by such party in doing the act for which the time was granted. In the present case, 16-8-67 was fixed in the ordinary course of things and the non-applicant No. 1 had not been granted time for doing any one of the three things mentioned above. In this view of the matter, Order 17, Rule 3 of the Code could not have been applied. To say this, however, cannot amount to saying that this Court could not have disposed of the election petition on merits. Order 17, Rule 3 of the Code permits decision on merits in cases of certain defaults. It has no relevance when the trial is otherwise concluded without any default by either side. In that case there could be decision on merits without invoking Order 17, Rule 3 of the Code. One can easily imagine the parties producing their evidence and concluding the trial on one day and it will be ridiculous to state that there was no decision on merits since Order 17, Rule 3 of the Code could not be invoked as none of the parties had committed any default. In the present case, the non-applicant No. 1's counsel did not examine the two witnesses present in Court and closed the non-applicant No. 1's evidence. The respondent (non-applicant No. 2) also closed his evidence. They then addressed the Court and eventually this Court held that the allegations in the petition remained unsubstantiated and dismissed the election petition. The decision, in my opinion, was clearly on merits and the applicants' counsel cannot be heard to say that the decision could not be treated as one on merits. Having regard to these findings in connection with the two premises relied upon by the applicant's counsel, the applicant's counsel has not been successful in establishing the first proposition. This Court's decision dated 16-8-67 having been given on merits an application for setting aside the decision with the help of Order 9, Rule 8 read with Section 151 of the Code is unmaintainable and deserves to be rejected on this ground alone. However, as the learned counsel for the parties addressed lengthy arguments on the various other points I have thought it proper to record my findings on them also.

15. Taking up the second proposition I may at once state that the Courts had occasions to consider the question of the

competence of the Election Tribunal to dismiss the election petition in default under the provisions of the Code of Civil Procedure under the law as it stood prior to the amendment by the Amendment Act No. 47 of 1966. In *Sunderlal Mannalal v. Nandram Das Dwarkadas*, AIR 1958 Madh Pra 260 the law was laid down as follows:—

"Now the Act does not give any power of dismissal. But it is axiomatic that no Court or tribunal is supposed to continue a proceeding before it when the party who has moved it has not appeared nor cared to remain present. The dismissal, therefore, is an inherent power which every tribunal possesses."

16. The Full Bench of the Kashmir High Court in *Dina Nath Kaul v. Election Tribunal Jammu and Kashmir*, AIR 1960 J and K 25 (F. B.), however, expressed a contrary opinion. After referring to Supreme Court cases *Mallappa Basappa v. Basavaraj Ayyappa*, AIR 1958 SC 698, *Jagan Nath v. Jawant Singh*, AIR 1954 SC 210, and *Kamaraja Nadar v. Kunju Tevar*, AIR 1958 SC 637 the Bench observed:

"These authorities establish that once an election petition is before the Election Tribunal, it has to proceed to completion according to the provisions of the Representation of the People Act, and it is not open to the petitioner to exercise his option to prosecute the petition or not or to abandon or withdraw it wholly or in part.

It follows that the dismissal of an election petition on the ground of non-appearance of the petitioner is contrary to law and causes injustice and denies the rights of the entire electorate who are unquestionably interested in the proceedings.

The order of the Election Tribunal dated 3-12-57 dismissing the election petition preferred by the second respondent under the provisions of Order 9, Rule 8, is, therefore, plainly erroneous, unjust and untenable in law."

The Full Bench, therefore, refused to issue a writ of certiorari under Article 226 of the Constitution, to quash a subsequent order setting aside the order of dismissal dated 3-12-57 and restoring the petition.

17. In *Vishwanath Prasad v. Malkhan Singh*, AIR 1964 All 181, a Division Bench of the Allahabad High Court commenting upon the view taken in AIR 1958 Madh Pra 260 stated as follows:—

"We, with great respect, are unable to agree with this line of argument. A tribunal cannot be said to possess inherent powers to dismiss an election petition in any way it likes. If the party does not appear before the Tribunal and does not produce the necessary evidence for the issue and the burden of proof is upon that party or does not submit arguments before the Tribunal to convince it to decide the issue in its favour, then the Tribunal may decide it against that party, but it must be a decision

on the merits. The issue which is before the Tribunal must be decided. It is not necessary for the Tribunal to wait indefinitely. The Tribunal may close the case and decide the issue but there is no reason for holding that the Tribunal has power to dismiss the petition without deciding the issue."

It was further observed as follows:—

"Since we have already held that the Tribunal had no power to dismiss the election petition for default, the question of restoring does not arise. In the eye of law the election petition was still pending and not disposed of. By the subsequent order the Tribunal had merely removed the effect of an order which was wrong and had no effect on the proceedings. The election petition had never been properly disposed of and therefore the tribunal was right in deciding to proceed with it."

18. In *Sawalia Behari Lall Verma v. Tribikram Deo Narain Singh*, AIR 1965 Pat 378 a Division Bench of the Patna High Court scrutinised the Supreme Court cases relied upon by the Full Bench of the Kashmir High Court in AIR 1960 J and K 25 (FB) for their conclusion and examined the relevant provisions of the statutory law and eventually recorded agreement with the decision of the Division Bench of the Madhya Pradesh High Court in AIR 1958 Madh Pra 260. The Bench observed—

"The position, indeed would be a baffling one if it were to be laid down that even if the petitioner chose not to prosecute a petition or lead evidence the Tribunal must go on with the case. I may only add to the reason assigned in the judgment that Section 90 (1) is sufficiently wide to make Order 9 of the Code of Civil Procedure applicable to all election disputes under the Representation of the People Act. It is no doubt, true that there is an observation in the judgment of their Lordships of the Supreme Court that the powers of the Tribunal under Section 92 of the Act are different from the powers of a Court under the Code of Civil Procedure. That, however, cannot be taken to have the effect of nullifying the clear provision of Sec. 90 (1) of the Act that the procedure to be followed by the Tribunal in disposing of the election petition would be that of the Code of Civil Procedure. Order 9 is a part of the Code of Civil Procedure, and there is no reason to hold that it would not apply to the present case, because there is no such restriction provided in the Representation of the People Act itself making this Order 9 inapplicable to the election cases."

After the amendment of the Representation of the People Act in the year 1966 the point came up for consideration in a Full Bench case: *Jugal Kishore v. Doctor Baldev Prakash, Elec. Petn. No. 9 of 1967, D/-1-9-1967* = (Reported in AIR 1968 Punj 152 (FB)) in which Grover, J. as he then was,

dealing with the point observed as follows:-

"I venture to think, with respect, that the Patna view is correct. It is quite clear that there is no distinct provision in the Act laying down any particular or special procedure which is to be followed when the petitioner chooses to commit default either in appearance or in production of evidence or generally in prosecuting the petition. The provisions of the Code of Civil Procedure would, therefore, be applicable under Section 87 of the Act. I am further of the opinion that any argument which could be pressed and adopted for saying that the inherent powers of the Court could not be exercised in such circumstances would be of no avail now as the High Court is a Court of record and possesses all inherent powers of a Court while trying election petitions. There can be no manner of doubt that the observations made by Hidayatullah, C. J. (as he then was) in AIR 1956 Madh Pra 260 would be fully applicable."

With great respect, I agree with the opinion expressed by Grover, J. and hold that the High Court has power to dismiss an election petition on non-appearance of the election petitioner. The second proposition advanced on behalf of the applicants cannot, therefore, be accepted.

19. I do not consider it necessary to adjudicate upon the controversy relating to the third proposition formulated by the applicant's counsel who start with an assumption that where a election petitioner though not openly withdrawing the petition was trying collusively to keep back the available evidence for sustaining the grounds taken in the petition any respondent can claim to lead evidence to prove the allegations made in the election petition. Indeed, the two cases Lahri Singh v. Attar Singh, (1953) 3 Ele LR 403 (Ele. Tri.-Patiala) and Roop Chandra Sogani v. Rawat Man Singh, (1953) 5 Ele LR 327 (Ele.-Tri.-Jaipur) support them. The applicants, however, do not derive any assistance in the present case from the proposition formulated by them and the two cases relied upon by them. In both these cases the election petitions were pending and before their disposal when the respondents came forward alleging non-production by the petitioners and expressing their intention to lead evidence in support of the election petitions. In the present case the election petition stood disposed of by this Court's order dated 16-8-1967. At the time of the filing of the present application by the applicants the petition was not pending and, therefore, there could be no question of the respondent being permitted to lead evidence in support of the election petition. I may also observe that the principle relied upon in these two cases cannot be extended to enable a respondent who allowed the election petition to proceed ex parte and who remained absent till the disposal of the election petition and who did not even care to appear

on the date of the dismissal of the election petition in spite of his being summoned to appear as a witness in the case, to challenge the order of dismissal and to obtain restoration of the election petition and then to lead evidence in support of the allegations contained in the petition.

20. The contention of the petitioners in support of the present petition on the basis of the three propositions initially formulated by them thus has no force and is rejected.

21. The alternative contention of the applicants is that the non-applicant No. 1 and non-applicant No. 2 entered into some kind of bargain for securing the dismissal of the election petition and that they adopted tactics of getting the election petition dismissed by an omission to produce evidence and in doing so they circumvented the provisions of the Act relating to the withdrawal of the election petition. It was contended that in doing so the non-applicant No. 1 committed a fraud upon the constituency in securing an order of dismissal of the election petition. An order obtained by fraud should not be treated as valid and operative and deserves to be ignored. It was prayed that this Court should ignore the order and permit the applicants to lead evidence in support of the allegations contained in the election petition so as to do justice to the constituency. I regret, I cannot accept this contention also. As pointed out by Grover, J. as he then was, in the Full Bench case: Roop Chandra Sogani v. Rawat Man Singh, (1953) 5 Ele LR 327 (Ele.-Tri.-Jaipur), "there is no provision whatsoever by which a respondent who might have been a petitioner can be compelled or forced by the Court to prosecute the petition or adduce evidence in support of it owing to the default of the original petitioner and on his refusal to do so notice of such event can be published in the official gazette to enable some one, who might have been a petitioner, to apply and get substituted and then prosecute the petition. Nor can the Court give any decision on the merits worth the name in a petition which is not being prosecuted in the absence of any evidence which might have been adduced by the parties. It is difficult to believe that the Legislature intended that the Court in such circumstances should embark *suo motu* on an enquiry which it will be impossible to successfully complete unless some one is prepared to provide the material and the evidence and incur the expense." The learned Judge in that case referred to the position under the English Law and quoted extensively from Halsbury's Laws of England, including the observations.

"If there are any indications of impurity in the election, it is impossible to shorten the case by concession between the parties. The Court must sit as long as there is anything which can be brought before it by the parties or the Director of Public Prosecutions relating to these allegations."

The learned Judge further observed,

"There is no such authority or officer in India who has been entrusted with the task which is being performed by the Director of Public Prosecutions in England in the matter of election petitions and election offences and unless such an agency is set up, it is not possible to see how the real purpose of the election petitions can be fully achieved where a petitioner after filing the election petition decides for some reason or the other to make persistent defaults in its prosecution, or even to deliberately withhold all the material evidence."

22. Having considered the principle laid down by Grover, J. as also the reasoning in support of the principle, I am not prepared to accept the alternative contention of the applicants.

23. The application, therefore, fails and is hereby dismissed. There will be no order as to costs.

JHS/D.V.C.

Application dismissed.

AIR 1969 RAJASTHAN 82 (V 56 C 17)

L. S. MEHTA, J.

Sajjan Singh Bhairun Singh, Petitioner v. Sajjan Singh Jagannath Singh and another, Non-Petitioners.

Criminal Ref. No. 139 of 1968, D/- 15-7-1968, from order of S. J., Jodhpur, D/- 31-5-1968.

(A) Criminal P. C. (1898), S. 145 (4) — Scope — Property attached under Section 145 (4) — Later, temporary injunction issued by civil court in respect of same property — Subsequently, Magistrate appointing Tehsildar as Receiver — Appointment is valid — (Civil P. C. (1908), Order 39, Rule 1, Order 21, Rule 54).

Where in respect of property, attached under Section 145 (4) of Criminal P. C., a temporary injunction is issued by a civil court, the subsequent appointment of Tehsildar as Receiver for the property by the Magistrate, is valid. (Para 10)

When the attachment order is not challenged, the consequential order of appointment of Receiver cannot be questioned. The right to attach carries with it the right to take the necessary step for the custody and management of the property. Therefore, once the attachment is made, there is no alternative for the criminal court but to take into its possession the property. If this is not done, the attachment becomes meaningless. The attachment order also does not mean symbolic possession but actual possession. The appointment of a Receiver is hence only a follow-up of the attachment. Further, the Receiver will only be an agent of the Magistrate acting under his order. Thus, such an appointment is only administrative. AIR 1948 Mad 234 and AIR 1955

All 81 and AIR 1966 Andh Pra 80, Rel. on; AIR 1920 Mad 209 and AIR 1933 Lah 409, Dissent. from AIR 1929 Lah 223 and (1912) 14 Ind Cas 759 (Mad) and AIR 1966 SC 359, Foll. (Paras 3, 6 and 9)

Moreover, the scope of Criminal P. C. is distinct from that of Civil P. C. The criminal court is concerned with the maintenance of law and order which is not the function of the civil court. The purpose of the civil court attachment also is quite different from that under Section 145 (4). Attachment order under Civil P. C. is a preliminary step to make available the property for sale for satisfaction of a decree. The main idea in a civil court attachment is to restrain the judgment-debtor from transferring or charging the property in any manner. Such an object is wholly foreign to a proceeding under Section 145. The Magistrate, under Section 145, has nothing to do with the title of the property and he may be concerned with maintaining actual possession to prevent breach of peace. The civil court attachment only restrains the party against whom it is issued. In spite of this injunction, there can still be an apprehension of breach of peace. In such a case, it is the duty of the Magistrate to take preventive action under Section 145. Thus, there is nothing to prevent the Magistrate from taking recourse to Section 145 in a suitable case where a civil suit is pending between the litigants in respect of the same subject matter. It cannot therefore be said that the criminal court should respect such civil injunction notwithstanding imminent danger of breach of peace. (Paras 4, 7 and 8)

Thus, such appointment of Receiver is valid. AIR 1951 Mad 784, Rel. on; AIR 1943 Pat 124, disapproving view of Mullick, J. in AIR 1918 Pat 197 and AIR 1961 Raj 216 (FB) and ILR (1961) 11 Raj 1180, Foll.; AIR 1938 Rang 88 and AIR 1959 Mys 122 and AIR 1960 Assam 111 (SB) and 1962 (2) Cr LJ 709 (Mys) and 1963 (1) Cri LJ 512 (All), Ref. (Para 9)

(B) Criminal P. C. (1898), Sections 439 and 145 (4) — Property attached under Section 145 (4) — Subsequently Receiver appointed — Attachment order not challenged within prescribed time — Revision against such appointment — Question of emergency at the time of ordering attachment cannot be canvassed.

When a Receiver is appointed after attaching a property under Section 145 (4) of Criminal P. C., and the attachment order is not challenged within the prescribed time, but a revision petition is filed against the appointment order, the attachment order having become final, the question of emergency at the time of ordering attachment cannot be canvassed by that petition. (Para 9)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 359 (V 53) = (1965) 3 SCR 655, Deo Kuer v. Sheo Prasad Singh

- (1966) AIR 1966 Andhra Pradesh 80 (V 53) = 1966 Cri LJ 256, Venkata Peddiraju v. Balireddi Appanna
 (1963) 1963 (1) Cri LJ 512 (All), Lal Chand v. Smt. Amrauti
 (1962) 1962 (2) Cri LJ 709 (Mys), Multani v. Shah Abdu Turab Qadari
 (1961) AIR 1961 Raj 216 (V 48) = ILR (1961) 11 Raj 657 = 1961 (2) Cri LJ 52 (FB), Tukuda v. The State
 (1961) ILR (1961) 11 Raj 1180, Chairman, Municipal Board Bhandra v. The State
 (1960) AIR 1960 Assam 111 (V 47) (SB), Brojendra Kumar Sen Gupta v. Jitendra Chandra Sen
 (1959) AIR 1959 Mys 122 (V 46) = 1959 Cri LJ 621, Malkappa v. Padmanna
 (1955) AIR 1955 All 81 (V 42) = 1955 Cri LJ 261, Shyama Charan v. State
 (1951) AIR 1951 Mad 764 (V 38) = 52 Cri LJ 705, Ramiah v. Nachappa Chettiar
 (1948) AIR 1948 Mad 234 (V 35) = 49 Cri LJ 456, Y. S. R. Prasad Zamindar of Devarakota v. K. Ramaswamy
 (1943) AIR 1943 Pat 124 (V 30) = 44 Cri LJ 414, Nand Kishore Prasad Singh v. Radha Kishun
 (1938) AIR 1938 Rang 88 (V 25) = 39 Cri LJ 484, Maung U San v. Maung Lu Gale
 (1933) AIR 1933 Lah 409 (V 20) = 34 Cri LJ 342, Prem Kuar v. Benarsi Das
 (1929) AIR 1929 Lah 223 (V 16) = 30 Cri LJ 411, Diwan Chand v. Emperor
 (1920) AIR 1920 Mad 209 (V 7) = 21 Cri LJ 73, Gopala Aiyar v. Krishnaswamy Iyer
 (1918) AIR 1918 Pat 197 (V 5) = 19 Cri LJ 249, Mewa Lal v. Emperor
 (1912) 14 Ind Cas 759 = 13 Cri LJ 295 (Mad), Srinivasa Pillai v. Sathayappa Pillay

V. S. Dave, for Petitioner; Than Chand Mehta and Bhim Raj, for Non-Petitioners.

ORDER: This is a criminal reference submitted by learned Sessions Judge, Jodhpur, recommending that the order of Sub-Divisional Magistrate, Jodhpur, dated January 27, 1968, for the appointment of a receiver to manage the attached house in Case No. 42 of 1967, under Section 145, Cr. P. C. be quashed.

2. Party No. 1, Sajjan Singh son of Bhairun Singh, it is alleged, made a report at the Police Station, Bilara, with the allegation that Sajjan Singh, son of Jagannath Singh, Party No. 2, forcibly occupied his house, situated in village Chokri Kallan, on October 16, 1967, and that there was every

possibility of breach of the peace. On receipt of the above report, the Station House Officer of the said Police Station proceeded on the spot, on October 27, 1967, conducted inquiry and apprehended that there was imminent danger of breach of the peace.

He then submitted a report, on October 28, 1967, to the court of Sub-Divisional Magistrate, Jodhpur, for taking immediate action by way of attaching the house in dispute. That very day the Sub-Divisional Magistrate drew up a preliminary order and attached the premises in question. Thereafter on November 9, 1967, Party No. 1, applied to the court for the appointment of a receiver. On January 27, 1968, learned Sub-Divisional Magistrate, Jodhpur, issued direction appointing Tehsildar, Bilara, as a receiver, to look after and preserve the property.

It may also be stated here that party No. 2 filed a civil suit in the Court of civil Judge, Jodhpur, in respect of this very property and obtained a temporary injunction against party No. 1 on January 25, 1968. A revision application was filed by party No. 2 against the order of Sub-Divisional Magistrate, dated January 27, 1968, in the court of learned Sessions Judge, Jodhpur.

Learned Judge observed in his order of reference that the Magistrate was not competent to appoint a receiver and that a criminal court should respect temporary injunction, issued by the civil court. He mainly relied on Mewa Lal v. Emperor, AIR 1918 Pat 197, Diwan Chand v. Emperor, AIR 1929 Lah 223, Malkappa v. Padmanna, AIR 1959 Mys 122 and Brojendra Kumar Sen Gupta v. Jitendra Chandra Sen, AIR 1960 Assam 111 (SB) and recommended that the order of the Sub-Divisional Magistrate, dated January 27, 1968, be quashed.

3. The order of attachment of the house including the furniture and other articles was made as far back as October 28, 1967. That order was not challenged in any revision petition. That order is the parent order. The order appointing the Tehsildar as a receiver is only a follow-up one, directing him to look after and preserve the property. When the principal order was not assailed, the consequential order could not have been challenged. The attachment having been made, on October 28, 1967, there was no other alternative for the Criminal court but to take into its possession the property in dispute. Thus the subsequent order was merely of administrative nature.

4. In support of the above proposition reference is made to Y. S. R. Prasad, Zamindar of Devarakota v. Ramaswamy, AIR 1948 Mad 234. In that case Govinda Menon, J., as he then was, held that when land in dispute had been attached and the court directed the Tehsildar to sell the cultivated rice by public auction, the Tehsildar only acted as an agent of the Magistrate and the direc-

tion given to him was merely an administrative order. As the order passed by the Sub-Divisional Magistrate, was simply an administrative one, no revision lay, and the High Court could not interfere.

Similarly, in *Shyama Charan v. State*, AIR 1955 All 81, *Raghubar Dayal*, J. as he then was, observed that a Magistrate's order with respect to the custody of a child would not be absolutely without any jurisdiction or power vested in him. As a Magistrate, he has to make suitable orders for the custody of the child. Such an order would undoubtedly be an order made by him in his executive capacity and, therefore, it would not be subject to the revisional jurisdiction of the High Court. Learned Sessions Judge, Jodhpur, relied upon AIR 1918 Pat 197.

In that case *Mullick*, J. pointed out that a Magistrate was not competent to appoint a receiver and that the order of attachment which the law empowers him to make has no greater force than any attachment, the effect of which is generally to restrain alienations. This view of *Mullick*, J. was not fully endorsed in the same judgment by *Jwala Prasad*, J., who observed that an attachment under Section 145, Cr. P. C., may have the same effect as an attachment under the Code of Civil Procedure.

It may possibly amount to something more than that, that is to say, after attachment the Magistrate may take steps for proper care and custody of the property and prevent the removal of the property by any of the rival claimants or strangers. The view of *Mullick*, J. has further been disapproved in a subsequent Division Bench authority of the Patna High Court, reported in *Nandkishore Prasad Singh v. Radhakishun*, AIR 1943 Pat 124, wherein it was held that the observation of *Mullick*, J., which was a mere obiter, does not seem to be correct.

The purpose of the civil court attachment is quite different from that of an attachment under Section 145 (4), Cr. P. C. Attachment of immoveable property under the Code of Civil Procedure is a preliminary step to be taken to make the property available for sale for satisfaction of the decree. The main idea of attaching a property by the civil court is to restrain judgment-debtor from transferring or charging the property in any manner. Such an object is wholly foreign to the scope of proceeding under Section 145, Cr. P. C. The Magistrate acting under Section 145, Cr. P. C., has nothing to do with the title of the property and he may be concerned with maintaining actual possession with a view to prevent breach of the peace. In *Gopala Aiyar v. Krishnaswamy Iyer*, AIR 1920 Mad 209, *Burn*, J., with whom *Sadasiva Aiyar*, J. agreed said:

"A mere restraint on alienation would generally be of no use in preventing a breach of the peace, and this is the object

with which Section 145, is enacted. In order to keep possession a Magistrate must ordinarily act through some agent appointed by him in this behalf."

This view of *Burn*, J. was followed by *Bhide*, J. in *Frem Kuar v. Benarsi Das*, AIR 1933 Lah 409. In *Maung U San v. Maung Lu Gale*, AIR 1938 Rang 88, *Mackney*, J. sitting alone said:

"The word 'attach' merely means to bring under the control of the Court and the Magistrate is entitled to effect that object in any way which is within his power. Certainly, the appointment of a receiver with the powers of a receiver under the Code of Civil Procedure is not one of those ways because unless that power is expressly given, a Magistrate cannot exercise it."

In a recent decision of the Andhra Pradesh High Court in *Venkata Peddiraju v. Balireddi Appanna*, AIR 1966 Andh Pra 80, it was held that an order by the Magistrate during the pendency of the proceedings under Section 145, Cr. P. C., that the lessee of the land in dispute should make deposit of certain amount is an administrative order and cannot be revised by the High Court. In *Srinivasa Pillay v. Sathayappa Pillai*, (1912) 14 Ind Cas 759 (Mad), it was held as follows:-

"The Receiver appointed under S. 146 has got the power of a Receiver appointed under the Code of Civil Procedure. He is invested by law with powers which he can exercise himself. But the Receiver appointed under this Section 145 may not have such powers. He will only be an agent or servant of the Magistrate acting under his order. It is an administrative order passed for maintenance of property which he has attached. The right to attach carries with it the right to take the necessary steps for its custody and management. It is not a judicial order concerning the petitioners." Likewise in *Deo Kuer v. Sheo Prasad Singh*, AIR 1968 SC 359, it has been pointedly made clear that there is no doubt that property under attachment under Section 145 of the Code of Criminal Procedure is in custodia legis.

5. Learned Sessions Judge relied on AIR 1929 Lab 223 in which *Dalip Singh*, J. was of the opinion that Section 146 (2), Cr. P. C. cannot be so read as to make its provision apply to attachment under Section 145 (4), and the appointment of the receiver under Section 145 (4) is illegal. This judgment was not followed by the same High Court in its subsequent decision reported in AIR 1933 Lah 409. In *Ramiah v. Nachiappan Chettiar*, AIR 1951 Mad 784, *Somasundaram* J. took a definite view that a receiver or officer appointed under Section 145 (4), has no power to lease the land attached pending disposal of the proceedings under Section 145, Cr. P. C. But it is open to him to take security from those who are willing to cultivate the land.

6. From the above authorities it is manifest that when once an order of attachment is passed, the court has to appoint someone to take possession of the property. If no one is appointed to take its possession or to preserve it, the order of attachment made by the court becomes meaningless, and its effect will be neutralised. Thus, the subsequent order is only a follow-up one. The Magistrate would be failing in his duty if he does not take the property in custodia legis by appointing a receiver or some other agent to look after it.

A Magistrate attaching the subject matter in dispute under Section 145 (4), Cr. P. C., is perfectly competent to make a suitable arrangement for its custody.

In the present case the Magistrate appointed the Tehsildar to look after or take care of the property. It cannot be doubted that this was a suitable arrangement. After the termination of the proceedings the Magistrate will no doubt see that the possession is handed over to the successful party, but before the conclusion of the proceeding it was within his right to attach the property and then appoint some one as his agent to look after it with a view to prevent breach of the peace or disturbance in public tranquillity. The receiver would only be an agent of the Magistrate acting under his order. Therefore, such an order would be an administrative one passed for the management of the property which has been attached. The right to attach carries with it the right to take necessary step for its custody and management.

7. Learned Sessions Judge has observed in his judgment that a temporary injunction was issued by the civil court on January 25, 1968, against the party No. 1 and, therefore, the criminal court should not have interfered with the order of the civil court. In this connection, it may be pointed out that the scope of the Criminal Procedure Code is distinct from that of the Civil Procedure Code. Criminal Court is concerned with the maintenance of law and order, which is not the function of the civil court. In the present case, on October 28, 1967, proceedings under S. 145, Cr. P. C., had already been started at the instance of party No. 1. Subsequent to that party No. 2 filed a suit on January 24, 1968.

The Civil Court issued an injunction on January 25, 1968, after the institution of the criminal proceedings and about 3 months after the order of attachment made by the criminal Court. The order, dated January 27, 1968, appointing the Tehsildar as a receiver, as pointed out above, is only a consequential direction of the parent order, passed on October 28, 1967. That order is nothing but a compliance of the previous one. The attachment order once passed cannot be left out as a dead direction. It had to be given effect to by the criminal court. That apart, Civil Court's attachment

only restrains interference by party No. 1. It does not forbid or restrain the parties from breaking each other's head.

Assuming that a dispute about certain immoveable property is pending before a civil court and one of the parties thereto moves a Magistrate to take proceedings under S. 145, Cr. P. C., about the same immoveable property the Magistrate, in a suitable case, can proceed under S. 145, Cr. P. C. For this proposition reliance is placed on a Full Bench decision of this Court, reported in *Tikuda v. The State*, ILR (1961) 11 Raj 657 = (AIR 1961 Raj 216) (FB).

In that case it was observed that the jurisdiction of the Magistrate to proceed under S. 145, Cr. P. C., is not ousted simply because a suit about the same immoveable property is pending in a civil or revenue Court. Again, in *Chairman, Municipal Board, Bhadra v. The State*, ILR (1961) 11 Raj 1180 it was pointed out that there is nothing to prevent the Magistrate from taking action under S. 145, Cr. P. C., even where a civil case is pending between the parties in respect of the same subject-matter.

8. Learned counsel for the opposite party No. 2, cited AIR 1959 Mys 122 in which it was held that the provisions of S. 145, Cr. P. C., should not be invoked when civil litigation about the identical subject-matter is actually pending. Likewise in *Multani v. Shah Abdu Turab Qadari*, 1962 (2) Cri LJ 709 (Mys) it was held that interim injunction granted by civil Court should be respected by criminal Court. Like opinion was expressed in *Lal Chand v. Smt. Amarauti*, 1963 (1) Cri LJ 512 (All). It is given therein that a Magistrate taking action under S. 145, is maintaining rights of the parties as determined by the civil Court.

A Special Bench of the Assam High Court in AIR 1960 Assam 111 held that the mere order of the Magistrate under S. 145, Cr. P. C., that a party might be treated to be deemed to be in possession did not affect in any manner the jurisdiction of the Civil Court to grant an injunction restraining the party from interfering with the possession. Although there are certain contrary decisions as pointed out by learned counsel for party No. 2, yet in the face of our own High Court decisions referred to above, it is crystal clear that in spite of a temporary injunction of a civil Court, there can still be an apprehension of breach of the peace.

In such a case it is the duty of the Magistrate to take preventive action under S. 145, Cr. P. C., and then, if necessary, to proceed under S. 107 of the Code of Criminal Procedure against the party seeking to disturb lawful possession and commit the breach of the peace. In other words, there is nothing to prevent the Magistrate from taking recourse to S. 145, Cr. P. C., in a suitable case even where a civil suit is pending between the litigants in respect of the same subject-

matter. Learned Sessions Judge, therefore, is not correct in holding that when a temporary injunction has been issued by a civil Court, that order ought to have been respected by the criminal Court, notwithstanding imminent danger of breach of the peace.

9. It may also be stated here, inter alia, that there was emergency. It is foreign to the scope of the revision-application for canvassing the question whether or not emergency existed at the time when the attachment order was passed by the Magistrate. When the parent order was issued, the aggrieved party could have filed a revision petition. The impugned order appointing an agent of the court to look after the property is only a consequential direction for giving effect to the attachment order. Under Art. 131, Limitation Act, a revision application against the order of attachment could have been made within 90 days, but since that order was not challenged within the prescribed time, it became final. The order of attachment passed on October 28, 1967, did not mean symbolic possession. It meant actual possession.

10. In the result, this reference is devoid of merits and is consequently rejected.

JRM/D.V.C.

Reference answered.

AIR 1969 RAJASTHAN 86 (V 56 C 18)

L. S. MEHTA, J.

State, Appellant v. Hari Singh, Respondent.

Criminal Appeal No. 626 of 1966, D/22-3-1968, against judgment of Addl. Munsif Magistrate No. 1 Jodhpur, D/6-5-1966.

(A) Penal Code (1860), S. 304-A — Fatal run over-accident — Rashness and negligence cannot be presumed against driver — That death was direct result of rash and negligent driving must be proved — Motor driver aged sixty — Age shows experience — Stopping of vehicle within seven feet — Victim coming under rear wheel — All these facts do not show any negligence on part of driver.

The mere fact that a fatal motor run over-accident took place would not by itself be enough to make the driver liable under S. 304-A I. P. C. To bring home an offence under this section, it must be proved beyond reasonable doubt by the prosecution that the death of the victim was the direct result of rashness or negligence on the part of the accused. In order to impose criminal liability on the accused, it must be found as a fact that a collision was entirely or at least mainly due to rashness or negligence on the part of the driver. It is not sufficient if it is only found that the accused was driving the vehicle at a fast speed. Where a driver of a motor bus under the

rear wheel of which a cyclist was crushed to death was aged sixty, it showed that he was an experienced and skilful driver, and when on meeting with an accident he could stop the vehicle within seven feet only, showed that vehicle was not driven at excessive speed, and further the fact that the victim came down under the rear wheel and not under the front wheel showed that the mishap was not the result of negligence or rashness on the part of the driver. When a person is run over by a bus and is crushed on the spot, the spectators are prejudiced against the driver of the vehicle and in such a case it becomes difficult for the court to ascertain the circumstances of the case. (1902) 4 Bom LR 679, Ref. AIR 1965 SC 1616 and AIR 1933 Oudh 391, Rel. on. (Paras 5, 6 and 7)

(B) Penal Code (1860), S. 304-A — Runover accident — Rashness and negligence on part of driver not directly established — Some mechanical defect in vehicle not detectable without thorough examination — Criminal liability cannot be fastened on driver in case of fatal accident.

When there was no rashness or negligence on the part of the bus driver, for having killed the girl in a run-over accident, so far as the use of the road and the manner of driving the bus was concerned, the fact that the vehicle of the accused had free-play cannot be taken into consideration in convicting the accused under S. 304-A. I. P. C., though it can be made the subject of prosecution under the Motor Vehicles Act, when it is clear that the defect in question was not in any way responsible for the accident. If the defect was such that it could not be detected without meticulous examination of the machinery, it cannot be laid down that criminal liability could be fastened on the accused on that ground. AIR 1938 Oudh 400 and ILR (1962) 12 Raj 103, Rel. on.

(Para 8)

(C) Criminal P. C. (1893), Ss. 417, 423 — Appeal against acquittal — High Court can accept evidence disbelieved by lower Court.

The powers of the appellate court in an appeal from acquittal are not different from an appeal from conviction. The High Court is at perfect liberty to accept the evidence disbelieved by the trial Court or to reject the evidence accepted by the original court. But at the same time it has got to be borne in mind that the accused is entitled to argue that presumption of innocence should be made against him.

(Para 10)

Cases Referred Chronological Paras
(1965) AIR 1965 SC 1616 (V 52) =
1965 (2) Cri LJ 550, Kurban Hussein
Mohamedali Rangwalla v. State of
of Maharashtra

(1962) ILR (1962) 12 Raj 103 = 1962
Raj LW 281, State v. Chater
Singh

6

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- (1936) AIR 1936 Oudh 400 (V 23) =
87 Cri LJ 975, Emperor v. Akbar
Ali
(1933) AIR 1933 Oudh 391 (V 20) =
34 Cri LJ 1154, Ram Sewak v.
Emperor
(1902) 4 Bom LR 679, Emperor v.
Omkar Rampratap

A. K. Mathur, Asstt. Govt. Advocate, for Petitioner; O. P. Chhangani, for Respondent.

JUDGMENT. : In the city of Jodhpur towards the West there is a highway known as Umaid Hospital Road. This road is fed by traffic from the south-eastern feeder roads, namely, Chopasani Road, 5th Road Sardarpura, and Pal Road. On its northern side, traffic emerges from Siwanchi Gate. On September 5, 1965, at about 1-15 p. m., accused Hari Singh, aged about 60 years, was driving bus No. RJQ 2694. He arrived on Umaid Hospital Road from the side of Pal. At that time Kumari Indu, a girl of about 16 years, also came on the said road on a bicycle from the side of Siwanchi Gate. She suddenly collided against the said bus somewhere near point marked O in the site plan Ex. P-9. She was run over by the rear right-wheel of the bus, as a result of which she sustained fatal injuries and died instantaneously on the spot.

After this accident Hari Singh stopped the bus after plying the same upto a distance of about 7 ft. First information report of this mishap was lodged that very day by the accused Hari Singh himself at the Police Station, Sardarpura, at about 1.35 p. m. On receipt of the report Ex. P-8, a case was registered under S. 304-A I. P. C., and investigation followed. The Police prepared a site plan Ex. P-9. Autopsy of the dead body of Kumari Indu was conducted by Dr. Har Govind, P. W. 9, Medico-Jurist, Mahatma Gandhi Hospital Jodhpur, on the date of the accident at 5.20 p. m.

Following injuries were found on her person:-

(1) Crush injury on skull, bones fractured brain flowing out, face compressed from before backward.

(2) Lacerated wound 1" x 1/4" x bone deep about the left eye brow.

(3) Clotted blood over lips in teeth left upper teeth fallen, maxilla left side fractured, so also mandible nasal bone fractured.

(4) Abrasion 3/4" x 3/4" on the dorsum of right middle finger.

(5) Irregular abrasion on the right side wall of abdomen.

(6) Lacerated wound 4 1/2" X 1 1/2" muscle deep on the left gluteal region near midline, stood passed.

(7) Abrasion 3/4" x 1/2" on the dorsum of left foot terminal part.

In the opinion of the Medico-Jurist, cause of death was crush injury on the skull and brain of Kumari Indu.

After the investigation was over, the Police put up a challan in the court of learned Additional Munsiff-Magistrate No. 1, Jodhpur City. The accused pleaded not guilty to the charge under S. 304-A, I.P.C. In support of its case the prosecution examined 9 witnesses. In his examination under S. 342, Cr. P. C., the accused admitted the unfortunate mishap, but stated that the accident did not take place because of his rashness or negligence. According to him it was Kumari Indu who collided against his bus. The accused further said that Indu came towards the wrong side of the road. He also stated that the bus was not being driven with excessive speed, which was hardly to 5 to 7 miles an hour. The accused also pointed out that the brakes of the bus were in proper working order and there was no free-play therein. In the end, he said that he had made every endeavour to save Kumari Indu's life by trying to take the bus towards the extreme foot-path of the road. In his defence, he examined 3 witnesses. The trial court disbelieved the prosecution evidence and reached the conclusion that the prosecution failed to prove that Hari Singh acted rashly or negligently. It, therefore, acquitted the accused of the offence under S. 304-A I. P. C. Aggrieved against the above judgment, the present appeal has been filed on behalf of the State Government.

2. Learned Assistant Government Advocate has argued that there is cogent and convincing evidence on the record to suggest that the accused acted rashly and negligently. He has further urged that there was free travel paddle play, in more than 1/2" (which was out of measurement) and that the hand-brake was also not in working order. That shows that Hari Singh was driving the vehicle with defective brake and, therefore, he was grossly negligent in plying the bus on the high-way. Learned counsel for the respondent supported the judgment of the trial court.

3. In this case the most important witnesses are P. W. 2 Ranjeet Mal and P.W. 5 Mohanlal. Ranjeet Mal has stated that the bus was moving at a high speed of about 30 miles an hour. According to him, the driver did not blow the horn. He has further said that when Kumari Indu was coming from the northern side and when she turned towards the right, she gave a signal with her hand. Nevertheless the bus collided against her and the right hind wheel of the vehicle ran over her body. The trial court did not place reliance upon the testimony of this witness. It has given reasons for doing so. The witness has made inconsistent statements as to when he actually saw the accident. In the Police statement Ex. D-1 at portion marked A to B he said that he had already left the bicycle shop when he saw the accident. Before the trial court he deposed that at the time of the mishap he was standing on

the bicycle shop, and was about to leave it. The witness has failed to clarify the distance between the bus and the place where the injured girl was lying. The witness is also unable to show as to which wheel of the bus ran over the bicycle of the deceased. The witness has also stated that there were no marks of the wheel on the road. This version stands negatived by the site inspection memo Ex. P-9, and the statement of the S. H. O. Shaktidan P. W. 8. The witness was admittedly a distant relation of the deceased. His natural conduct demanded of him that after the mishap he ought to have taken requisite care for the victim or he ought to have endeavoured to seek prompt immediate medical aid. So much so he even did not go to the nearby Police Station to lodge a report. The trial court, which watched his demeanour, found his testimony incredible. The basis for discarding his evidence does not appear to be superfluous. Unless there exists substantial reasons, this Court feels hesitant to take contrary view in the matter.

4. P. W. 5 Mohanlal admittedly saw the occurrence after its actual happening. He has stated that he could not say positively whether or not the driver blew the horn. He, on the other hand, has stated that the driver took the bus towards the extreme left of the Kachha road. According to him the bus was being driven at a speed of about 25 miles an hour, which was normal.

5. From the testimony of the above two eye-witnesses Ranjeet Mal P. W. 2 and Mohanlal P. W. 5 it is not clear that the accused Hari Singh was driving the bus so rashly and negligently as to endanger the life of a pedestrian. On the other hand, it is plain from the prosecution evidence itself that the bus was being driven with a normal speed and towards the correct side of the road. It is also manifest from the prosecution evidence that Kumari Indu, who was coming on a bicycle from the northern side of the road, did not wait till the bus passed off and took a turn on her right side of the road. The fact that she was knocked down by the rear wheel of the bus and not by the front wheel or mudguard further indicates that the mishap was not the result of negligence or rashness on the part of the driver. It is further plain from the prosecution evidence itself that the driver stopped the bus, after taking it towards the extreme left, at a distance of about 7ft. from the actual place of the accident. According to Rule 145 of the Motor Vehicles Rules, when the bus moves with a speed of 20 miles an hour, it can be stopped by the application of brakes at a distance of 45 ft. From this fact also it is apparent that the driver took requisite care, as a man of ordinary prudence would do.

6. In order that a person may be guilty under S. 304-A, I. P. C., rash and negli-

gent act should be the direct or a proximate cause of the death. I may in this connection refer to Emperor v. Omkar Rampratap, (1902) 4 Bom LR 679 in which Sir Lawrence Jenkins made the following observation:

"To impose criminal liability under Section 304-A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non." This view has been approved by their Lordships of the Supreme Court in Kurban Hussein Mohamedali Rangwalla v. State of Maharashtra, AIR 1965 SC 1616. The mere fact that a fatal accident took place would not by itself be enough to make the accused liable under S. 304-A, I. P. C. To bring home an offence under this section, it must be proved beyond reasonable doubt by the prosecution that the death of the victim was the direct result of rashness or negligence on the part of the accused. Such evidence is lacking in this case. The death in this case does not appear to be the direct result of rash or negligent act on the part of the respondent, without the intervention of another's negligence.

7. Learned Assistant Government Advocate argued that Hari Singh was driving the bus at an excessive speed and, therefore, rashness or negligence should be attributed to him. For the finding that Hari Singh was driving the vehicle at an excessive speed, I can find no real justification in the evidence led by the prosecution. It would not seem that the witnesses Ranjeet Mal and Mohanlal, in the first place, would be real judges of speed. Their evidence is extremely vague. Ranjeet Mal has said that he saw Hari Singh driving the bus at a high speed. Mohanlal, on the other hand, has deposed that the accused was driving the bus at a speed of about 25 miles an hour, which was normal. The witness could not have any exact idea of the speed of the bus at which it was being driven. It is very probable that these witnesses were unable to give estimate of the exact speed at which the bus was travelling.

That apart, it does not appear that on a straight and open road, like that of the Umaid Hospital, Road, such a speed can be described as excessive or rash. There can be little doubt that the accused, who is aged 60 years, must have been an experienced and skilful driver. It is impossible to believe that he would lose control of his vehicle at a speed of about 25 miles an hour on such a spacious and straight road. In this case, the death of Kumari Indu was caused due to a collision. In order to impose criminal liability on the accused, it must be found as a fact that the collision was entirely or at least mainly due

to rashness or negligence on the part of the accused. It is not sufficient if it is only found that the accused was driving the vehicle at a fast speed. In this connection, a reference is made to Ram Sewak v. Emperor, AIR 1933 Oudh 391. In that case a Division Bench of the Oudh Chief Court consisting of Smith and Allsop JJ., observed that on a straight and open road a speed of 30 miles cannot necessarily and of itself be described as an excessive and rash speed.

8. Learned Assistant Government Advocate argued that from the statement of P. W. 6 Guman Singh it is proved that there was free travel paddle play more than $\frac{1}{2}$ ", indicating that the brakes of the vehicles were not in perfect condition. He has stated that the hand-brake of the bus was out of order as its linkages were disconnected. In the cross-examination, motor mechanic Guman Singh has stated that the free-play could result, even when the vehicle was in motion, and that in that event it would take hardly a fraction of a second to apply the brake. The witness has further pointed out that the hand-brake in a heavy vehicle like a bus could not have been made use of at the time when it was in motion and that the linkages in the hand-brake could also result when the vehicle was in motion. From the above evidence it is not clear that there existed any material defect in the vehicle at the time when it was put on the road. The defect in the hand-brake was of no consequence as such a brake, according to the expert, could not have been applied by the driver while the vehicle was in motion. The defect of free-play according to the expert could possibly occur even when the vehicle was in motion.

When there was no rashness or negligence on the part of the bus driver, for having killed the girl, so far as the use of the road and the manner of driving the bus was concerned, the fact that the vehicle of the accused had free-play cannot be taken into consideration in convicting the accused under S. 304-A, I. P. C., though it can be made the subject of prosecution under the Motor Vehicles Act, when it is clear that the defect in question was not in any way responsible for the accident. I am fortified in my view by the case reported in Emperor v. Akbar Ali, AIR 1936 Oudh 400. I further get support in this view from a Division Bench decision of this Court reported in State v. Chater Singh, ILR (1962) 12 Raj 103. In that case there was no evidence on the point that the accused knew of the defect. It was also not brought out that he had been driving the vehicle for a long time, so that knowledge of the defect could be imputed to him. If the defect was such that it could not be detected without meticulous examination of the machinery, it cannot be laid down that criminal liability could be fastened on the accused on that ground. In this case the defect was such that it could not be detected without

thorough examination of the machinery. It cannot be suggested that the accused Hari Singh should have undertaken such an examination before starting the vehicle. In that view of the matter also, no criminal responsibility can possibly be imputed to the accused.

9. It may also be stated here that from the evidence as pointed out above, it has not been found that the vehicle was being driven with rashness or negligence. On the other hand, there is the evidence to suggest that the bus was moving towards the extreme left side of the road. According to the prosecution, the girl turned towards the right side of the road. It is not clear how the girl suddenly turned towards the right side. When a person is run over by a bus and is crushed on the spot, the spectators are prejudiced against the driver of the vehicle and in such a case it becomes difficult for the court to ascertain the circumstances of the case. It is possible that the present mishap took place because the girl abruptly paddled from the left side of the road towards its right, without knowing its consequences. The lorry stopped at a distance of about 7 ft. away from the place of the accident. In that circumstance, the accused cannot be held liable for the accident. Thus, circumstances of the accident being doubtful, the trial court rightly gave benefit of the doubt to the accused.

10. Before I part with this case, it may be observed that the powers of the appellate court in an appeal from acquittal are not different from an appeal from conviction. The High Court is at perfect liberty to accept the evidence disbelieved by the trial court or to reject the evidence accepted by the original court. But at the same time it has got to be borne in mind that the accused is entitled to argue that presumption of innocence should be made against him. I had had the relevant evidence of the prosecution witnesses read to me and after careful consideration I am not satisfied that it is consistent, convincing and credible for bringing home the charge under S. 304-A, I. P. C., against the accused. Consequently it cannot be said that the finding of the trial court is erroneous.

11. In the result, this appeal having no force stands dismissed.

BDB/D.V.C.

Appeal dismissed.

AIR 1969 RAJASTHAN 89 (V 56 C 19)
KAN SINGH, J.

Hardayal and another, Petitioners v. Jaggasingh and others, Respondents.

Civil Revn. No. 230 of 1968, D/- 18-4-1968, against order of S. J., Civil, J. Ganganager, D/- 13-1-1968.

Tenancy Laws — Rajasthan Tenancy Act (3 of 1955), S. 242 — Jurisdiction of civil court to try suit relating to tenancy rights

HL/IL/D353/68

— Some portion of claim made in plaint triable by civil Court and other portion triable by revenue court — Civil Court can try suit and refer issue regarding claim for tenancy rights to revenue court.

Where the revenue court would not be competent to make any pronouncement about the validity of the agreement between the parties or to decree the refund of the amount said to have been advanced by the plaintiff, the suit will be triable by a civil Court. It is true that a Civil Court will not be competent to go into the question whether the plaintiff had or had not acquired the khatedari rights claimed by him in the land or to grant him any relief by way of declaration in respect of such rights, yet on that basis alone it cannot be postulated that the suit shall not be triable by a civil Court. The legislature has made provision for dealing with such composite matters when it enacted Section 242 in the Rajasthan Tenancy Act, 1955. This section clearly contemplates a situation where some portion of the claim made in the plaint is triable by a civil Court and the other portion is triable by a revenue Court.

(Paras 3, 5)

Therefore, if in a suit instituted in a civil Court, any question regarding tenancy rights arises and such question has not previously been determined by a revenue Court of competent jurisdiction, the civil Court will have to frame an issue on the plea of tenancy and submit the record to the appropriate revenue Court for the decision of that decision only. In other words, it will be necessary to refer only the issue relating to claim about tenancy rights to the revenue Court, but otherwise the suit remains with the civil Court: 1953 Raj LW 332 and ILR (1951) 1 Raj 81, Ref. (Para 4)

Cases Referred Chronological Paras
(1981) AIR 1961 SC 1299 (V 48)

= (1961) 3 SCR 1015, Rathnavar-

maraja v. Smt. Vimla 2

(1953) 1953 Raj LW 332 = ILR 3

(1952) 2 Raj 355, Gulla v. Doliya 3

(1951) ILR (1951) 1 Raj 81 = 1951

Raj LW 228, Hamirsingh v. Peeth 3, 5

Singh

H. M. Lodha, for Petitioners.

ORDER: Learned counsel for the petitioner raised two points to start with—

(1) that the Court fee paid by the plaintiff respondent was not sufficient.

(2) that the trial Court was in error in holding that the suit was triable by it and therefore, it was not necessary to return the plaint.

2. In the light of Sri Rathnavarmanraja v. Smt. Vimla, AIR 1961 SC 1299, learned counsel very rightly did not press the first point.

3. Regarding the second point he submitted that as the plaintiff had sought a declaration for his being a khatedari tenant of the land the suit was not cognisable by

a civil Court and could be tried only by a revenue Court according to the provisions of Section 207 of the Rajasthan Tenancy Act, 1955. He referred me to the analogous provisions in the Revenue Courts (Procedure and Jurisdiction) Act, 1951 which governed the procedure for suits triable by revenue Courts before the Rajasthan Tenancy Act came to be passed. Learned counsel pointed out that Section 7 of the Act, was in pari materia with the provisions of Section 207 of the Rajasthan Tenancy Act. He drew my attention to two cases (1) Gulla v. Doliya, 1953 Raj LW 332 and (2) Hamirsingh v. Peeth Singh, ILR (1951) 1 Raj 81. In the former case Wanchoo, C. J. as he then was observed that:

"Once the cause of action is such that a suit can be brought in the revenue Court on the basis of it and some relief obtained, the suit must be filed in the revenue Court even though it may be possible to ask for greater or additional or some different relief from the civil Court."

The learned C. J. held that:

"In any case if an additional relief to the one that could be granted by the revenue Court and which follows from that relief could be claimed then the mere prayer for an additional relief would not take the suit out of cognisance of the revenue Court."

It is to my mind clear that the learned C. J. was dealing with the situation where an additional relief would be flowing from the relief that could be granted by the revenue court. The learned Chief Justice in my humble view was not dealing with a case of more than one causes of action in an action. In other words he did not have any occasion to make a pronouncement as regards the position where there are more than one causes of action joined in a suit and at any rate one cause of action is such as is not triable by a revenue Court, as in the present case. In the present case the plaintiff averred that the defendant petitioner had entered into an agreement with him for the sale of certain agricultural lands which belonged to him. In pursuance of that agreement certain advance payments towards the sale price are alleged to have been made by the plaintiff to the defendant petitioner. The plaintiff took the position that at the time the agreement was made the land which was a zamindari land had become vested in the State of Rajasthan as a result of the Biswedari and Zamindari Abolition Act with the result that the defendant was not competent to sell the same. The plaintiff, therefore, prayed in the first instance that the agreement alleged to have been made be declared to be null and void and the defendant be ordered to refund the amount that the plaintiff had advanced to him together with certain incidental expenses. In the second place it was averred in the plaint that the defendant-petitioner had purported to transfer the land to the

other co-defendants and this transfer according to the plaintiff was null and void because the plaintiff had acquired khatedari rights in respect of this land on account of his cultivatory possession. Learned counsel contends that since the civil Court is not competent to declare whether the plaintiff had or had not acquired khatedari rights and this declaration can be granted only by the revenue court the civil Court was not competent to try the whole suit. Such a case was not examined by the learned C. J. in the afore-mentioned decision. In my view where the revenue court would not be competent to make any pronouncement about the validity of the agreement between the parties or to decree the refund of the amount said to have been advanced by the plaintiff, the suit will be triable by a civil court. It is true that a civil court will not be competent to go into the question whether the plaintiff had or had not acquired the khatedari rights claimed by him in the land or to grant him any relief by way of declaration in respect of such rights yet on that basis alone it cannot be postulated that the suit shall not be triable by a civil Court. In my humble opinion the legislature has made provision for dealing with such composite matters when it enacted section 242 in the Rajasthan Tenancy Act, 1955 which runs as under:—

"Section 242. Procedure when plea of tenancy rights raised in civil Courts—(1) If, in any suit relating to agricultural land instituted in a civil court, any question regarding tenancy rights arises and such question has not previously been determined by a revenue court of competent jurisdiction, the civil court shall frame an issue on the plea of tenancy and submit the record to the appropriate revenue court for the decision of that issue only.

Explanation:— A plea of tenancy which is clearly untenable and intended solely to oust the jurisdiction of the civil Court shall not be deemed to raise a plea of tenancy.

(2) The revenue Court, after re-framing the issue, if necessary shall decide such issue only, and return the record together with its finding thereon, to the civil Court which submitted it.

(3) The civil Court shall then proceed to decide the suit, accepting the finding of the revenue court on the issue referred to it.

(4) The finding of the revenue court on the issue referred to it shall, for the purposes of appeal, be deemed to be a part of the finding of the civil court."

4. Now it cannot be gainsaid that this is a suit relating to agricultural land and the suit has undoubtedly been instituted in a civil court. Therefore, if in such a suit any question regarding tenancy rights arises and such question has not previously been determined by a revenue court of competent jurisdiction the civil Court will have to

frame an issue on the plea of tenancy and submit the record to the appropriate revenue court for the decision of that decision only. In other words it will be necessary to refer only the issue relating to claim about tenancy rights, to the revenue Court, but otherwise the suit remains with the civil court. Therefore, Section 242 clearly covers a situation arising in the present case. It will be for the civil court to see at the appropriate stage, if necessary, whether the question regarding the claim to tenancy rights should be referred to the revenue court. I do not see the civil court will take upon itself to deal with such a question if it is really necessary to decide the same.

5. Learned counsel also invited my attention to certain observations in Hamir-singh's case, ILR (1951) 1 Raj 81 = 1951 Raj LW 228, in the penultimate paragraph of the judgment. Bapna J. observed as follows:

"It was contended by the learned counsel for the petitioner that there were other reliefs in the present suit which could not be granted by a revenue Court, and drew my attention to the claim for possession of the three plots of abadi land in the village as also for mesne profits. The cause of action for the possession of abadi land is entirely different from that in respect of the agricultural holdings and the suit be tried by Civil Court merely because the plaintiff chooses to add some other claim unconnected with the agricultural holding in the suit. The plaintiff may, if so advised, file a separate suit for possession of the Abadi land. As regards mesne profits, that relief would be ancillary to his claim for possession of agricultural land."

It is true the case before Bapna J. was of the type where there were more than one causes of action joined in a suit and one cause of action was found to be triable by a revenue court and the other by a civil court. The solution suggested by Bapna J. in that case was that for the cause of action that is triable by civil court the plaintiff could file a separate suit, but in any case the suit was held by him to be triable by a revenue Court. With utmost deference to the learned Judge, in my humble view his attention was not invited to the provisions of Section 39 of 1950 Act which was analogous to Section 242 of the Rajasthan Tenancy Act, 1955. As observed by me above this section clearly contemplates a situation where some portion of the claim made in the plaint is triable by a civil court and the other portion is triable by a revenue court. In a case like the present I am clearly of the opinion that the suit could rightly be taken cognisance of by a civil court and what would be necessary is to refer the issue regarding the claim for tenancy rights to the revenue Court if at all it is found necessary in the case.

6. In these circumstances I do not find force in this revision application which is hereby rejected in limine.
MBR/D.V.C. Revision application rejected.

AIR 1969 RAJASTHAN 92 (V 56 C 20)

KAN SINGH AND C. M. LODHA JJ.

Dhanpat Lal, Appellant v. Harisingh and others, Respondents.

Civil Spl. Appeal No. 41 of 1966, D-5-7-1968, against order of single J. Rajasthan High Court reported in 1967 Raj LW 71.

(A) Panchayats — Rajasthan Panchayat and Nyaya Panchayat Election Rules (1960), Rr. 30 and 39 — Ballot paper translucent — Lines demarcating compartments and symbols clearly visible on back side — Ballot paper marked by voter on the reverse — Paper valid — 1967 Raj LW 71 Expl. and Affirmed.

Where a ballot paper, which is translucent and the lines demarcating the compartments and symbols are clearly visible on the back side, is marked on the reverse by the voter, the paper is valid under R. 30 of the Rajasthan Panchayat and Nyaya Panchayat Election Rules. 1967 Raj LW 71 Expl. and Affirmed. (Para 13)

The marking of such a ballot paper on its back is not against R. 30 or R. 39. It cannot be said that the direction in R. 30 to mark the ballot paper with a mark opposite the name and symbol amounts to a positive direction to mark on the face of the paper only. The entire sheet of paper is the ballot paper, one side of which is its face and the other its back. AIR 1960 All 66, Foll. 1961 Raj LW 499, Ref. (Para 8)

The dominant consideration in deciding the validity of a vote is to ascertain the intention of the voter. It makes no difference whether the mark is put outside the compartment in the paper, opposite the name of the candidate or is put on the reverse so long as it is clear that the voter intended to vote for a particular candidate. But if the marking is against the provisions of the statute then the vote will be invalid even though the intention of the voter may be clear from the marking on the ballot paper. While construing R. 30 it cannot be forgotten that the conditions of our country are different from those in western countries and a vast majority of voters in our country are illiterate. (1907) 2 KB 313, Foll. Halsbury's Laws of England, Third Edn., Vol. 14, P. 319 para 240, Ref. (Para 10)

(B) Constitution of India, Art. 226 — Certiorari — Grounds — Question of law — Voter marking on reverse of ballot paper — Question of validity of such paper — Interference in writ valid — (Civil P. C. (1908), S. 100 — Question of Law) — Panchayats — Rajasthan Panchayat and

Nyaya Panchayat Election Rules (1960), R. 30).

Where a ballot paper is marked on the reverse by a voter, interference under Art. 226 of the Constitution on the question of validity of such paper is valid. (Para 13)

The question whether a ballot paper had been wrongly excluded from consideration and whether the marking on the back of it is against the relevant statutory provisions is a question of law. Therefore, when the High Court interferes under Art. 226 on such question of law after accepting the findings of fact of the Tribunal that the ballot paper had been marked by the voter on the reverse opposite the name of a particular candidate and that the symbols were visible on the back of the paper, the interference is valid. (Para 13)

Cases Referred: Chronological Paras (1961) 1961 Raj LW 499 = ILR (1961) 11 Raj 1192, Ramdayal v. Munsif Rajgarh

(1960) AIR 1960 All 66 (V 47) = 1959 All LJ 607, Swarup Singh v. Election Tribunal

(1907) 1907-2 KB 313 = 76 LJ KB 702, Poutardawala Rural District Council, Election Petition 10 M. M. Tewari, for Appellant; P. N. Dutt, for Respondent No. 1.

JUDGMENT: This is a special appeal under S. 18 of the High Court Ordinance 1949 against the judgment of a learned Single Judge dated 22nd July, 1966 passed in S. B. Civil Writ Petition No. 882 of 1965.

2. The facts giving rise to this appeal may be stated as follows:—

3. The election for the office of Sarpanch Gram Panchayat, Nanagal Rajawatian, District Jaipur, took place on 1-1-1965. Initially three persons filed their nomination papers but the nomination paper of one Badri was rejected with the result that Dhanpat Lal appellant and Harisingh respondent remained in the field. Dhanpat secured 395 votes whereas Harisingh secured 397 votes and 55 votes were declared to be invalid. Consequently Harisingh was declared duly elected by the Returning Officer. Thereafter Dhanpat Lal and Chhajuram filed separate election petitions in the Court of Munsif-Magistrate, Dausa under R. 78 of the Rajasthan Panchayat and Nyaya Panchayat Election Rules, 1960 (hereinafter called "the Rules") challenging the validity of the election of Harisingh.

Chhaju Ram withdrew his election petition and therefore the election petition filed by Dhanpat Lal was proceeded with. The main ground, taken in the election petition was that Dhanpat Lal had secured more votes than Harisingh. His contention was that some of the votes which had been cast in his favour had been wrongly rejected by the Returning Officer and so also a few

votes had been wrongly counted in favour of Harisingh. The learned Munsiff recounted the votes and found that Dhanpatlal had got 401 valid votes as against 399 secured by Harisingh. Thus the learned Munsif allowed the election petition, set aside the election of Harisingh and declared Dhanpatlal to have been duly elected as Sarpanch.

4. Aggrieved by the decision of the Election Tribunal i.e. the learned Munsif, Dausa Harisingh filed writ petition before this Court for getting the order of the Tribunal quashed.

5. The only point which was agitated before the learned single Judge was that 5 ballot papers Nos. 534903, 534650, 534843, 534875 and 534668, out of which the first four had been marked for Harisingh and the last one in favour of Dhanpatlal, had been wrongly rejected. The learned single Judge after considering the arguments pro and con came to the conclusion that the aforesaid five ballot papers even though marked on the reverse were valid and came to the conclusion that Harisingh had secured 403 votes as against 402 votes secured by his rival Dhanpatlal. In this view of the matter he set aside the order of the Tribunal and held that Harisingh had been rightly declared by the Returning Officer as Sarpanch. Dhanpat Lal has, therefore, filed this special appeal.

6. The question of law for our determination is whether the marking on the back of the five ballot papers mentioned above is against law and therefore these ballot papers should not have been taken into consideration.

7. For a correct decision of this question, it would be necessary to refer to the relevant provisions of law on the subject. R. 30 of the Rules deals with the manner of casting votes. It runs as under:—

"30. Manner of casting votes:— (1) An elector shall, on receiving the ballot paper issued to him under Rule 28, forthwith proceed to the polling compartment, there mark his ballot paper by affixing a seal containing a cross mark (x) opposite the name and symbol or on the name or symbol of the candidate in whose favour he desires to cast his vote, fold up the ballot paper thus marked so as to conceal his vote and put the ballot paper, so folded up into the ballot box which shall be placed within the view of the polling officer.

(2)

7a. Rule 39 deals with the rejection of ballot papers:

(1) A ballot paper shall be liable to rejection,

(i) if it bears any mark by which the elector can be identified,

(ii) if the number of votes recorded thereon exceeds the number of Panchas to be elected,

(iii) if no vote is recorded thereon,
(iv) if the ballot paper or the vote recorded thereon is void for uncertainty, or
(v) if it is so damaged or mutilated that its identity as a genuine ballot paper cannot be established.

(2) No ballot paper shall be rejected otherwise than on any of the grounds enumerated in sub-rule (1).

(3) The Returning Officer shall record on every ballot paper which he rejected a brief statement of the reasons for such rejection.

(4) The decision of the Returning Officer as to the validity or otherwise of the ballot paper shall be final."

8. From the aforesaid provisions it would be clear that a ballot paper should be marked by affixing a seal containing a cross-mark opposite the name and symbol or on the name or the symbol of the candidate in whose favour the voter desires to cast his vote. R. 39 mentions a number of grounds for either or more of which the Returning Officer is bound to reject a ballot paper. The first question is whether the marking on the reverse of a ballot paper in this particular case is against the provisions of Rule 30.

This rule directs the voter to make a mark on the ballot paper opposite the name and symbol of the candidate for whom he intends to vote. The ballot paper mentions not only the names of the candidates but also the distinct symbols allotted to them. It is significant that in the present case the symbols were clearly visible on the back of the ballot paper. This is the finding given by the learned single Judge and no just exception can be taken to it. The learned single Judge has clearly observed that the ballot papers in dispute are translucent and even an illiterate voter can distinguish which is the face of the ballot paper and which is the back of it. He has also observed that the lines demarcating the compartments and the symbols are visible on the back side.

It is further clear that 4 of them are marked for Harisingh and one for Dhanpatlal. In these circumstances marking of the ballot papers on their back cannot be said to be against the rule. We find ourselves unable to accept the contention on behalf of the appellant that the direction in the rule to mark the ballot paper by putting a mark opposite the name and symbol amounts to a positive direction to mark on the face of the ballot paper only. In our view the entire sheet of paper is the ballot paper, one side of which is its face and the other side is the back. In this connection reference may be made to a bench decision of the Allahabad High Court—Swarup Singh v. Election Tribunal, AIR 1960 All 66 wherein their Lordships were pleased to observe as follows:—

"The entire sheet of paper is the ballot paper, of course one side of it is the face

of the ballot paper and the other is the back side of the ballot paper."

This authority was brought to the notice of the learned single Judge and he was of the opinion that the marking of a ballot paper which is printed on one side means marking on the face of it only and in this view of the matter he expressed his dissent with the view taken in the Allahabad case. In the later part of his judgment, however, the learned single Judge went on to say that "the intention behind Rule 30 thus is that the ballot paper should be marked on the face, and not on the back." However, after referring to an earlier decision of his own: *Ramdayal v. Munsif, Rajgarh, 1961 Raj LW 499* the learned single Judge observed "that Rule 30 is directory and a ballot paper cannot be rejected if the intention of the voter can be clearly ascertained from it."

The learned Judge then proceeded to ascertain the intention of the voters with respect to the ballot papers in dispute and came to the conclusion "that they marked them on the back with the intention of voting for the candidate, on the back of whose compartment the mark was affixed." With great respect we find ourselves unable to agree with the reasoning adopted by the learned single Judge. Once he came to the conclusion that the marking of a ballot paper means marking on the face of it only and that the intention behind R. 30 was that the ballot paper must be marked on the face and not on the back, the only course open to him, in our opinion, was to treat these ballot papers as invalid as there was no room left for ascertaining the intention of the voter. We might state at once that the later reasoning adopted by the learned single Judge is more just and reasonable.

8. Lord Halsbury has observed.*

"240. Ballot papers rejected for uncertainty:-

A ballot paper which is unmarked or void for uncertainty is void and must not be counted, but a ballot paper on which a vote is marked elsewhere than in the proper place, or otherwise than by means of a cross or by more than one mark is not by reason thereof to be deemed to be void (either wholly or as respects that vote) if an intention that the vote shall be for one or other of the candidates, or at a poll consequent on a parish meeting, for or against any question, clearly appears and the way the paper is marked does not of itself identify the vote and it is not shown that he can be identified thereby."

16. Learned counsel for the appellant has invited our attention to a Pontardawe Rural District Council, Election Petition, (1907) 2 KB 313 in which the marks al-

though outside the compartment were placed directly opposite the names of certain of the candidates, so as to leave no doubt for whom the voters intended to vote. Ridley, J. while upholding the validity of such ballot papers held that so long as the mark is opposite the name of the candidate so as to make it clear that the voter intended to vote for him the vote is good. Phillimore, J. agreeing with Ridley, J. further observed that the mark put directly opposite the name of a particular candidate was a good vote.

Mr. Tewari, learned counsel for the appellant seeks to argue that this principle laid down by Ridley and Phillimore, JJ. would have no application to a case where the mark is put on the reverse of the ballot paper. In our view the submission made by Mr. Tewari is not correct. Once we accept the principle that the dominant consideration for deciding the validity of the vote is to ascertain the intention of the voter, it makes no difference whether the mark is put outside the compartment, opposite the name of the candidate or is put on the reverse so long it is clear that the voter intended to vote for a particular candidate. There is, however, one exception in our view, and it is this that if the marking is against the provisions of the Statute then the vote would be invalid even though the intention of the voter may be clear from the marking on the ballot paper.

The question, therefore, arises whether in the present case the marking is against the provisions of the Rules. As we have already observed above Rule 30 does not make it imperative that the ballot paper must be marked on the face of it and on this point we find ourselves unable to agree to the observations made by the learned single Judge that the intention behind R. 30 was that the ballot paper must be marked on the face only and not on the back. While construing the provisions of Rule 30 we cannot forget that the conditions in our country are different from those prevailing in the western countries. A vast majority of voters in our country are illiterate and that is why symbol has been introduced in the ballot paper for each candidate.

11. In order to test the correctness of the view we have been persuaded to take, we might also examine the conditions under which a ballot paper may be rejected. As already stated Rule 39 of the Rules deals with the rejection of a ballot paper and mentions six grounds for either or more of which the Returning Officer is bound to reject a ballot paper. The only two grounds which have been relied upon by the learned counsel for the appellant for rejection of the ballot papers in the present case are grounds Nos. (iii) and (iv) which are as under:

- (iii) if no vote is recorded thereon.
- (iv) if the ballot paper or the vote recorded thereon is void for uncertainty."

**Halsbury's Laws of England, Third Edition, Vol. 14, at p. 319 in para 240.*

When a voter has made marks on the ballot paper though on the back side, it cannot be said that no vote has been recorded on that ballot paper at all. We are, therefore, of opinion that the Returning Officer could not validly reject these ballot papers on the ground mentioned in sub-clause (iii). A ballot paper on which a vote is recorded can however be rejected if the Returning Officer is unable to make out as to for which candidate the vote has been given. The question then arises whether there is any doubt in the present case as for whom the vote has been cast in the ballot papers in question.

It is not disputed before us that in the ballot papers Nos. 534903, 534650, 534843 and 534875 the marks were for Harisingh and in ballot paper No. 534668 the mark was for Dhanpat Lal. It is further clear as observed by the learned Single Judge that the lines demarcating the compartments and the symbols were visible on the back side of these ballot papers. These ballot papers could not therefore be rejected under sub-clause (iv) either.

12. Learned counsel for the appellant has referred to a number of cases cited in the English and Empire Digest, Volume 20, pages 112 and 113 and also the observations made by Lord Halsbury, (Vol. 14, Third Edition, page 140) in the following terms:-

"A ballot paper marked on the back only should not be counted, even though the mark shows through the paper on to the front."

We have gone through some of the cases which were made available to us cited by Lord Halsbury as well as in the English and Empire Digest and an over all examination of these cases goes to show that the observations contained in these cases were bad on the particular language of the Act, which was under consideration for instance in 7 Supreme Court Reports Canada (1883) Sec. 45 of the Election Act, 1874 has been referred to. It provided that the mark by making a cross with a pencil must be placed on any part of the ballot paper within the division. Thus it is clear from this provision that the Statute itself made it obligatory that the mark must be contained within the division containing the name of the candidate. As we have already stated in the earlier part of our judgment there is no such statutory prohibition in the Rules against marking the ballot paper on the back and in our opinion the English Authorities referred to by the learned counsel for the appellant are not of much assistance for interpreting Rule 30 of the Rules.

13. Learned counsel for the appellant has also submitted that the Allahabad case relied upon by us is distinguishable on facts inasmuch as the ballot papers in the Allahabad case were transparent and the symbols on those ballot papers could be seen through

the back, whereas in the present case, they are translucent. We do not find force in this contention inasmuch as in the present case also the lines demarcating the compartments of the symbols are visible on the back side of the ballot papers. Another contention raised by the learned counsel is that in the facts and circumstances of the present case when two views were possible the learned Judge was not justified in interfering with the decision of the Tribunal.

Suffice it to say that the question whether certain ballot papers had been wrongly excluded from consideration and whether marking on the back of these ballot papers was against the directions contained in the Rules is a question of law. The only fact found by the Tribunal was that the markings on these ballot papers had been made on the reverse and the symbols were visible on the back, and that these markings had been made opposite the names of particular candidates.

The learned single Judge accepted these facts found by the Tribunal and thereafter examined the question of law whether these ballot papers were valid. The learned counsel is therefore not correct in his submission that the learned single Judge should not have interfered in writ. In our opinion, the only correct view in the facts and circumstances of the case is that the ballot papers in question were valid, and the tribunal had wrongly rejected them. The view taken by the learned single Judge in our opinion is correct though on different grounds.

14. For the reasons stated above we see no force in this appeal and hereby dismiss it, but make no order as to costs.

JRM/D.V.C.

Appeal dismissed.

AIR 1969 RAJASTHAN 95 (V 56 C 21)

D. M. BHANDARI AND G. M.
MEHTA, JJ.

Good Year India Ltd., Jaipur, Petitioner
v. Industrial Tribunal, Rajasthan, Jaipur,
and others, Respondents.

Civil Writ Petn. No. 290 of 1967, D/-
8-5-1968.

(A) Industrial Disputes Act (1947), Sections 10, 12 (5) — Order of Government under Section 12 (5) refusing to refer dispute — Government can supersede the order and make reference under Section 10 — Orders under Sections 12 (5) and 10 are administrative orders — (Constitution of India, Article 226 — Administrative order) — (Civil P. C. (1908), Section 11) — AIR 1966 Punj 354, Dissented from.

In making a reference under Sec. 10 (1) of the Act, the Government is doing an administrative act; it is neither a judicial nor a quasi judicial act. AIR 1953 SC 53, Rel. on. (Paras 14, 15)

A decision under Section 12 (5) not to make a reference is an administrative act and not a judicial or quasi judicial adjudication and such a decision not having been invested with statutory finality by any provision of the Act, the Government can re-examine the question and make a reference under Section 10 (1) if it is of the opinion that an industrial dispute exists or is apprehended. The earlier decision by the Government not to make a reference does not operate as res judicata. AIR 1966 Punj 354, Diss. from; AIR 1958 SC 1018, Expl.; and Dist.; 1962 (1) Lab LJ 555 (Punj), (1964) 1 Lab LJ 644 (Punj), AIR 1958 Andh Pra 276 and AIR 1956 Mad 113 and AIR 1956 Mad 115 and (1963) 2 Lab LJ 717 (Mys) and AIR 1962 All 70 and AIR 1964 All 328 and (1968) 1 Lab LJ 79 (Delhi), Ref. (Paras 17, 34)

Per Bhandari, J.: The expression "at any time" occurring in Section 10 (1) (d) does not mean at one time or only once. The words "at any time" only emphasize that there are no restrictions on the power of the appropriate government to refer the industrial dispute provided that it is of opinion that such dispute exists or is apprehended. There is no restriction or impediment for the appropriate government to form one opinion and then to form another opinion which may be altogether contrary to its first opinion nor can a court of law review the decision of the appropriate government to refer a dispute even though it has material on record that earlier that very Government had refused to make a reference. AIR 1966 Punj 354, Diss. from; AIR 1958 SC 1018, Expl. (Para 50)

Power to make a reference is contained in Section 10 (1) of the Act and not in anything contained in Section 12 (5). That power cannot be said to be exhausted even when an order has been made refusing to make a reference under Section 12 (5) and reasons for not making a reference have been recorded and communicated to the parties concerned. AIR 1958 SC 1018, Expl. (Para 52)

(B) Industrial Disputes Act (1947), Sections 10 (1), 12 (5) — Order of reference may not give reasons — Satisfaction of Government is the only condition precedent — Fact that reasons were given for refusing to make reference under Section 12 (5) does not make it necessary to give reasons for reference under Section 10, made subsequently.

The power to refer the dispute under Section 10 to the tribunal rests with the appropriate Government and for making reference it may give reasons and may not do so. The satisfaction of the Government is the only condition precedent to the making of the order of reference. Where in the order of reference it has been clearly stated by the Government that it is satisfied that there is a case for reference to the

tribunal, the order of reference meets the requirements of law. (Para 35)

The fact that in the previous order under Section 12 (5) the Government has given reasons for refusing to make a reference, does not make it necessary for the Government to give reasons for subsequently making reference under Section 10. When a report from the Conciliation Officer is received on failure of conciliation under Section 12 (4), the State Government is required to consider it, and if, under subsection (5) of that section, it is satisfied that there is a case for reference, it may make it, but if, on the other hand, it makes no reference, it should record and communicate to the parties concerned its reasons therefor. In case the Government refuses to make a reference, it is imperative for it to record reasons and communicate them to the parties concerned. No such reasons are required to be given in the order of reference to the tribunal. What is required in such an order is satisfaction of the Government that there is a case for reference to the tribunal. (Para 36)

(C) Industrial Disputes Act (1947), Sections 10, 12 (5) — Order under S. 12 (5) on report of Conciliation Officer, refusing to make reference of dispute between employer and employee — Representation of employee requesting Government to reconsider matter and refer the dispute for adjudication to meet ends of justice — Government referring matter under Section 10 without giving opportunity to employer to be heard — Order held was not illegal and invalid as violating principles of natural justice, since the employer had made detailed representation before Conciliation Officer regarding all the points raised by employee and the employee had not raised any new material in representation to Government to reconsider the previous decision — Government held not bound to give notice to the parties or to hear them before making order of reference — (Constitution of India, Article 226 — Natural justice — Opportunity to be heard) — (Natural Justice) — AIR 1959 Bom 538, Dist; AIR 1951 Trav-Co 203 and AIR 1956 Mad 113, AIR 1959 Cal 339 and (1968) 1 Lab LJ 79 (Delhi), Rel. on. (Paras 37 and 45)

Per Bhandari, J.— Before saying that an administrative authority has violated the principles of natural justice, it must be held that the authority was duty-bound to adopt judicial approach. (Para 58)

(D) Industrial Disputes Act (1947), Sections 2 (k), 10 — Termination of employee's services — Immediately employee moving Conciliation Officer challenging termination and requesting reinstatement — Employer opposing reinstatement — Industrial dispute held had been raised — Government could make reference under Section 10. AIR 1968 SC 529, Dist. (Para 46)

against them on 22-1-1359 T. E., as per Ext. 8, was illegal as the ex parte decree passed against them on 17-8-1353 T. E. as per Ext. 5 was not set aside and was still alive. The District Judge found the same to be correct as can be seen from Ext. 11, copy of his order dated 31-1-1951 A. D. and set aside the ex parte decree against them passed on 22-1-1359 T. E.

(h) The first respondent-plaintiff filed E. P. 32 of 1951 A. D. on 20-5-1951 for delivery of possession of the suit land on the basis of the decree, dated 17-8-1353 T. E. and obtained possession of the same on 19-6-1951 as can be seen from Ext. 14.

(i) On the ground that the appellants and the other defendants disturbed the first respondent-plaintiff's possession of the suit land the first respondent started proceedings under Section 144 Criminal Procedure Code and obtained an order restraining them from interfering with his possession. But, as they violated the order, they (including the ninth defendant herein) were punished under Section 188 Indian Penal Code. The accused carried the matter in appeal and their convictions and sentences were confirmed.

(j) Some of the defendants dispossessed the first respondent-plaintiff from the plaint schedule 2 land comprising 1 kani, 10 gandas forming part of schedule 1 of the plaint. The first respondent-plaintiff filed Criminal Case No. 164 of 1364 T. E. against the defendants. But, the case was dismissed.

(k) So, the first respondent-plaintiff filed Title Suit No. 194 of 1955 on the file of the Munsiff, Kailasahar, to recover possession of the plaint first schedule land, after declaration of his title to the same.

(l) After trial, the Munsiff held that the three plots covered by Exts. 4, A and B are different plots, that the first respondent-plaintiff has title to the plaint first schedule land and that he is entitled to a decree as prayed for.

(m) The contesting defendants 8 to 10 carried the matter in appeal to the District Judge in Tripura in Title Appeal No. 99 of 1956. The Learned District Judge concurred with the finding of the Munsiff that the three plots covered by Exts. 4, A and B are separate plots, that the first respondent-plaintiff purchased Kharija Taluk No. 36/4 (covered by Ext. 4) in auction, that the Kharija Taluk No. 36/4 is identifiable and that he has title to recover the same. He further held that, as per Ext. 11 order dated 31-1-1951, the original ex parte decree dated 17-8-1353 T. E. stood, that though it was barred by limitation on the date of E. P. 32 of 1951 A. D. under Article 182 of Indian Limitation Act, still as

the said decree was executed and as the matter cannot be unsettled and as the appellants were not parties to the decree, the suit is not barred by limitation. Accordingly, he dismissed the appeal with costs. Hence the present second appeal.

3. The points, which were argued and which arise for determination are:—

(i) Whether the first respondent-plaintiff's Kharija Taluk No. 36/4 is identifiable, whether he was in possession of it and whether the appellants dispossessed him.

(ii) Whether the appellants should have moved the Certificate Officer under Section 20 of the Tripura Public Demands Recovery Act (Act IV of 1326 T. E.) to set aside the sale of the suit land.

(iii) Whether the suit is barred by limitation.

4. Point (I).

There are concurrent findings of the two Courts below that the plaint schedule No. 1 land covered by Kharija Taluk No. 36/4 is a separate identifiable property and their findings are supported by the evidence on record. (His Lordship after discussing evidence (Paras 5 and 6) proceeded).

7. Thus, even though Ext. 1 does not mention the boundaries of the plaint Schedule No. 1 land, it is identifiable with reference to Kharija Taluk No. 36/4 and also the boundaries mentioned in Ext. 4 I find point (i) in the affirmative.

8. Point (II).

The Learned Counsel for the first respondent argued that if really the appellants were in possession of the plaint Schedule No. 1 land and were entitled to it, then they must have filed a petition under Section 20 of the Tripura Public Demands Recovery Act (Act IV of 1326 T. E.) within 30 days from the date of the auction to set aside the sale held by the Government to realise the arrears of land revenue. The contention of the Learned Counsel for the appellants that as they were not parties to the auction proceedings they were not bound to file a petition is not correct. They could file a petition under Sec. 20 (2) of the Act even after the expiry of 30 days from the date of the sale, if there were reasonable grounds for condoning the delay.

9. Thus, the failure of the appellants to apply under Section 20 of the Act shows that the land did not belong to them. I find point (ii) in the affirmative.

10. Point (III).

The first respondent-plaintiff, as already stated, obtained ex parte decree on 17-8-1353 T. E. as per Ext. 5 in Civil Suit No. 19 of 1353 T. E. and 25 of 1353 T. E. for recovery of possession of the

suit land. The fourth respondent in those suits viz. Nabawip Singh filed a petition under Order IX Rule 13, Civil Procedure Code in 1354 or 1355 T. E. to set aside the ex parte decree against him. The Munsif restored the suit and passed a fresh decree (on contest against Nabawip Singh and ex parte against the others) on 22-1-1359 T. E. as per Ext. 8. On 2-2-1359 T. E. the first respondent-plaintiff filed E. P. 4 of 1359 T. E. for obtaining delivery of the land as can be seen from Exts. 9 and 10. In the meanwhile, the defendants in the above suits carried the matter in appeal to the District Court in Civil Appeal No. 24 of 1359 T. E. which was numbered as 3 of 1950 A. D. The first respondent-plaintiff filed a petition to set aside the decree against Nabawip Singh, as he was not in possession of the land. The other defendants contested the appeal on the ground that the earliest decree dated 17-8-1353 T. E. was alive and that the subsequent decree dated 22-1-1359 T. E. was barred by res judicata. Thus, the earliest ex parte decree dated 17-8-1353 T. E. stood. Inasmuch as the delivery proceedings in E. P. 4 of 1359 T. E. which were taken in pursuance of the decree dated 22-1-1359 T. E. were illegal on account of the fact that the decree dated 22-1-1359 T. E. was set aside, the first respondent-plaintiff filed E. P. 32 of 1951 for delivery of the land and obtained delivery of the same on 19-6-1951 as per Ext. 7. Evidently E. P. 32 of 1951 was barred by limitation, because the ex parte decree which was executed was passed on 17-8-1353 T. E. (corresponding to about 1943 A. D.) and as the ex parte decree was thus put into execution 8 years after it was passed.

11. The District Judge states in his judgment in the First Appeal in this case that though there is indication that the ex parte decree dated 17-8-1353 T. E. was set aside against all the defendants, Ext. 11 shows that it was set aside only against Nabawip Singh, that the earliest ex parte decree dated 17-8-1353 T. E. stood and that, therefore, E. P. 32 of 1951 was barred by limitation. But, on three grounds, he held that the execution proceedings were valid. Firstly, he was of opinion that as the first respondent-plaintiff obtained possession of the land on 19-6-1951 A. D. as can be seen from Exts. 6, 7 and 14 and as the judgment-debtors concerned did not raise any objection, the present appellants, who were not parties to the ex parte decree dated 17-8-1353 T. E., are not bound by it. The second ground on which the District Judge held that the appellants cannot raise the question of limitation is that they have no interest in the land. The third ground on which he held that, though the decree is barred by

limitation, the appellants are still bound by the execution proceedings is that the first respondent obtained actual possession of the lands on 19-6-1951. The above grounds do not stand any scrutiny. The fact that the appellants were not parties to the ex parte decree dated 17-8-1353 T. E. or that the appellants have no interest in the land or that the first respondent-plaintiff obtained delivery of the land by execution of a barred decree is of no avail in view of Section 3 of the Limitation Act, which casts a duty on the Court to dismiss any matter, which is barred by limitation, even though no plea is taken by the defendants with regard to limitation. Thus, the grounds given by the District Judge in his judgment for holding that the delivery proceedings taken by executing the barred ex parte decree dated 17-8-1353 T. E. are not valid.

12. The Learned Counsel for the first respondent, however, tried to support the finding of the District Judge on the ground that the time taken during the pendency of Civil Appeal No. 24 of 1359 T. E. corresponding to 3 of 1950 has to be excluded under Article 182 of the Limitation Act and that, therefore, the ex parte decree dated 17-8-1353 T. E. was not barred by limitation on the date of the filing of E. P. 32 of 1951 A. D. He relied on Nagendra Nath Dey v. Suresh Chandra Dey, AIR 1932 PC 165, Narayanan Thampi v. Lakshmi Narayana, AIR 1953 Tra-Co 220 (FB) and Thodkamalla Venkata Laxmi Narayana Rao v. Krishnala, AIR 1961 Andhra Pra 326. This contention will be correct if Civil Appeal No. 24 of 1359 T. E. i.e., 3 of 1950 was filed against the judgment and decree dated 17-8-1353 T. E. But, it was filed against the judgment and decree dated 22-1-1359 T. E. which were passed on the second occasion. So the time taken in prosecuting the appeal against the judgment and decree dated 22-1-1359 T. E. cannot be deducted in computing the period of limitation for the purpose of execution of the ex parte decree dated 17-8-1353 T. E. The District Judge also referred to this aspect of the case, though he did not cite any decision. He states in his judgment that the execution proceedings in E. P. 32 of 1951 were barred by limitation under Article 182 of the Indian Limitation Act, as there was no appeal against the decree dated 17-8-1353 T. E. and that the period of limitation of 3 years ran from the date of the passing of the decree. So the execution proceedings in E. P. 32 of 1951 are barred by limitation.

13. The fact that the fourth defendant in Civil Suits Nos. 19 of 1353 T. E. and 25 of 1353 T. E. namely, Nabawip Singh filed a petition under Order 9 Rule 13 Civil Procedure Code and that

the decree was set aside against him also does not avail the first respondent as can be seen from Order 9 Rule 13 Civil Procedure Code, under which an application is not one for "review" within the meaning of clause (3) of Article 182 of the Limitation Act and the order thereon does not give a fresh start of limitation. Vide Ramakrishna Naidu v. Srinivasulu Naidu, AIR 1950 Mad 552. Thus, the judgment of the District Judge that the execution proceedings in E. P. 32 of 1951 are barred by limitation is correct. But, his further finding that settled matters cannot be unsettled and the other reasons given by him for giving the finding that they are binding upon the appellants are not correct.

14. For the above reasons, I find point (iii) in the affirmative.

15. In the result, this second appeal is allowed and the suit is dismissed with costs in all the three Courts. The judgments and decrees of the two Courts below are set aside.

AGJ/D.V.C.

Appeal allowed.

AIR 1969 TRIPURA 19 (V 56 C 6)

C. JAGANNADHACHARYULU, J. C.

Ashoka Construction Co. and others, Petitioners v. Union of India, New Delhi, Respondent.

Civil Revn. Petns. Nos. 42 to 47 of 1966, D/- 23-12-1967 against order of Sub-J. Tripura, Agartala D/- 18-7-1966.

(A) Contract Act (1872), Section 10 — Construction of contract — Arbitration clause providing innumerable persons as arbitrators — Identity of arbitrator must be interpreted as vague and uncertain. AIR 1964 Tri 27, Diss. from.

The terms of a covenant should be interpreted on two well-established principles. Firstly, there must be a clear intention, which is beyond the possibility of any dispute, that the parties intended to act according to the covenant entered into and as interpreted by the Court. Secondly, the construction to be placed on a deed ought to be such as to render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. (Para 5)

Where the C. P. W. D. and a contractor agreed to refer any dispute arising between them to the "Chief Engineer or Additional Chief Engineer C. P. W. D." there being innumerable Additional Chief Engineers, no particular person, can be pointed out, and hence the agreement must be interpreted wherein the identity of persons, to whom reference can be made is left very vague and uncertain. AIR 1964 Tri 27, Diss. from; AIR 1945 Pat 447, Rel. on. (Para 5)

(B) Arbitration Act (1940), Sections 2 (a) and 20 — Identity of arbitrator left vague in arbitration clause — Agreement is not rendered invalid — Reference is maintainable — Parties not agreeing to appointment of arbitrator — Court must appoint. AIR 1964 Tri 27, Diss. from.

It cannot be said that because the arbitration clause is vague and uncertain as regards the person to whom reference is to be made, there cannot be any reference at all. Section 2 (a) envisages that an arbitration agreement is a valid agreement whether any arbitrator is named therein or not. Vagueness regarding identity of arbitrator does not render the arbitration as void, but only the vague clause regarding identity is void and is liable to be ignored. The agreement must be treated as if no arbitrator is named therein. The fact that the petitioner himself filed the petitions for arbitration does not remove vagueness in the clause regarding the person chosen as an arbitrator. And where the parties do not agree upon any arbitrator, it is the duty of the court to appoint an arbitrator. AIR 1964 Tri 27, Diss. from; AIR 1956 Punj 205, Rel. on; AIR 1955 Punj 172, Distinguished.

(Paras 7, 8, 9)

(C) Civil P. C. (1908), Section 11 — Res judicata — Principles of, applicable in Arbitration proceedings.

The same dispute once referred and embodied in an award cannot be the subject-matter of a fresh reference and to that extent the rule of res judicata applies to arbitration proceeding. But when the subject-matter of reference is different there can be no question of res judicata. AIR 1964 Cal 545, Rel. on. (Para 11)

(D) Arbitration Act (1940), Sections 4, 8 — Appointment of arbitrator — Appointment as persona designata — Parties can authorise him to appoint his nominee.

There is nothing illegal if an arbitrator appointed persona designata is authorised by both the parties to appoint his own nominees and the provisions of Section 8 of the Act are not contrary to those in section 4 of the Act. AIR 1964 Tri 27, Foll.; AIR 1955 Punj 172, Rel. on. (Para 14)

(E) Civil P. C. (1908), Section 115 — Tripura (Courts) Order, Section 34 — Subordinate Court following High Court's decision — High Court subsequently dissenting from earlier decision — Revision against order of subordinate court is maintainable. (Para 15)

(F) Arbitration Act (1940), Sections 2 (a), 20, 21 — High Court, as court of revision, is authorised to appoint arbitrator.

A Civil Court having jurisdiction to decide the questions forming the subject matter of reference has power to appoint arbitrator. Except for the purpose of arbitration proceeding under Section 21, the word "Court" does not include small cause court, but it includes an Appellate Court. Hence, even

a court of revision can appoint an arbitrator. AIR 1955 Mad 693, Rel. on. (Para 16)

Cases Referred: Chronological Paras
(1967) AIR 1967 Bom 347 (V 54) =

68 Bom LR 586, S. N. Shrikantia and Co. v. Union of India 7

(1964) AIR 1964 Cal 545 (V 51) = Kerorimall v. Union of India 11

(1964) AIR 1964 Tripura 27 (V 51), Gupta, R. D. v. Union of India 5, 7

10, 11, 14, 15

(1962) AIR 1962 SC 256 (V 49) = (1962) 3 SCR 497, Union of India v. Mohindra Supply Co. 7

(1962) AIR 1962 All 407 (V 49) = 1962 All LJ 495, Juggilal Kamla Pat v. Ram Janki Gupta 16

(1962) AIR 1962 Cal 360 (V 49) = Cannon Dunkerley and Co. v. Union Carbide (India) Ltd. 13

(1956) AIR 1956 Punj 205 (V 43) = ILR (1956) Punj 488, Delhi and Finance Housing and Construction Ltd. v. Brij Mohan Shah 6, 9

(1955) AIR 1955 Mad 693 (V 42) = ILR (1956) Mad 204, Subramannaya Bhatta v. Devadas Nayak 15

(1955) AIR 1955 Punj 172 (V 42) = 57 Pun LR 192, Union of India v. New India Constructors, Delhi 10, 14

(1954) AIR 1954 SC 202 (V 41) = 1954 SCR 313, Raj Krishna Bose v. Binod Kanungo 14

(1954) AIR 1954 Cal 462 (V 41) = 92 Cal LJ 220, Nalini Ranjan Guha v. Union of India 16

(1945) AIR 1945 Pat 447 (V 32) = ILR 24 Pat 438, Humayun Reza v. Harendra Nath Das 5

in Agartala. He filed Arbitration Cases Nos. 4 of 1964 and 9 of 1964 as power-of-attorney holder of M/s. Ashoka Construction Company, Delhi and the other applications in his own name under Sections 8 and 20 of the Act to direct the respondent to file the original agreements into the Court and requested the Court to appoint an independent person, who is not an employee of the Union of India, as sole arbitrator to decide the disputes mentioned in the Schedules No. 1 appended to the petitions.

The respondent filed agreements along with the objections in the six cases on 17-12-1964. The petitioner filed two affidavits on 4-9-1964 and on 16-1-1965 swearing to the allegation made by him in the petitions. He alleged inter alia that there are several disputes between him and the respondent with regard to some more works of contract done by him, that the respondent interfered with the arbitration proceedings in the other cases, that the petitioner is put to harassment, huge financial expenditure, prolonged litigation and delay in the adjudication of disputes involving lakhs of rupees and that unless an impartial arbitrator, who is not an employee of the C. P. W. D. is appointed he will be put to heavy loss. The respondent took time on 3-2-1965 and on 20-2-1965 to file counter-affidavits. But, it did not file any counter-affidavits. The petitioner offered to lead evidence. The Subordinate Judge, however, directed him to file affidavit and he filed a third affidavit on 9-12-1965 reiterating the same allegations.

4. After enquiry, the learned Subordinate Judge passed the orders in question negating the request of the petitioner to appoint a third party arbitrator. He directed the parties to choose either the Chief Engineer or the Additional Chief Engineer, C. P. W. D., Agartala as arbitrator and adjourned the cases to enable both the parties to choose one of them. Hence the six revision petitions by the petitioner.

5. The petitioner argued the cases in person. His first contention is that the arbitration agreement contained in Cl. 25 of the agreements is vague and that under Section 20 (4) of the Act the Court has to appoint its own nominee as an arbitrator to decide the disputes. Before proceeding to deal with this argument, it has to be mentioned that in the two agreements covered by Civil Revision Petitions Nos. 44 of 1966 and 46 of 1966 arising out of Arbitration Cases Nos. 6 of 1964 and 8 of 1964, the words "Chief Engineer" were struck off and only the words "Additional Chief Engineer" were retained. So, according to the arbitration agreements contained in those two cases the parties agreed to refer the disputes to the Additional Chief Engineer, C. P. W. D. In the remaining 4 cases the parties agreed to refer the disputes to the Chief Engineer/Additional Chief Engineer, C. P. W. D. A plain reading of the agreements clearly

shows that the identity of the persons, to whom references should be made, was left very vague and uncertain. There is only one Chief Engineer in the C. P. W. D. But, there are innumerable Additional Chief Engineers in the C. P. W. D. So, even though the words "Chief Engineer" in the cases covered by Civil Revision Petitions Nos. 44 of 1966 and 46 of 1966 were scored out, still there is vagueness regarding the Additional Chief Engineer to whom the references should be made. Should they be made to the Additional Chief Engineer of the concerned Zone in charge of the works, which were to be executed, or any other Additional Chief Engineer working in the C. P. W. D.? In the remaining 4 cases there is again uncertainty and dubiousness. Did the parties agree to refer their disputes to the Chief Engineer or Additional Chief Engineer and, if the latter, who is that Additional Chief Engineer?

Exactly the same questions arose for determination before this Court in a batch of 7 cases between the same parties decided by one of my learned predecessors Shri T. N. R. Tirumalpad, J. C. reported in R. D. Gupta v. Union of India, AIR 1964 Tri 27. He negated the contention of the petitioner regarding the vagueness and uncertainty about the identity of the Additional Chief Engineer, C. P. W. D., who was to arbitrate between the parties. He held that there was no dubiousness because the parties must have meant the Additional Chief Engineer (Zone II) in charge of the particular works, though there are several Additional Chief Engineers in the C. P. W. D., as both the parties knew, when they entered into the contracts, who the Additional Chief Engineer was who should be the sole arbitrator and that he was the Additional Chief Engineer (II) in charge of the particular works. With due respect, I am unable to agree with him in his reasoning. The terms of a covenant should be interpreted on two well-established principles. Firstly, there must be a clear intention, which is beyond the possibility of any dispute, that the parties intended to act according to the covenant entered into and as interpreted by the Court. Secondly, the construction to be placed on a deed ought to be such as to render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. Vide Humayun Reza v. Harendra Nath Das, AIR 1945 Pat 447. There is no reason to suppose that the parties intended that the Additional Chief Engineer, C. P. W. D. Zone II should be the person to arbitrate between the parties and why they did not intend to have some other Additional Chief Engineer of the C. P. W. D. to arbitrate. It cannot be stated that the parties had the concerned Additional Chief Engineer in their mind, because the arbitration agreement states that

his connection with the works is no bar. It is not known why he was not specifically mentioned in the agreement. Evidently, an officer of the C. P. W. D. was sought to be chosen as an arbitrator, because as a technical person he can make a proper award on the disputes. So, there is no reason to limit the ambiguous expression of Additional Chief Engineer, C. P. W. D. to the Additional Chief Engineer, C. P. W. D. Zone II in charge of the works.

6. My learned predecessor again held that even the expression Chief Engineer/Additional Chief Engineer, C. P. W. D. in the other cases (as in the 4 present revision petitions Nos. 42 of 1966, 43 of 1966, 45 of 1966 and 47 of 1966) was not ambiguous, though he felt that there was some ambiguity in the words. In the cases before him the petitioner's Advocate agreed to the arbitration of one Shri M. V. Subrahmanyam Superintending Engineer, Arbitration, Ministry of Works, to act as arbitrator. But, in the revision petitions filed in this Court the petitioner in person contended that his Advocate made the admission without his consent and that it did not bind him. Shri T. N. R. Tirumalpad, J. C. accepted his argument and proceeded to dispose of his contention on merits. Firstly, he held that if the contention of the petitioner that the agreement was vague was correct, then the agreement itself was void that there could not be any arbitration, but that the petitioner himself wanted arbitration and filed the petitions under Section 20 of the Act, that he must be deemed to be of the view that when he filed the petitions there was no vagueness or uncertainty, that otherwise he should have filed suits and that, therefore, there was no vagueness or uncertainty in the arbitration clause. Secondly, he distinguished the decision of the Punjab High Court in Delhi and Finance Housing and Construction Ltd. v. Brij Mohan Shah, AIR 1958 Punj 205 which supports the petitioner's contention.

7. I closely studied the judgment of my learned predecessor and I regret I am not able to agree with him. For, the first ground in his judgment that the petitioner himself thought that there was no vagueness or uncertainty and that, therefore, he filed the applications under Section 20 of the Act, that if the arbitration clause itself was vague and uncertain then there could not be any arbitration at all is, in my judgment, not correct. That the respondent Union Government of India itself thought that the expression "Chief Engineer/Additional Chief Engineer, C. P. W. D." is vague and uncertain is clear from the fact that it scored out "Chief Engineer" in the two agreements covered by Revision Cases Nos. 44 of 1966 and 46 of 1966 and confined the matter only to the Additional Chief Engineer, C. P. W. D., but without stating of which Zone should he be. But, in the remaining

four cases the parties simply signed the stereotyped printed agreements without applying their mind to the arbitration clauses proper namely, as to the person who should be appointed as the sole arbitrator, whether the Chief Engineer or the Additional Chief Engineer of any particular Zone. The Indian Arbitration Act X of 1940 is a self-contained Code regarding arbitration proceedings. Vide also Union of India v. Mohindra Supply Co., AIR 1962 SC 256 and S. N. Srikantia and Co. v. Union of India, AIR 1967 Bom 347.

The preamble to the Act reads that it was enacted to consolidate and amend the law relating to arbitration. The Act is divided into VII Chapters and the Chapters II to IV lay down the procedure to be adopted in three kinds of arbitration. Chapter II relates to arbitration without intervention of a Court and contains Sections 3 to 19. Chapter III relates to an arbitration with intervention of a Court, when there is no suit pending. It contains Section 20. Chapter IV contains Sections 21 to 25 and relates to arbitration in suits. Chapter I is an introductory one. Chapter V is a general one. Chapter VI relates to appeals. Chapter VII relates to miscellaneous proceedings. The reasoning of my learned predecessor in AIR 1964 Tri 27 that if the arbitration clause is vague, then there cannot be any arbitration at all is opposed to the definition of "arbitration agreement" in Section 2 (a) of the Act. It defines an arbitration agreement as any written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. So an arbitration agreement is a valid agreement whether any arbitrator is named therein or not. If the expression "Chief Engineer/Additional Chief Engineer, C. P. W. D." which is admittedly vague is deleted from the agreements, even then the agreements are valid as "arbitration agreements" because an arbitrator can be appointed under the provisions of the Act.

It is not necessary that the parties should mention any arbitrator either by his name as a persona designata or by his office in the arbitration agreement. This point is crystal clear from the definition of the "arbitration agreement" in Section 2 (a) of the Act. A party has three remedies open to him. He can file a petition under Section 8, Chapter II of the Act requesting the Court to appoint the arbitrator and the Court can appoint one under sub-section (2) of Section 8, if the provisions of Section 8 are complied with. He has a second remedy of filing an application under Section 20, Chapter II of the Act. He has a third remedy of filing a suit and getting the disputes referred to arbitration under Chapter IV of the Act. But, the petitioner chose to avail of the second remedy under Section 20 of the Act, though he added Section 8 also in the petitions. I shall first of

all consider the applicability of Section 20 of the Act to these cases.

8. Section 20 of the Act runs as follows:
"Application to file in Court arbitration agreement:—

20. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by the other provisions of this Act so far as they can be made applicable." It ordains the Court to perform three functions. First of all, the Court should number the applications as suits. This, the Court did. Secondly the Court should direct notices thereof to be given to all the parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notices why the agreement should not be filed. This the Court did and the respondent filed the agreements in all the six cases. Then the third function of the Court is envisaged in sub-section (4) of Section 20 of the Act. After the agreements are filed, the Court shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. In the present case the Subordinate Judge should have made an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise. But, it has so happened that in all the six agreements there is dubiousness, vagueness and uncertainty about the identity of the arbitrator. So, the

expression Chief Engineer/Additional Chief Engineer, C. P. W. D. (or Additional Chief Engineer, C. P. W. D.) has to be ignored. The parties do not agree upon any arbitrator. The petitioner specially does not agree to the appointment of any person working in the C. P. W. D. under the respondent. So, it is the duty of the Court to appoint an arbitrator. It is very important to note that the conjunction used is "or" and not "and". Where there is an appointed arbitrator, then the Court is bound to make a reference to him. But, where there is no appointed arbitrator and where the parties cannot agree upon any arbitrator, then the Court is bound to appoint an arbitrator. After the arbitrator is appointed the other provisions of the Act are attracted as mentioned in sub-section (5) of Section 20 of the Act. So, it is not correct to state that because there is vagueness regarding the identity of the person, to whom the reference had to be made, the entire agreement is void. The agreement is not void, but only the vague clause therein mentioning "Chief Engineer/Additional Chief Engineer, C. P. W. D." is void and is liable to be ignored.

9. Next, regarding an almost direct ruling on this point decided by the Punjab High Court in AIR 1956 Punj 205 referred to by my learned predecessor and distinguished by him, the facts of that case have to be stated. There was an arbitration clause in that case that all the disputes regarding the contract were to be referred to the sole arbitration of the managing agent/Technical Director, Delhi Finance Housing and Construction Ltd. The Punjab High Court held that the clause was vague and uncertain and that there could not be a reference for arbitration either to the Managing agent or to the Technical Director. So, this is a case similar to the present cases before me and also the previous batch of cases before Shri T. N. R. Tirumalpad, J. C. But, he distinguished the case on the ground that in spite of the arbitration clause one of the parties filed a suit in Court when disputes arose and that the other party applied for stay of proceedings on the ground that a contract contained a clause for reference to arbitration. My learned predecessor states in his judgment that as the arbitration clause was vague, there could not be a reference to arbitration and that, therefore, the suit could not be stayed, that in that connection the decision was given that the clause was uncertain, but that in the cases before him the petitioner himself wanted arbitration and that, therefore, the above decision did not apply to them. With respect, this is a distinction drawn without any difference. Whether the objection was taken in a suit or in a petition is quite immaterial, so long as the objection is a valid one.

I do not find any real distinction at all between that case and the batches of cases

in this Court. The fact that the petitioner himself filed the petitions for arbitration does not remove the vagueness in the clause regarding the person chosen as an arbitrator. The petitioner wants arbitration and it can be allowed, even if there is no mention of the name of any arbitrator, provided there is an agreement between the parties to refer the disputes to arbitration. There is such an agreement to refer the disputes to arbitration in all the cases before me and there was such agreement even before Shri T. N. R. Tirumalpad, J. C. That agreement is sufficient to attract the provisions of the Act and the Court can ignore the fact that they agreed to have an uncertain person as an arbitrator.

10. The learned Counsel for the respondent drew my attention to a prior decision of the Punjab High Court in Union of India v. New India Constructors, Delhi, AIR 1955 Punj 172. This was also referred to by my learned predecessor in AIR 1964 Tri 27 in connection with another point urged by the petitioner. But, the point in issue namely, whether the arbitration clause to refer the matter to the Chief Engineer/Additional Chief Engineer, C. P. W. D. was not raised in that case and decided. It was taken as granted by both the parties that either of them could act as an arbitrator. This decision is, therefore, no authority for the point whether the expression "Chief Engineer/Additional Chief Engineer, C. P. W. D." is vague and uncertain in the arbitration clauses.

11. The learned Counsel for the respondent contended that the decision of this Court in AIR 1964 Tri 27 must be held to operate as res judicata and that the parties are at least bound on principles analogous thereto. But, the subject-matter of references in the two batches is different. The same dispute once referred and embodied in an award cannot be the subject-matter of a fresh reference and to that extent the rule of res judicata applies to arbitration proceeding. But, when the subject-matter of reference is different there can be no question of res judicata. Vide Kerorimall v. Union of India, AIR 1964 Calcutta 545.

12. Thus, to summarise the applicability of Section 20 to the facts of the cases, all the agreements contain clauses for reference of their disputes to arbitration. The agreements were filed into the Court. But, the identity of the arbitrator appointed by the parties in the agreements is dubious and uncertain. The parties do not agree to any arbitrator. So, under sub-section (4) of Section 20 the Court has to appoint an arbitrator.

13. The petitioner purported to take steps under Section 8 (1) (b) of the Act before filing the petitions and filed them under Section 8 of the Act also, as evident-

ly S. 8 (1) (a) of the Act does not apply. The petitioner issued notices to one Shri John Mukund, ACE, C. P. W. D. who is now said to be working in Himachal Pradesh to enter upon the references. He did not enter upon them. The contention of the petitioner is that he could approach Shri John Mukund, ACE, C. P. W. D. also as an appointed arbitrator, but that he did not enter upon the references, that it was not intended by the parties that the vacancy should not be filled up and that, therefore, the vacancy has to be filled up under Section 8 (1) (b) of the Act. He relied on Gannon Dunkerley and Co. v. Union Carbide (India) Ltd., AIR 1962 Cal 360. In that case it was urged for the respondent that under the arbitration clause in that case the Executive Engineer, C. P. W. D. or his nominees alone could be appointed arbitrator and no other, that it was the express agreement between the parties, but that as the Executive Engineer refused to act and/or appoint an arbitrator, no other arbitrator could be appointed and that no order for reference could be made. It was held that, even in a case where the agreed arbitrator is unwilling or unable to act, the Court has jurisdiction to appoint an arbitrator under Section 20 (4) of the Act and that the clause "where the parties cannot agree to an arbitrator" in Section 20 (4) of the Act should be liberally construed to make an order of reference to its own arbitrator in all cases when the parties do not agree to an arbitrator, so that the second class of cases contemplated by the sub-section should include not only cases where, at no previous point of time, the parties agreed to an arbitrator but also cases, where the parties having agreed to an arbitrator previously, do not agree to a new appointment after the arbitrator previously agreed to is unable or unwilling to act.

The learned Counsel for the respondent also relied on this decision to show that the reference should be first made to the appointed arbitrator and that the Court can appoint an arbitrator only after he refuses to act. But, in view of my finding that the identity of the alleged appointed arbitrator "Chief Engineer/Additional Chief Engineer, C. P. W. D." in the four cases or "Additional Chief Engineer C. P. W. D." in the two cases is vague and ambiguous, section 8 (1) (b) of the Act does not come into play. So, the decision relied on by both the parties also does not apply to the facts of the cases herein.

14. The petitioner then argued that in any case the further clause in the agreements that the nominees of the "Chief Engineer/the Additional Chief Engineer, C. P. W. D." should arbitrate, if the latter is unwilling or unable to act, is illegal and contrary to the provisions of Section 4 of the Act. He further contended that there is a

conflict between section 4 on one hand and Section 8 on the other and that where there is a conflict it should be resolved, as laid down in *Raj Krushna Bose v. Binod Kanungo*, AIR 1954 SC 202. He further argued that under Section 4 of the Act an arbitrator appointed as a persona designata cannot appoint another arbitrator as his nominee and that, therefore, the further clause in Clause 25 of the agreement that in case the Chief Engineer/Additional Chief Engineer, C. P. W. D. is unable or unwilling to act, he can nominate another arbitrator is repugnant and void under Sections 57 and 58 of the Indian Contract Act. Thus, his contention is that if it is held that the expression "Chief Engineer/Additional Chief Engineer, C. P. W. D." is not vague and is held to be a binding contract, the remaining portion in the clause that the Chief Engineer/Additional Chief Engineer, C. P. W. D. should nominate another arbitrator is illegal being contrary to Section 4 of the Act and is a void agreement. Section 4 of the Act lays down that the parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a persona designata either by name or as the holder for the time being of any office or appointment. There is nothing illegal if an arbitrator appointed persona designata is authorised by both the parties to appoint his own nominee and the provisions of Section 8 of the Act are not contrary to those in Section 4 of the Act.

In AIR 1955 Punj 172 this contention was raised, but was repelled. It was held that in such a case the functions of the Chief Engineer are two-fold. Firstly, it is his duty to act as an arbitrator himself and, if he does not do so, he clearly refuses or neglects to perform the duties as an arbitrator. His second function is that, if he is unable or unwilling to act as the sole arbitrator, then he must appoint another person in his place. This second function is a function which is performed by him not as an arbitrator but as a persona designata having duties to perform not as an arbitrator but as a persona designata appointing somebody else to act as an arbitrator. The latter case falls under Section 4 of the Act. This contention was also raised before my learned predecessor in AIR 1964 Tri 27 and he too repelled the contention of the petitioner. I agree with both the decisions. But, it is not necessary to decide further this point in view of my finding that the expression "Chief Engineer/Additional Chief Engineer, C. P. W. D." is vague and so no question of either of the two vague persons appointing an arbitrator arises.

15. The Subordinate Judge cannot be said to have committed any illegality in passing the orders by following the judgment of this Court in AIR 1964 Tri 27. But,

as I find that the judgment of this Court is not correct, it follows that the order of the Subordinate Judge is also incorrect. Revisions lie to this Court under Section 34 of the Tripura (Courts) Order, under which the powers of this Court are wider than those of the Court under Section 115 C. P. C. and therefore this Court can certainly interfere with the order of the lower Court.

16. Then, the next question is who should be appointed as arbitrator by the Court. The word "Court" in Section 2 (c) of the Act is defined as a "Civil Court" having jurisdiction to decide the questions forming the subject-matter of reference, if the same had been the subject-matter of a suit. But, except for the purpose of arbitration proceedings under Section 21 of the Act, it does not include a Small Cause Court. It was held to include an Appellate Court. Vide *Subramannaya Bhatta v. Devadas Nayak*, AIR 1955 Mad 693. So, it includes even a Court of revision. The petitioner filed three affidavits on 4-9-1964, 16-1-1965 and 9-12-1965 setting forth his grievances against the respondent. But, they were not controverted by any counter-affidavit. So, they have to be presumed to be correct. Vide *Juggi Lal Kamla Pat v. Ram Janki Gupta*, AIR 1962 All 407. The learned Counsel for the respondent, however, stated that until the Chief Engineer or the Additional Chief Engineer entered upon the references, no question of their filing any affidavit could arise and that, therefore, he did not file any counter-affidavit. No doubt, it can be filed in the subsequent proceedings, if any objection is raised about the arbitrator or the award on the ground of misconduct of the arbitrator or otherwise. But, respondent took time to file counter-affidavits and did not file them. It ought to have filed counter-affidavits denying the allegations of the petitioner.

According to the petitioner, litigation is going on between him and the respondent from about a decade. He alleges that there are several similar references pending arbitration between him and the respondent in Assam and Nagaland, N. E. F. A., Tripura and other places. He filed certified copies of two judgments of the Supreme Court in Civil Appeal No. 163 of 1965 and Civil Appeal No. 99 of 1966 on the file of the Supreme Court disposed of on 24-3-1965 and 24-2-1966 respectively. Their Lordships observed in their judgment in the former appeal that they must express their concern over the long delay which occurred in that case and their Lordships hoped that the Union of India would co-operate in the matter and see to it that the arbitration proceedings were concluded within a reasonable time and relieve the respondent therein (petitioner herein) from the suspense in which he had been placed for all those years and that in view of the enormous delay it would be a matter for the considera-

tion of the Government as to whether it could not be settled by mutual agreement at an early date. But, there was no such settlement and the same matter came up again before the Supreme Court in the second case referred to above, namely, Civil Appeal No. 99 of 1966 after the Civil Court in the NEFA area appointed one Mr. Nath as an arbitrator, who subsequently died. The Court appointed one Mr. Dutt as arbitrator in his place. The High Court refused to interfere in revision with his appointment.

The Supreme Court confirmed the order of the High Court and further pointed out that though the Supreme Court indicated in its judgment in Civil Appeal No. 163 of 1965 that the matter was eminently fit for settlement, nothing had happened except carrying on litigation and that it could not do credit to the Government if people, who have done work for it, have to undergo harassment to get their claims settled quickly one way or the other. The Supreme Court wished that the dispute would be brought to an end soon. So, this is the type of litigation that is going on from at least about a decade. As such, there is no doubt that the petitioner apprehends that justice will not be done to him, if a person working in the C. P. W. D. under the respondent is appointed as an arbitrator. When the Court is called upon to appoint an arbitrator, it is the duty of the Court to select an impartial person for that office. The observations of the learned author Russell in his Text Book on the Law of Arbitration, 16th Edition, at pages 110, 111 and 112 are pertinent. To disqualify an arbitrator so appointed, it is insufficient to show that he might be suspected of partiality. But, it must be shown, that if not actually biased, at least there is a strong probability that he would be biased and that to such an extent as to be incapable of fairly and honestly giving a decision (page 110). An arbitrator, notwithstanding his suitability for that office at the date of his appointment, may become unfit to decide judicially upon the question submitted to him by reason of events between the time of his appointment and the arbitration (page 111). A person is disqualified from acting as an arbitrator in a dispute in relation to which he is a necessary witness (page 112). Vide also Nalini Ranjan Guha v. Union of India, AIR 1954 Cal 462. So, an independent arbitrator has to be appointed. I, therefore, appoint Mr. G. N. Dutt of Cauhati, Retired Chief Engineer (the same person who was appointed by the other Courts and referred to by the Supreme Court in its two judgments) as arbitrator. The Subordinate Judge is directed to refer the matters to him for arbitration with a direction that he should expedite the arbitration proceedings.

17. In the result, the revision petitions are allowed with costs and the order of the

Subordinate Judge is set aside. He should act as ordered above. Pleader's fee Rupees 50/- one set in these revision cases.

BNP/D.V.C.

Petitions allowed.

AIR 1969 TRIPURA 26 (V 56 C 7)

C. JAGANNADHACHARYULU, J. C.

Sri Aswini Kumar and others, Appellants
v. Union Territory of Tripura, Agartala, Respondent.

First Appeal No. 8 of 1960, D/- 30-9-1967.

(A) Civil P. C. (1908), O. 6, R. 8; O. 8,
R. 2 and O. 41, R. 1 — Denial of contract
— Plea as to, raised during reply argument
in appeal — Not admissible — Constitution
of India, Art. 299 (1).

Where in a suit brought by the Government to recover the cost of goods remained undelivered by its storing agent, a plea that inasmuch as conditions mentioned in Art. 299 (1) of the Constitution were not satisfied before a binding contract could arise in the case was raised for the first time by the defendant appellants' counsel in his reply arguments in the appeal he could not be allowed to do so. AIR 1967 SC 203 and AIR 1954 SC 165 and AIR 1960 Pat 139 Rel. on. (Para 7)

(B) Contract Act (1872), Ss. 65, 70 —
Suit based on void contract — Benefit derived
from transaction — Party bound to
compensate.

Under Sections 65 and 70, a party would be bound to compensate if really he had derived any benefit under the contract, even if it is discovered to be void. AIR 1955 Assam 33 and AIR 1962 SC 779 and AIR 1967 SC 203, Rel. on. (Para 8)

(C) Civil P. C. (1908), O. 7, Rr. 14, 18 —
Production of documents — Non-compliance
— Effect.

The accounts relating to the suit must be produced along with the plaint, when it is filed into the Court. Where accounts are not produced in Court, no copy of accounts is filed with plaint, nor are they shown in the schedule mentioning the documents relied on by the plaintiff, it is a lacuna in the case of the plaintiff. (Para 9)

(D) Evidence Act (1872), Ss. 159, 160 —
Use of writing for refreshing memory.

Under Section 159 a witness may refresh his memory by looking into a document and give evidence. The document can acquire some evidentiary value under Section 160 subject to the conditions mentioned therein. Where a witness merely refreshed his memory by looking into a certified copy and also spoke to the various details of dates etc. by looking into it, such a procedure is not

hit by S. 159. AIR 1924 Lah 605, Rel. on.
(Para 13)

(E) Evidence Act (1872), S. 34 — Books of accounts — Relevancy.

An account book, not regularly maintained is not relevant evidence under S. 34. AIR 1958 Orissa 4, Rel. on. (Para 14)

(F) Evidence Act (1872), Ss. 63, 65 — Copy of copy not admissible.

A genuine copy of the original, can be looked into as secondary evidence under sections 63 and 65 but not a copy of a copy. AIR 1957 Cal 59 and (1954) 58 Cal WN 533, Rel. on. (Para 14)

(G) Contract Act (1872), S. 148 — Evidence Act (1872), Ss. 101-104 — Storing agent — Liability to return goods — Burden of proof.

Where the plaint was filed on a definite averment that the storing agent did not deliver certain goods and the plaintiff claimed a specific amount towards their value, the burden lies, at the outset, on the plaintiff to prove its case. The burden will shift to the defendants after the plaintiff discharges the onus. (Para 18)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 203 (V 54) =

(1966) 3 SCR 919, K. P. Choudhury v. State of Madhya Pradesh 7, 8

(1964) AIR 1964 Madh Pra 137 (V 51) = 1963 MPLJ 498, Mohan Singh Laxman Singh v. Bhanwarlal Rajmal 12-13

(1962) AIR 1962 SC 779 (V 49) =

1962 Supp (1) SCR 876, State of West Bengal v. B. K. Mondal and Sons

(1960) AIR 1960 Pat 139 (V 47) =

State of Bihar v. Charanjitlal Chadha 8

(1958) AIR 1958 Ori 4 (V 45) =

ILR (1957) Cut 437, Hira Meher v. Birbal Prasad Agarwala 7

(1957) AIR 1957 Cal 59 (V 44), Sm. Krishna Subala Bose v. Dhapatni Dutta 14

(1957) AIR 1957 Mys 55 (V 44) =

ILR (1956) Mys 281, Samaraj v. Kuppuswami 14

(1955) AIR 1955 Assam 33 (V 42), N. Purkayastha v. Union of India 18

(1954) AIR 1954 SC 165 (V 41) =

1954 SCR 958, Kalyanpur Lime Works Ltd. v. State of Bihar 8

(1954) 58 Cal WN 533, Commr. of Waqfs, West Bengal v. Kazim Ali Murza 7

(1948) 51 Cal WN 157, H. Brij Kishore Singh v. Sm. Nazuk Bai 14

(1942) AIR 1942 Mad 299 (V 29) =

1942-1 Mad LJ 44, Visalakshi Ammal v. Coimbatore Janopakara Nidhi Ltd. 18

(1924) AIR 1924 Lah 605 (V 11) =

25 Cri LJ 95, Bhika v. Emperor 12-13

R. C. Bhattacharjee, B. C. Dev Barma and P. K. Sarkar, for Appellants; J. K. Roy, for Respondent.

JUDGMENT: This is an appeal filed by the defendant in Money Suit No. 24 of 1957 on the file of the Subordinate Judge, Tripura at Agartala, against the judgment and decree for Rs. 12,939/-, with proportionate costs, towards the cost of 706 maunds and 23 seers of food-grains, said to have been stored in the godown of late Kumud Bandhu Saha (father of the appellants 1 and 2 and husband of the 3rd appellant) and remained undelivered to the respondent Union Territory of Tripura. The decretal amount was made payable by the appellants out of the assets of late Kumud Bandhu Saha in their hands.

2. The case of the respondent in the plaint is that in 1949 late Kumud Bandhu Saha was appointed by the Director of Procurement, Government of Tripura, as a storing agent for storage of Government food-grains in his godown in Agartala, Tripura, that according to the terms of his appointment as storing agent he was bound to make suitable arrangements for storing the food-grains sent to him for storage by persons authorised by the Government and by officers of the Directorate of Procurement, Government of Tripura and that he should deliver the same to any person holding a written delivery order of the Director of Procurement or any other person authorised by him to issue delivery orders. He was also bound to maintain a godown stock book and was entitled to receive commission at the rate of -/3/- annas for every maund of food-grains cleared out of his godown.

When the food-grains were carried to his godown in any Government vehicle (within Agartala town) the driver of the vehicle carried with him a log sheet, which contained the particulars of the food-grains issued by the consignor. Whenever food-grains from outside the town of Agartala were despatched to the godown, a despatch invoice was issued by the Government officer who despatched the same mentioning the particulars of the food-grains. Thus, from 11-11-1950 to 27-2-1951 late Kumud Bandhu Saha, the storing agent received 5307 maunds and 6 seers of Government rice contained in 2664 gunny bags. But, he delivered 4600 maunds and 23 seers of rice and 2330 gunny bags in pursuance of the orders of the Directorate of the Procurement. The balance of 706 maunds and 23 seers of rice and 334 gunny bags remained undelivered. The storing agency of late Kumud Bandhu Saha continued until his death in the first week of July, 1954.

3. The respondent filed Criminal Case No. 2 of 1953 against Kumud Bandhu Saha and the appellants 1 and 2. But, it was dismissed on 20-12-1955. So, the respondent filed the suit on 3-6-1957 for recovery of Rs. 14,598 towards the cost of the un-

delivered 706 maunds and 23 seers of rice and 334 gunny bags.

4. The appellants denied in their written statement the existence of any contract between the respondent and late Kumud Bandhu Saha binding him as a storing agent under the respondent. They pleaded that late Kumud Bandhu Saha delivered away to the respondent the entire stock which was kept with him from 11-11-1950 to 27-2-1951. They further alleged that, when the respondent issued a registered notice dated 27-2-1952 to late Kumud Bandhu Saha to deliver the rice remaining in his godown to the Inspector, Central godowns, before 15-3-1952, late Kumud Bandhu Saha intimated the respondent, on 1-3-1952 and 30-3-1952, that P. W. 2 (Shri Dhiren Chandra Ghosh, Central Inspector) had taken delivery of the rice and bags remaining in the godown and that he took away the account books also with him.

It is the further case of the appellants that they complained to the Chief Commissioner that P. W. 2 Shri Dhiren Chandra Ghosh, the Central Inspector did not return the account books, that the Chief Commissioner directed the police to search the house of P. W. 2 (Shri Dhiren Chandra Ghosh) that D. W. 2 (Shri Anath Bandhu Choudhury), the then Circle Inspector of Police seized all the account books of Kumud Bandhu Saha from the house of P. W. 2 (Shri Dhiren Chandra Ghosh), but that he did not return them to the appellants and sent them to the S. D. M's Court. The appellants also averred that as the respondent did not file any account of rice and bags stored in the godown of late Kumud Bandhu Saha, the appellants were prejudiced in their defence and that the suit is liable to be dismissed.

5. On the above contentions the learned Subordinate Judge framed seven issues and held that late Kumud Bandhu Saha was appointed as storing agent by the Procurement Department of the respondent, as pleaded in the plaint, that he failed to deliver 706 maunds and 23 seers of food-grains, that the respondent is entitled to their cost of Rs. 12,939 at the rate of Rs. 18/5 annas per maund and that the suit is maintainable. Accordingly, he decreed the suit for Rs. 12,939 and proportionate costs payable by the appellants from out of the assets of late Kumud Bandhu Saha in their hands.

6. The points, which were argued and which arise for determination, are:

(i) Whether the suit is not maintainable under Article 299 (1) of the Constitution of India corresponding to Section 175 (3) of the Government of India Act of 1935?

(ii) Whether the respondent is entitled to the amount of Rs. 12,939 towards the price of 706 maunds and 23 seers food-grains as decreed by the lower Court?

(iii) To what relief are the parties entitled?

7. Point (i): In this case there is no written contract of agency of late Kumud Bandhu Saha under the respondent. Ext. P-3 was filed to show that the same terms of agency which applied to the storing agents mentioned therein also applied to him. The contention of the learned Counsel for the appellants is that under Article 299 (1) of the Constitution of India (corresponding to Section 175 (3) of the Government of India Act of 1935) three conditions must be satisfied before a binding contract against the Government can arise, that they are, firstly, the contract must be expressed to be made between the President or the Governor or the Raj Pramukh of the State as the case may be, that, secondly, it must be in writing and that, thirdly, the execution should be by such person and in such manner as the President or Governor or the Raj Pramukh may direct, that in the present case there is no written contract and that, therefore, the suit is not maintainable. He relied on K. P. Choudhury v. State of Madhya Pradesh, AIR 1967 SC 203 in which the previous cases on this subject were also reviewed.

This objection was not taken by the learned Counsel for the appellants in the course of his arguments at first. But, after the respondent's Counsel argued, the appellant's Counsel raised this point in his reply. It may be mentioned at this stage that no such objection was taken by the appellants in their written statement. So this question, which was raised for the first time by the appellants' Counsel in his reply arguments in the appeal, cannot be countenanced. There is a direct ruling of the Supreme Court in Kalyanpur Lime Works Ltd. v. State of Bihar, AIR 1954 SC 165 on this point. It was held that the provisions contained in Order 6, Rule 8 and Order 8 Rule 2, Civil P. C. leave no doubt that the party denying merely the factum of the contract and not alleging its unenforceability in law must be held bound by the pleadings and be precluded from raising the legality or validity of the contract in the course of his arguments in the High Court. Vide also State of Bihar v. Charanjitlal Chadha, AIR 1960 Pat 139. So, the appellants' Counsel, who did not rightly put forward any contention about the legality of the oral contract cannot be heard to raise it even in his reply arguments.

8. However, under Sections 65 and 70 of the Indian Contract Act of 1872 the appellants would be bound to compensate the respondent, if really they had derived any benefit under the contract, even if it is discovered to be void. Vide N. Purkayastha v. Union of India, AIR 1955 Assam 33 and State of West Bengal v. M/s. B. K. Mondal and Sons, AIR 1962 SC 779. The latter decision was referred to with approval by

the Supreme Court in the latest decision of AIR 1967 SC 203. So, if it is found that the appellants really derived benefit out of the transaction, then they are bound to compensate the respondent, even though the contract is discovered to be illegal and void. I find point (i) against the appellants.

9. Point (ii): A close study of the plaint shows that the respondent alleged that there were a number of transactions from 11-11-1950 to 27-2-1951, under which a total quantity of 5307 maunds and 6 seers of Government rice contained in 2664 gunny bags was stored in the godown of late Kumud Bandhu Saha on various dates, that he delivered back 4600 maunds and 23 seers of rice and 2330 gunny bags off and on and that the balance of 706 maunds and 23 seers of rice and 334 gunny bags remained in his godown undelivered. So, this is a suit filed on the basis of an account for recovery of the price of the balance of undelivered rice and gunny bags.

Under sub-rule (1) of Order 7, Rule 14, Civil P. C. the respondent should have produced into the Court along with the plaint the documents in the possession of the department concerned and should have delivered a copy of the account to be filed with the plaint. Under sub-rule (2), it should have entered such other documents, on which it relied, whether they were in its possession or not, as evidence in support of its claim in a list annexed to the plaint. Order 7, Rule 18, Civil P. C. bars the respondent from subsequently filing the documents, which it should have filed under Order 7, Rule 14 (1), Civil P. C., to be admitted in evidence. But, with the leave of the Court, they may be received in evidence. A perusal of the plaint shows that no account was produced into the Court along with the plaint and that no copy of the account was filed with the plaint. Nor does the plaint contain any schedule mentioning the documents relied on by the respondent. So, this is a lacuna in the case of the respondent. The learned Subordinate Judge refers to this aspect of the case in his judgment in his discussion under Issue No. 1 and states that he was not shown any law which lays down that the accounts relating to the suit must be produced along with the plaint, when it was filed into the Court. Evidently, he lost sight of the provisions of Rules 14 and 18 of Order 7, Civil P. C.

10. No mention was made in the plaint as to what happened to the accounts of the respondent and how the respondent arrived at the various detailed figures of consignment of rice and gunny bags to the godown of the storing agent late Kumud Bandhu Saha and the delivery by him of the same under the orders of the officers of the Procurement Department. But, evidence was let in to show that the account books were filed in G. R. No. 2 of 1953 on the file of

the first class Magistrate's Court in Agartala, that they were damaged in the floods and that, therefore, the respondent was obliged to lead secondary evidence. Exhibit P-4 is a letter dated 3-4-1957 addressed by the District Magistrate, Tripura, to the first class Magistrate to return the records to his office as the suit had to be filed. Exhibit P-4 (a) is a reply dated 17-5-1957 sent by the Magistrate to the District Magistrate stating that the case was disposed of on 20-12-1955 and that the records were totally damaged on account of floods. So, the department concerned waited from 20-12-1955 upto 3-4-1957 without taking any action for taking back the records from the Magistrate's Court. The respondent did not mention in the plaint that the account books etc., were damaged by floods.

11. It remains, therefore, to be seen whether the secondary evidence, let in by the respondent to prove the liability of the storing agent and consequently of the appellants, is reliable or not. The respondent examined the following three witnesses P. Ws. 1 to 3 (Sri Satya Das Chakraborty, Shri Dhiren Chandra Ghosh and Shri Jnan Chandra Saha):

(After discussing the evidence His Lordship proceeded):

12-13. The contention of the learned Counsel for the appellants is that P. W. 2 (Shri Dhiren Chandra Ghosh) looked into a certified copy of the deposition in the criminal Court and gave evidence in the suit, that though he was entitled to refresh his memory under Section 159 or Section 160 of the Indian Evidence Act, he did not do so, but that he simply reproduced the evidence by reading it and that the procedure adopted was illegal. He relied on Mohansingh Laxmansingh v. Bhanwarlal Rajmal, AIR 1964 Madh Pra 187, where it was held that though under Section 159 of the Indian Evidence Act a witness may refresh his memory by looking into a document and give evidence in the ordinary way, the document is not by itself evidence and that the document can acquire some evidentiary value under Section 160 of the Indian Evidence Act, subject to the conditions mentioned therein. But, in the present case P. W. 2 (Shri Dhiren Chandra Ghosh) appears to have refreshed his memory by looking into a certified copy. He also spoke to the various details of dates etc. by looking into it. Such a procedure is not hit by Section 159 of the Indian Evidence Act. Vide Bhika v. Emperor, AIR 1924 Lah 605.

14. There are, however, the following circumstances which go to show that no reliance can be placed upon the various entries spoken to by P. W. 2 (Shri Dhiren Chandra Ghosh) or found in Ext. P-5 which are relied on by the respondent as secondary evidence:—

(After discussing the circumstances, His Lordship proceeded further):

So, no reliance can be placed on the evidence of P. W. 2 (Shri Dhiren Chandra Ghosh) given in the Criminal Court with reference to the alleged stock register, which was not maintained properly in the regular course of business. Vide also Hira Meher v. Birbal Prasad Agarwala, AIR 1958 Orissa 4, wherein it was held that an account book, not regularly maintained, is not relevant evidence under Section 34 of the Indian Evidence Act.

(iii) With regard to Ext. P-5 there is an amount of suspicion about its genuineness. P. W. 3 (Shri Jnan Chandra Saha) stated that he prepared it in the course of the pendency of the Criminal Case. But, he admitted in his cross-examination that he did not mention the date on which he prepared it. There is no seal of the department on it. There is no certificate of anybody on it to the effect that it is a correct one that it was compared with the original and found correct. It does not mention the numbers of the pages of the stock book, from which the entries were said to have been copied. It was not shown what was the necessity at that time for the preparation of Ext. P-5. So, it must have been prepared for the purpose of the suit and it carries no weight at all. The learned Counsel for the appellants stated that it is a copy of a copy and that it is not admissible in evidence. He relied on Smt. Krishna Subala Bose v. Dhanapati Dutta, AIR 1957 Cal 59. But, in case it is a genuine copy of the original, it can be looked into as secondary evidence under sections 63 and 65 of the Evidence Act. Vide Commissioner of Wafis, West Bengal v. Kazim Ali Murza, 58 Cal WN 533. But, no reliance can be placed on it as it cannot be said to be a true copy of the original register.

15. Thus, there is no legal proof that the storing agent failed to deliver 706 maunds and 23 seers of food-grains as found by the lower Court.

16. The learned Counsel for the respondent, however, strongly urged that the storing agent late Kumud Bandhu Saha was bound to maintain godown stock register according to the terms of agency, that the appellants did not produce it into the Court and that adverse inference should be drawn under Section 114, Illustration (g) of the Indian Evidence Act. The defence of the appellants is that the respondent issued a notice dated 27-2-1952 to Kumud Bandhu Saha demanding him to deliver the undelivered stock to P. W. 2 (Shri Dhiren Chandra Ghosh) by 15-3-1952, but that he had already delivered the same and informed the respondent by his letters dated 1-3-1952 and 30-3-1952, that P. W. 2 (Shri Dhiren Chandra Ghosh) took delivery of all the rice and bags, that Kumud Bandhu Saha lodged a complaint with the Chief Commissioner, that P. W. 2 (Shri Dhiren

Chandra Ghosh) took away all his account books and that at the instance of the Chief Commissioner the house of P. W. 2 (Shri Dhiren Chandra Ghosh) was searched by D. W. 2 (Shri Anath Bandhu Choudhury) the then Circle Inspector of Police, that the books were seized from the house of P. W. 2 (Shri Dhiren Chandra Ghosh) and that they were not given to the appellants but that they were sent to the S. D. M's Court. The First Appellant Aswini Saha deposed as D. W. 1 that he was not present when the seizure took place, but that his brother was present. The latter was not examined. The appellants, however, examined D. W. 2 (Shri Anath Bandhu Choudhury) who was the Circle Inspector of Police in Agartala in 1951 A. D. He deposed that under the orders of the Chief Commissioner on the basis of a complaint lodged by Kumud Bandhu Saha, he seized the purchase register, the stock register and other account books from the house of P. W. 2 (Shri Dhiren Chandra Ghosh) and sent them to the Court. In the cross-examination, he stated that he seized the stock register or stock ledger and that the name of Kumud Bandhu Saha or some form was written on the account books in Bengali language. He further stated that the S. I. seized the books in his presence and that it happened in 1950 or 1951. The Subordinate Judge held that the books were seized in 1950 or 1951, but that according to the plea of the appellants in paras 10 and 11 of their written statements the entire stock was delivered by Kumud Bandhu Saha in 1952 and that therefore the books, which were seized, did not relate to the period between 11-11-1950 and 1-5-1951. This reasoning is incorrect. For the appellants did not state in paras 10 and 11 of their written statement that late Kumud Bandhu Saha delivered the goods in 1952 to P. W. 2. D. W. 2 (Shri Anath Bandhu Choudhury) deposed that he worked as Circle Inspector of Police in 1951 and that the S. I. seized the books in his presence. So, the seizure could not take place in 1950 when D. W. 2 (Shri Anath Bandhu Choudhury) was not the Circle Inspector of Police. It must have taken place in 1951 or thereafter. The seizure was admitted by P. W. 2 (Shri Dhiren Chandra Ghosh) even in the Chief examination. He deposed that he took the "dag patty" book from Kumud Bandhu Saha to his house to compare it with the stock book, but that Kumud Bandhu Saha filed a petition with untrue allegations, that the Circle Inspector of Police seized the said "dag patty" book, that it was filed in the criminal case and that it was destroyed. In the Chief examination P. W. 2 (Shri Dhiren Chandra Ghosh) denied having seized the stock register of Kumud Bandhu Saha. But in the cross-examination, he admitted that a stock register was seized from his house. According to him, that stock register was of the Procurement department. But, the evid-

ence of D. W. 2 (Shri Anath Bandhu Choudhury) shows that he seized the account books of Kumud Bandhu Saha. It, therefore, follows that the evidence of P. W. 2 (Shri Dhiresh Chandra Ghosh) that the stock register was of the Procurement department is not true. He admitted that he was transferred from the Procurement department in February, 1952 and that he was also kept under suspension. But according to him he got promotion after he was released from suspension. The evidence of D. W. 2 (Shri Anath Bandhu Choudhury) and P. W. 2 (Shri Dhiresh Chandra Ghosh) leaves no doubt that all the account books including the stock book of Kumud Bandhu Saha were seized from the house of P. W. 2 (Shri Dhiresh Chandra Ghosh) and sent away to the S. D. M's Court.

17. As can be seen from the notes paper maintained by the lower Court (vide Order 42 dated 5-2-1960) the appellants filed two petitions one to send for the account books from the Court of the S. D. M. and another to examine the second appellant. The Sub-ordinate Judge dismissed the petitions on the ground that they were filed late and that the suit was posted for arguments. Thus, they were not sent for. Under these circumstances, no adverse inference can be drawn against the appellants that they suppressed the account books.

18. The learned Counsel for the respondent, however, urged, firstly, that under section 213 of the Indian Contract Act an agent is bound to render a proper account to his principal on demand and also relied on H. Brij Kishore Singh v. Smt. Nazuk Bai, 51 Cal WN 157 where the liability of the legal representatives of a person, standing in fiduciary relationship with another person to render accounts to that person, was laid down. It was held that the legal representatives of an agent are also liable to render an account, but that such liability of the legal representatives does not involve the duty to explain the accounts kept by the deceased but that it includes the liability to deliver the account papers and support them by vouchers.

The second contention of the respondent's learned Advocate is that late Kumud Bandhu Saha was a bailee as defined by Section 148 of the Indian Contract Act, that he was bound to take proper care of the goods as laid down by Section 151 of the said Act and also bound to return the same under Section 160 of the said Act and that the burden of proof lay on the appellants to show that Kumud Bandhu Saha took care of the goods as a man of ordinary prudence and what he did with them. He relied on Visalakshi Ammal v. Coimbatore Janapakara Nidhi Ltd., AIR 1942 Mad 299 where it was held that entrustment of goods with a person for safe custody is also a species of bailment. In Samaraj v. Kuppuswami, AIR 1957 Mys 55 it was held that in case of

loss of goods by a bailee, the burden of proof lies on him to prove the loss. These two contentions are misconceived. In the present case the plaint was filed on a definite averment that late Kumud Bandhu Saha did not deliver 706 maunds and 23 seers of rice and 334 pieces of gunny bags and the respondent claimed a specific amount towards their value. So, the burden lies, at the outset, on the respondent to prove its case. The burden shifts to the appellants after the respondent discharges the onus, that lies on it. No doubt, where evidence has been let in by both the parties, then it is a question of appreciation of evidence. But, this is not a suit for accounts filed by the respondent calling upon the appellants to render an account of the agency. So, the above contentions of the learned Counsel for the respondent have no bearing on the case, as set out and pleaded by the respondent in the plaint. I find point (ii) in the negative.

19. Point (iii): The judgment and decree of the lower Court cannot be sustained and are accordingly set aside. The appeal is allowed and the suit is dismissed. But, under the circumstances of the case, I direct the parties to bear their respective costs in both the Courts.

HGP/D.V.C.

Appeal allowed.

AIR 1969 TRIPURA 31 (V 56 C 8)
C. JAGANNADHACHARYULU, J. C.

Joy Sankar Bhattacharjee, Appellant v.
Sushil Kumar Gupta and others, Respondents.

Criminal Appeal No. 8 of 1963, D/- 9-1-1967, against order of Asst. S. J., Tripura, D/- 3-4-1963.

(A) Penal Code (1860), Ss. 408 and 477-A — Applicability — Secretary to Co-operative society entrusted with its funds and responsible to keep cash and accounts — Causing false entries to be made showing sham payments to his friends and relatives — Contravention of bye-laws — Secretary liable — His absence at the time of alleged payments, held, could not absolve him — Prior prosecution for offences under Ss. 60 and 63 of the Bombay Co-operative Societies Act, held, no bar to trial for offences under Penal Code — (Bombay Co-operative Societies Act (7 of 1925), Ss. 60, 61, 63) — (Constitution of India, Art. 20) — (Criminal P. C. (1898), S. 403).

In a case where the Secretary to a Co-operative society who was entrusted with the funds of the society and who was responsible for the cash and maintenance of correct accounts, dishonestly and contrary to the rules of the Society caused false entries

to be made showing payments in favour of certain friends and relatives of his and further made it appear that the amounts were repaid before the end of that co-operative year and that an identical sum was again paid by the Society within a few days at the commencement of next year, it was held that the Secretary was clearly guilty of the offences under Ss. 408 and 477-A of the Penal Code. The fact that he was actually away from office on the days when the payments were said to have been made and during which time his subordinates were in charge, held, did not absolve the Secretary from liability under the provisions since he was the person in charge of the cash, accounts, etc., under the Bye-laws of the society. AIR 1958 Ker 103, Foll.; AIR 1962 SC 1821 and AIR 1953 All 142 and AIR 1933 Cal 800, Ref.; AIR 1965 Mys 128 and AIR 1933 All 818 and AIR 1955 Tripura 35, Dist.

(Paras 10, 12, 13, 27, 30 and 36)

It was further held that the delay of two months in filing the case or non-prosecution of the subordinates of the society who had actually made the entries were not fatal to the case and that the Secretary was not thereby absolved of the criminal liability.

(Para 31)

The contention that the accused having already been prosecuted on some of the above items under Ss. 60 and 61 of the Bombay Co-operative Societies Act there could not be a second prosecution under provisions of the Penal Code, was not accepted on the ground that offences under Ss. 60 and 63 of the said Act are different from those under the Penal Code.

(Para 34)

(B) Evidence Act (1872), Ss. 17, 24 — Admission — What is — Statement explaining a discrepancy in accounts maintained by Secretary of a Co-operative Society in reply to a Memo from the Co-operative Registrar — Registrar entitled to call for information under Ss. 54 and 60 (b) of the Bombay Co-operative Societies Act — Statement in reply in an admission under S. 17 and not hit by S. 24. (1962) 1 Cri LJ 835 (Ori), Dist.; AIR 1942 Mad 654, Foll.; AIR 1959 All 518, Ref. (Bombay Co-operative Societies Act (7 of 1925), Ss. 54, 60 (b) and (c)).

(Para 19)

(C) Criminal P. C. (1898), S. 417 (3) — Right of complainant — Appeal against acquittal — Court can set aside the acquittal if it is incorrect — Lower Court's judgment need not be characterised as perverse. AIR 1955 SC 584 and AIR 1957 SC 216 and AIR 1966 SC 1775, Ref. (Para 35)

Cases Referred: Chronological Paras
 (1966) AIR 1966 SC 1775 (V 53) = 35
 1966 Cri LJ 1491, Durgacharan Naik v. State of Orissa
 (1966) AIR 1966 Manipur 2 (V 53) = 35
 1966 Cri LJ 767, Malsawa Lushai v. Manipur Administration

(1965) AIR 1965 Mys 128 (V 52) =	
(1965) I Cri LJ 565, Krishna Murthy, C. N. v. Abdul Subban	30
(1964) 1964-1 Cri LJ 566 = 1963-3 SCR 749, Babu Singh v. State of Punjab	33
(1962) AIR 1962 SC 1821 (V 49) =	
(1962) 2 Cri LJ 805, Dalmia, R. K. v. Delhi Administration	28
(1962) 1962-1 Cri LJ 835 (Ori), State of Orissa v. Bhourilal Agarwal	19
(1959) AIR 1959 All 518 (V 46) =	
1959 Cri LJ 940, Ram Singh v. State	19
(1958) AIR 1958 Ker 103 (V 45) =	
1958 Cri LJ 518, State of Kerala v. Kunhikannan Nair	27
(1957) AIR 1957 SC 216 (V 44) =	
1957 Cri LJ 481, Balbir Singh v. State of Punjab	35
(1955) AIR 1955 SC 584 (V 42) =	
1955 Cri LJ 1299, Dhirendra Nath Mitra v. Mukunda Lal Sen	35
(1955) AIR 1955 Tripura 35 (V 42) =	
1955 Cri LJ 1636, Gopal Krishna Majumdar v. State of Tripura	27
(1954) AIR 1954 SC 621 (V 41) =	
1954 Cri LJ 1645, Bhagat Ram v. State of Punjab	33
(1953) AIR 1953 All 142 (V 40) =	
1953 Cri LJ 885, Anwarul Hasan v. State	28
(1942) AIR 1942 Mad 654 (V 29) =	
44 Cri LJ 72, Narayana Murti, In re	19
(1933) AIR 1933 All 818 (V 20) =	
35 Cri LJ 224, Mt. Sudesvara v. Emperor	27
(1933) AIR 1933 Cal 800 (V 20) =	
35 Cri LJ 156, Robert Stuart Wauchope v. Emperor	29
N. L. Choudhury, S. R. Barman and M. Kar Bhowmik, for Appellant; N. C. Talapatra and H. Dutta, for Respondents.	

JUDGMENT: This is an appeal filed under Section 417 (3) Cr. P. C. by the complainant Shri Joy Sankar Bhattacharjee in Sessions Case No. 3 of 1962, on the file of the Assistant Sessions Judge of Tripura against the judgment of acquittal of the 6 accused respondents, out of whom the first was charged for offences under Sections 408 and 447-A, I. P. C. and the others under Sections 408 and 477-A I. P. C. read with Section 109 I. P. C.

2. The facts of the case according to the prosecution and as brought out in the evidence are as follows:—

(a) The Bombay Co-operative Societies Act, (Bombay Act No. VII of 1925) was extended to the Union Territory of Tripura on 1-5-1959. The first respondent (Shri S. K. Gupta) was the Secretary of Tripura Central Marketing Co-operative Society (hereinafter called the C. M. S.) from the inception of the Society and also during the relevant period between September 1958 to July 1959. He was entrusted with the funds

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